

John Roberts and the Judicial Revolution

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The death of Chief Justice Rehnquist and the nomination of Judge John Roberts to replace him once again focused the country's attention on the Supreme Court and the Roe decision. The debate over that case, however, has obscured a much more significant judicial development that took place over the past twenty years. Indeed, it is a development that is the hallmark of the Rehnquist Court. It is a development, however, that lies below the general public's radar screen, generating little public interest and provoking few demonstrations. The development concerns *federalism*, and involves the appropriate distribution of power between the federal government and the states.

During the Rehnquist years, the Court tipped the balance decidedly in favor of the states. It did so in two ways. First, it limited congressional power to adopt laws that would apply nationwide. Second, it limited the federal court's ability to enforce federal laws against the states.

The Court, for example, struck down the Violence Against Women Act, which authorized victims of gender-motivated violence to sue for damages. Congress again tried to justify the law as falling under its power to regulate interstate commerce. It held four years of hearings and made extensive findings, which showed that violence against women has a substantial impact on interstate commerce. It was estimated that we spend \$5 to \$10 billion dollars a year on health care, criminal justice and other costs related to domestic violence alone. In addition, substantial amounts are spent on costs related to rape and other violent acts against women. Congress concluded that gender motivated crimes have a substantial effect on interstate commerce by diminishing national productivity, increasing medical and other costs, decreasing the demand for interstate goods, deterring potential victims from traveling interstate, and deterring them from transacting with businesses engaged in interstate commerce.

A majority of the Supreme Court held that Congress does not have power to enact the Violence Against Women Act. Chief Justice Rehnquist wrote: "The Constitution requires a distinction between what is truly national and what is truly local." The regulation of violence against woman, he concluded, is a local matter that our federal system leaves to the states despite the findings of a substantial impact on the national economy.

The Court also made it more difficult to sue state officials who violate federal law. The Fair Labor Standards Act imposed minimum wages on private and public employers. Maine ignored the federal requirements, refusing to pay some of its state employees the minimum wage. The employees sued the State in federal court but the Supreme Court held that Congress could not authorize such lawsuits. In subsequent cases, the Court similarly held that individuals could not sue states for violating the American with Disabilities Act and the Age Discrimination in Employment law. Without the ability to bring a lawsuit, the injured individuals were left without any recourse. They have a right but no way to enforce it; an empty guarantee at best.

In the name of federalism and states' rights, the Court has severely restricted congressional power and left individuals with little ability to enforce federal laws against the states. This reordering of federal and state relations by the Supreme Court is the judicial revolution that took place during the Rehnquist years. As a government lawyer, John Roberts argued in support of a restrictive role for federal courts in enforcing federal rights, and as a judge he expressed a limited role for Congress as well. As Chief Justice, he likely will continue the federalism revolution.