

# States Rightists Have Met the Enemy, and It Is Them

One of the biggest myths about the right-wing justices who control the U.S. Supreme Court is that they are federalists who protect state autonomy against encroachment by the federal government.

Nothing could be further from the truth. Except for the few instances when they actually approve the substance of state policies, the Court's conservative majority consistently overrules state laws that attempt to protect consumers and workers in the name of national uniformity.

The hook the justices use to overrule state laws with which they disagree is the Supremacy Clause in Article VI of the Constitution, which makes federal law the supreme law of the land and thus pre-empts all inconsistent state laws and regulations. Of course, inconsistency is often in the eyes of the beholders, which explains the Court's many 5-4 decisions in such cases. There were any number of such decisions in the past term of the Court.

The most egregious of those decisions was *AT&T Mobility v. Concepcion*, which involved consumer contracts for the sale of mobile phones. The plaintiffs in a class-action suit accused the defendant of fraud for charging them sales tax on "free phones" provided under service contracts. The contracts also provided that any disputes be subject to arbitration and forbid class actions.

The U.S. Court of Appeals held that those provisions were unconscionable under California law. The Supreme Court ruled that California law was pre-empted by the Federal Arbitration Act, even though that act was adopted by Congress in 1925, long before most modern consumer-protection statutes. The law had been enacted at a time when federal courts were hostile to arbitration agreements as intrusions on judicial authority, and whose original purpose was to protect business-to-business agreements to arbitrate.

As a consequence, it is now all but inevitable that every company will include in standard contracts with consumers and employees that all disputes be subject to arbitration, thus keeping their fate out of the hands of judges and juries.

A similar result was reached in *Brusewitz v. Wyeth*, holding that a suit under Pennsylvania law for a design defect resulting in injury was pre-empted by the National Child Vaccine Injury Act. In other words, Pennsylvania was not allowed to provide protection in excess of that allowed under federal law.

And in *Pliva v. Mensing*, the same 5-4 majority overruled two lower courts (in cases arising under the laws of Minnesota and Louisiana), and denied injured consumers the right to sue

generic drug manufacturers for failing to affix warning labels that exceeded the warnings required by federal law.

Curiously, the major exception to the majority's concern to uphold federal law over contrary state regulation came in the Arizona immigration law case. There, the conservative quintet found a state law to its liking, allowing Arizona to revoke the licenses of businesses that knowingly hired unauthorized aliens in the face of a claim that the state law was pre-empted by the federal immigration statute. In another case that protected business interests from state judicial regulation, the five conservatives (this time joined by Justice Stephen Breyer) refused to allow New Jersey courts to hear a case against a British manufacturer whose defective product caused severe injury to a worker. In a blistering dissent, Justice Ruth Bader Ginsburg, a former Rutgers Law School-Newark professor, wrote:

"A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales made to United States purchasers. Where in the United States buyers reside does not matter to the manufacturer. Its goal is simply to sell as much as it can, wherever it can. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?"

And once again, the Court has protected corporate interests from punishment by state lawmakers attempting to protect their citizens.

But maybe the most hypocritical decision of the year by the so-called states-rights advocates was *McDonald v. City of Chicago*, where the usual majority held that local governments were unable to regulate the ownership of guns within their own jurisdictions. In so doing, the justices totally distorted the words of the Second Amendment ("A well regulated militia being necessary to the security of a free state"), turning this state shield into a federal sword disabling the states and their subsidiaries from regulating their own citizenry.

Or as Justice John Paul Stevens said in his dissent: "The Second Amendment ... 'is a federalism provision.' It is directed at preserving the autonomy of the sovereign States, and its logic therefore 'resists' incorporation by a federal court *against* the States."

The states rightists have met the enemy — and it is them!