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Op-ed Piece

BIG BROTHER OR STATE'S RIGHTS?

In the contentious term of the United States Supreme Court recently completed one could not help but notice a profound alteration in the direction of the nation's highest tribunal. Turned on its head are notions of free speech, consumer protection under the antitrust laws and racial desegregation. The Court cited free speech interests to strike down laws on campaign finance reform but then refused the free speech rights of students to hold up a banner at graduation which the principal disapproved of. What is the difference? One case involved the desire by special interests to influence elections, thus asserting their free speech rights, and the other case was a mere student in an act of defiance.

In the consumer field the Supreme Court made it much more difficult to prevent resale price maintenance agreements. It will become routine for manufacturers to prevent retailers from cutting prices which has been a tremendous consumer benefit over the years. The antitrust laws conceived during the Industrial Revolution to protect consumers and birthed by the likes of Theodore Roosevelt have been nearly eviscerated by a modern court hungry to reward international mega-corporations.

Communities have been told that they cannot keep schools integrated by assigning students on a racial basis. The decision ignores the history of racial segregation in the United States and the re-segregation that is happening throughout the country.

At the end of the Court's session it announced cases that it will be hearing in its next term. One of those, a sleeper, has great importance for consumers. The Supreme Court has granted certiorari and will hear a case in which a cardiac patient suffered injury because a cardiac catheter burst during an angioplasty. Lawsuits involving defective products, from the time of the fountains of this republic, have invoked state remedies in tort. If a wheel fell off a newly minted carriage because it was defectively placed on the axel, the various states would define the right to sue the manufacturer. However, in the modern era the doctrine of preemption has been invented. This is a concept that says when federal government regulation occupies a particular field, the rights of consumers disappear notwithstanding the injury caused by neglectful manufacturers.

Riegel v. Medtronic, Inc. concerns a device that received so called pre-market approval by the flawed Food and Drug Administration. This is an agency that is nothing more than a revolving door where big drug manufacturers and pharmaceutical companies hire new lobbyists who trained with and use to work for the regulator. The FDA is one of the best examples of the fox guarding the hen house.

The reasoning of the medical industry is that since the FDA approves the marketing of a product as safe or effective, if the product does not work as promised there should be no right of action on the part of the innocent injured victim. Where does this strong immunity originate? Sometimes congress will simply legislate and say that they have usurped the entire field and therefore all consumer remedies are wiped away. Even more pernicious is the concept of so called implied preemption. Under this legal fiction, it is assumed that since congress has decided to occupy a particular field of law, all other rights and remedies provided by the states evaporate.

Since preemption is a blunt instrument eliminating the rights of the injured and exalting the pocketbooks of the powerful, it was always held to be of minimal value. The court has said that there was a presumption against implied preemption because it is a legal fiction which could only be justified in limited circumstances. The logic goes that a manufacturer should not have to be subject to potentially conflicting rules in differing state's courts and therefore no state court may protect the consumer if the FDA has chosen not to do so. The problem with this illogical logic is that it would justify eliminating state laws altogether. The fifty (50) states do have different rules and regulations but the founders of this republic rejected the view of Hamilton and others that the states ought to be permitted to whither away. Quite to the contrary, state's rights grew strongly once the Federalists, Washington and Adams, were superseded by Republicans, Whigs and Democrats. It was not until the Great Depression decimated our economy that legal thinkers began to wonder whether state's rights had gone too far by restricting the ability of the federal government to resuscitate the economy.

For now state's rights have been abandoned once again and not in the name of national economic recovery but rather to protect the special interests that control big government in Washington. Those special interests finance elections in the name of free speech rights while eliminating financial remedies to those harmed by the sloppiness and neglect of the manufacturing sector. Congress has not seen fit to eliminate the right to sue in state court for defective products but the courts have invented, through activist conservative judges, legal doctrines which serve the same purpose.

The question is whether the principaled conservatives on the court will join with progressive pro-consumer judges to permit the right to sue in state court for malfunctioning products or whether the newly appointed justices will side with the pro-business politicians who supported their appointment. For many of the justices on the court this will be a serious and difficult decision and one which will separate honest ideologues from those who feel the need to reward friends in high places.