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The Revolution Next Time?

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Linda Greenhouse on the Supreme Court and the law.

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It has been 15 years since the Rehnquist court began applying the constitutional brakes to assertions of federal power that had seemed unassailable since the New Deal. Its first target was modest, a five-year-old federal statute called the Gun-Free School Zones Act that most people had never heard of, which made it a federal crime to possess a gun within 1,000 feet of a school.

The vote in United States v. Lopez was 5 to 4. Chief Justice William H. Rehnquist wrote the court's opinion, observing that the Constitution's commerce clause did not confer on Congress a general police power disconnected from the regulation of economic activity. To uphold this statute, he said, would be to blur the "distinction between what is truly national and what is truly local." For the first time since 1936, the Supreme Court struck down a federal law as exceeding Congress's commerce power. In dissent, Justice David H. Souter warned that "it seems fair to ask whether the step taken by the court today does anything but portend a return to the untenable jurisprudence from which the court extricated itself almost 60 years ago."

Thus began the Rehnquist court's federalism revolution, a 5-to-4 forced march through the various sources and attributes of Congressional power. The targets included, most notably, Congress's authority under Section 5 of the 14th Amendment to enact into law its own vision of the guarantees of equal protection and due process when that vision was broader than the court's own. William Rehnquist had waited a judicial lifetime to assemble a majority that would follow him on such a course. Eleven federal statutes would eventually fall, in whole or part, on federalism grounds in less than a decade before the court, including the chief justice himself, began to blink and the revolution petered out.

Ever since, it has been quite easy to get a good debate going, among people who spend time thinking about such matters, about whether the federalism revolution really had amounted to much beyond the symbolic. True, the court did strike down a provision of one fairly high-profile law, the Violence Against Women Act, under which women could sue their attackers for damages. But no major federal program felt the ax. I had been an early proponent of the view that something big was happening. But in recent years, while still finding the subject of great interest, I was beginning to have my own doubts about what it all had meant.

Until now. In his opinion on Monday striking down the individual mandate of the new health care law, Judge Henry E. Hudson of federal district court in Virginia cited the Lopez case and United States v. Morrison, the Violence Against Women Act decision (also a 5-to-4 Rehnquist

majority opinion), more than a dozen times. Judge Hudson deployed the two cases as the major building blocks for his argument that Congress lacked constitutional authority to require individuals either to purchase health insurance or pay a fine to the Internal Revenue Service, a provision the judge said was "neither within the letter nor the spirit of the Constitution."

In his zeal to deliver a fatal blow to the statute, Judge Hudson seriously over-read Lopez and Morrison and just as seriously discounted Supreme Court decisions that look in the opposite direction. The government's lawyers will undoubtedly make this argument in the forthcoming appeal, and I will leave the brief-writing to them.

I have a more modest aim here. Well, maybe not so modest. Whatever its ultimate fate, the decision has succeeded quite well in shifting the burden of the argument, removing the presumption of constitutionality in which federal laws ordinarily come clothed and that the Obama administration now has to regain, as not only the appeals process, but the public conversation as well, moves forward.

In his zeal to deliver a fatal blow to the health care law, Judge Henry E. Hudson seriously over-read some Supreme Court decisions of the Rehnquist court.

One way to do this, it seems to me, is to put Judge Hudson's building blocks, the Lopez and Morrison decisions, into proper historical perspective as the intensely disputed and legally adventurous rulings that they were. To read Judge Hudson's decision, Commonwealth of Virginia v. Sebelius, in the absence of that perspective is to assume that the use he made of them was not only correct, but obvious; as the decision of a single judge, a district court opinion contains no dissenting voice to enlarge the frame. And encountering Lopez and Morrison again now, years after the Rehnquist federalism revolution seemed to have run its course, makes it easy to forget how radical they felt when they were decided, 60 years after a huge federal expansion during which the Supreme Court never once found that Congress had exceeded its commerce clause authority.

Chief Justice Rehnquist, who served more than 33 years on a court he saw for the first time when he arrived as a law clerk, was a highly strategic master of the long game. There were no flowery passages in his opinions (unless he was describing some geographical quirk of a Western landscape). There was often little explicit analysis; when he had five votes, there was nothing much to explain. What he excelled at was seeing around corners to which others appeared oblivious, planting little seeds in little cases where the seeds could germinate and grow while waiting for the big case to come along. It happened in one doctrinal area after another: religion, equal protection, criminal law. Years later, there would be a Rehnquist opinion to cite for a proposition more sweeping than the context in which the case had originally appeared.

That is not to say with confidence that Chief Justice Rehnquist would have invoked Lopez and Morrison to strike down the health care mandate. In fact, I think there is a decent chance that he would not have. Much as he cared about projecting his judicial philosophy onto the Supreme Court, he also cared deeply about the court, and he had a finely tuned sense of limits. That sense was on display in 2003 when he wrote the majority opinion in Nevada Department of Human Resources v. Hibbs on the question of whether Congress had the authority to make state governments give their employees the benefits of the federal Family and Medical Leave Act.

To the surprise of almost everyone, the chief justice's answer was yes. Michael Kinsley, writing on Slate, called the 6-to-3 opinion "amazingly radical" for its account of how society's stereotyped expectations of women as caretakers "create a self-fulfilling cycle of discrimination" that must be broken by enabling male as well as female employees to take time off to attend to family emergencies.

Earlier decisions in this series had found that Congress could not require state employers to abide by federal laws against discrimination on the basis of age and disability. So what happened with Hibbs, a case that effectively brought an end to the federalism revolution? Was the chief justice's unaccustomed display of empathy based on his own experience, having nursed his wife through terminal cancer and occasionally helped his daughter, a single mother, with child-care duties? Perhaps, but I think there was also something else.

I mentioned earlier that Chief Justice Rehnquist eventually blinked. The question framed in Hibbs was whether state governments could be required to follow federal rules aimed at eradicating sex discrimination in the workplace. Because of the privileged constitutional status accorded to sex equality — the government has a high burden to meet in justifying distinctions in how public policy treats men and women — this was a question that cut closer to the core of the federal civil rights canon than any of the earlier federalism cases. To declare the Family and Medical Leave Act beyond Congressional authority would have been a provocative act with deep doctrinal implications for other equality-based claims, including racial equality, and it would thus have had political implications for the court as well. Chief Justice Rehnquist decided not to go there. He had, after all, made his point.

I thought of the Hibbs case earlier this year when the court considered a provision of a federal law, the Adam Walsh Act, that gave the federal prison system the power to keep "sexually dangerous prisoners" in continued civil confinement after the conclusion of their criminal sentences. A federal appeals court had found that Congress lacked authority under the commerce clause or any other constitutional provision to adopt such a policy.

The Supreme Court reversed that decision on the basis of the Constitution's "necessary and proper" clause, which grants Congress the power "to make all laws which shall be necessary and proper for carrying into execution" all the other powers granted by the Constitution. Writing for the majority in United States v. Comstock, Justice Stephen G. Breyer said the civil confinement provision was necessary and proper for carrying out the government's authority to run a penal system. The vote, over the dissents of Justices Clarence Thomas and Antonin Scalia, was 7 to 2. Justices Anthony M. Kennedy and Samuel A. Alito Jr. wrote separate concurring opinions, taking issue with Justice Breyer's opinion as too broad in its analysis.

Justice Breyer's opinion, one of the most important of his Supreme Court tenure, thus commanded only five votes. One of those came from Chief Justice John G. Roberts Jr., who simply signed the Breyer opinion, without further explanation.
The Comstock decision did not receive a great deal of public attention when it was issued last May, but the implications of its elevation of the necessary and proper clause were clear to critics of the newly enacted health care law. Prof. Ilya Somin of George Mason University Law School wrote for a Cato Institute symposium that the "severely flawed" decision was "a step in the

direction of interpreting the clause as a virtual blank check for Congress to regulate almost any activity it wants."

In his decision this week, Judge Hudson also mentioned the Comstock case, endeavoring to show why it didn't save the statute. In my view, his effort to wish the case away was unpersuasive, but my view is not the one that matters. The view that ultimately may count the most is that of Chief Justice Roberts. As everyone knows, he was once William Rehnquist's law clerk. So my question, as the health care debate continues on its path to the Supreme Court, is this: When John Roberts thinks about his former boss and mentor, which Rehnquist does he see? The one who started the federalism revolution, or the one who ended it?

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