

TEN YEARS OF THE ROBERTS COURT: IMPACT ON STATE AND LOCAL GOVERNMENT

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John Glover Roberts Jr. became the 17th Chief Justice of the United States Supreme Court on September 29, 2005. Roberts Court decisions have affected everyone from average Americans to Guantanamo Bay detainees to state and local government. This article provides a brief analysis of how the Roberts Court has impacted 10 areas of interest to state and local government: federalism, preemption, race, free speech, religion, public employment, qualified immunity, death penalty, Fourth Amendment, and gun control.

Federalism

Much of the Court's docket every term involves the relationship between the federal government and state and local government, which makes it difficult to generalize about federalism decisions. However, the early years of the Roberts Court were not dominated by particularly significant federalism cases.

In the Court's October 2011 term federalism was at issue in the two big cases. In *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), the Court was asked to decide whether the Affordable Care Act individual mandate and Medicaid expansion were constitutional. *Arizona v. United States*, 132 S. Ct. 2492 (2012), involved a challenge to four provisions of Arizona law designed to crack down on illegal immigration.

The big cases in the Court's October 2012 term involved federalism too. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court was asked to decide the constitutionality of the Defense of Marriage Act requirement that marriage for federal purposes be defined as between a man and a woman. In *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the fate of Section 4 (and, practically speaking, Section 5) of the Voting Rights Act was in the Court's hands.

Federalism fared well in three of the four cases. Notably, in *NFIB v. Sebelius*, while the Affordable Care Act remained mostly intact, the individual mandate was deemed to violate the Commerce Clause on the ground that Congress lacks the power to compel a person to engage in commerce. And for the first time ever, the Court concluded that a federal law exceeded Spending Clause authority because it was coercive. In *Arizona v. United States*, while the Court held that three provisions of Arizona immigration law were preempted, it concluded the most controversial provision ("show me your papers") wasn't clearly preempted. Following *Shelby County*, Section 5 of the Voting Rights Act is currently inoperable.



All state and local governments do not necessarily want a result that favors federalism in all cases. This is probably best illustrated in environmental cases where states are often suing each other or otherwise involved on both sides of the case. Notably, in probably the most significant environmental case the Roberts Court has decided to date, *Massachusetts v. EPA*, 549 U.S. 497 (2007), several states and local governments asked the Court to force EPA to regulate carbon dioxide emissions in new motor vehicles, and it did.

Preemption

The Court's preemption docket in the last few years has been very thin. The Court's lone preemption case of the October 2014 term was *Oneok v. Learjet*, 135 S. Ct. 1591 (2015). The Court held the Natural Gas Act does not preempt state-law antitrust lawsuits alleging price manipulation that affect both federally regulated wholesale natural-gas prices and non-federally regulated retail natural-gas prices.

Recent preemption cases have often been on very narrow issues. For example, the issue in *American Trucking Association v. City of Los Angeles*, 133 S. Ct. 2096 (2013), was whether the Federal Aviation Administration Authorization Act preempted provisions in concession agreements between a port and short-haul trucking companies that required trucks moving cargo in and out of the port to affix placards with a phone number to receive complaints to each truck and to submit a plan for off-street parking for the trucks.

And, particularly recently, unanimous opinions in preemption cases have been common. For example, *American Trucking Association v. City of Los Angeles* was unanimous as was *National Meat Association v. Harris*, 132 S. Ct. 965 (2012). In that case the Court held that the Federal Meat Inspection Act expressly preempted a California law regulating the treatment of non-ambulatory pigs at slaughterhouses.

Cuomo v. Clearing House Association, 557 U.S. 519 (2009), is good example of a broader, more divided Roberts Court preemption case. The Court held 5-4 that federal banking regulations did not preempt states from enforcing their fair-lending laws against national banks.

A series of preemption cases involving drug labeling are also noteworthy. In *Altria Group Inc. v. Good*, 555 U.S. 70 (2008), the Court held federal law does not preempt state law deceptive practice claims in connection with the advertising of "light" and "low tar" cigarettes. In *Wyeth v. Levine*, 555 U.S. 555 (2009), the Court held federal law does not preempt state torts claims imposing liability on drug labeling that the FDA had previously approved. But in *PLIVA v. Mensing*, 131 S. Ct. 2567 (2011), the Court held that federal drug regulations applicable to generic drug manufacturers preempted state-law tort claims alleging a failure to provide adequate warning labels. And in *Mutual Pharmaceutical v. Bartlett*, 133 S. Ct. 2466 (2013), the Court held that state-law design-defect claims that turn on the adequacy of a drug's warnings are preempted by federal law.

Race

Part of the Roberts Court agenda is to decide cases involving race. The best evidence is the lack of circuit splits in *Shelby County v. Holder*, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), involving the constitutionality of the University of Texas's affirmative action plan, and *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*,

135 S. Ct. 2507 (2015), involving whether disparate impact claims are possible under the Fair Housing Act.

The Roberts Court can be fairly characterized as using a sledge hammer or a pick when issuing decisions in cases involving race, depending how broad and significant the question in the case. While the outcomes in *Shelby County v. Holder* and *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), holding that states may ban affirmative action through voter-adopted amendments to their state constitutions, were predictable, they are probably the best examples of sledge hammer decisions.

Fisher v. University of Texas at Austin and *Ricci v. DeStefano*, 557 U.S. 557 (2009), are two examples of the Roberts Court taking a pick to chip away at race-based decision making. In *Fisher* the Court held that the lower court improperly deferred to the University's argument that its race conscious admissions policy was narrowly tailored. In *Ricci v. DeStefano* the Court held that the City of New Haven violated Title VII when it discarded tests favoring white and Hispanic applicants for fear of a disparate impact lawsuit.

A few employment decisions other than *Ricci v. DeStefano* have made it more difficult for plaintiffs to win civil rights cases. In *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), the Court held that retaliation plaintiffs must prove "but-for" causation, which is harder than proving "motivating factor" causation, which applies to other discrimination plaintiffs. On the same day the Court in *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), defined "supervisor" narrowly (only a person who can take a tangible employment action against the victim), making it more difficult for employees to sue their employers for workplace harassment.

Race-related decision making hasn't always fared poorly in the Roberts Court. In a surprising 5-4 decision in *Texas Department of Housing and Community Affairs*, the Court held 5-4 that disparate impact claims may be brought under the Fair Housing Act.

Free Speech

Many Court commentators have opined that the Roberts Court is pro-free speech. For state and local government this trend is either irrelevant (when a federal law gets struck down) or bad (when a state law or local ordinance gets struck down). The apex of the Court embracing a broad First Amendment is *Citizens United v. FEC*, 552 U.S. 1240 (2008), holding 5-4 that corporations have First Amendment rights regarding political campaigns. More relevant to local governments, a case that poignantly illustrates the Roberts Court preference for more speech rather than less is *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218 (2015), holding that strict scrutiny applies to content-based sign ordinances. The impact of *Reed* may be particularly significant as *Reed's* holding will likely be applied to content-based speech in contexts other than signs.

The Roberts Court has generally held that speech most would consider obnoxious or offensive is protected by the First Amendment. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court held the First Amendment protects from tort liability those who peacefully protest on a matter of public concern near a military service member's funeral. In *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011), the Court struck down California's ban on the sale or rental of violent video games to minors. And in *United States v. Stevens*, 559 U.S. 460 (2010), the Court concluded that a federal statute criminalizing electronic depictions of animal cruelty is unconstitutional.

The Roberts Court has decided a number of cases that go against its trend of supporting free speech. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held public employee speech related to their job duties isn't protected by the First Amendment. And in *Morse v. Frederick*, 551 U.S. 393 (2007), the infamous BONG HiTS 4 JESUS case, the Court held that school officials may prohibit students from displaying messages promoting illegal drug use.

Finally, state and local government have been able to rely on the government speech doctrine to limit their own speech in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), involving a city refusing to display a monument, and *Walker v. Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015), involving a state refusing to allow the Confederate flag on license plates.

Religion

While the Roberts Court hasn't accepted a lot of cases directly involving religion, in the cases it has decided, it has been tolerant of religion in public spaces. One of the most significant religion cases of its tenure is *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). In a 5-4 decision the Court upheld Greece's practice of beginning town board meetings with a prayer that was almost always Christian.

The Roberts Court has decided two cases involving fixed structures with religious messages. In *Pleasant Grove City v. Summum*, the Court allowed a town in Utah to keep its display of the Ten Commandments in a public park even though it rejected a park monument of the Seven Aphorisms of Summum. And in *Salazar v. Buono*, 559 U.S. 700 (2010), the Court upheld the transfer of the federal land on which a cross was situated to a private party.

The Supreme Court has long been interested in the use of taxpayer money to fund religious causes and the Roberts Court has been no exception. In *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), the Court held that taxpayers had no standing to challenge the constitutionality of tax credits for contributions to tuition organizations that provide scholarships to religious schools. And in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), the Court held that a public law school did not have to officially recognize a club that denied gays leadership positions on religious grounds.

Public Employment

Generalizing about public employment decisions is easy because the Court has only decided about one public employment case every other term. All have been decided in favor of public employers except the narrowest case it has considered to date.

The most significant public employment case is *Garcetti v. Ceballos*. In a 5-4 decision the Court held that public employees have no First Amendment protection for speech pursuant to their ordinary job duties. In *Lane v. Franks*, 134 S. Ct. 2369 (2014), the Court concluded that public employees have First Amendment protection for subpoenaed speech outside their regular job duties.

Engquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008), could have been bigger than *Garcetti* had it gone the other way. But the Court held 6-3 that the "class-of-one" theory of equal protection does not apply in the public employment context.

In *Ontario v. Quon*, 560 U.S. 746 (2010), the Court held that the City of Ontario did not violate

an employee's Fourth Amendment rights because its search of the employee's text messages was reasonable. Public employers had hoped the Court would rule that the employee did not have an expectation of privacy in his government-owned pager. The Court assumed, but did not decide, that he did.

In *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011), the Court held that public employees have no First Amendment Petition Clause claim unless their petition relates to a matter of public concern.

Finally, in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court held that the First Amendment prohibits collection of an agency fee from home health care providers, who the Court characterized as quasi-state employees, who do not wish to join or support a union. This case is best known for being very critical of, but not overruling, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The Court has another chance to overrule *Abood* in its October 2015 term in *Friedrichs v. California Teachers Association*.

Qualified Immunity

During the Court's October 2013 term it decided five qualified immunity cases. That term and over the tenure of the Roberts Court state and local government have done well in qualified immunity cases. This is likely for two reasons—the qualified immunity standard is very deferential to government, and the Court tends to not take close cases.

Police in particular have fared well in the Roberts Court. In fact, *Tolan v. Cotton*, 134 S. Ct. 1861 (2014), was the first time in a decade where the Court did not grant an officer qualified immunity. The Court sent the case back to the lower court concluding that it failed to view the evidence most favorably to the non-moving party, here, a person shot by police. *Tolan* was an anomaly, since then the Court has continued the trend of conferring qualified immunity to officers.

The October 2006 term produced *Scott v. Harris*, 550 U.S. 372 (2007), which held that an officer using deadly force to stop a speeding (though otherwise safely driving) motorist was entitled to qualified immunity. The Court reasoned that using force against a motorist who poses a threat to officers or other motorists violates no clearly established right. In the October 2013 term the Court reaffirmed *Scott v. Harris* in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), also involving the use of deadly force during a high-speed chase.

Two other qualified immunity cases stand out. In *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), the Court held unanimously that an individual temporarily hired by the government to do its work is eligible for qualified immunity. And in *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court held that the *Saucier v. Katz*, 533 U.S. 194 (2001), two-step sequence for resolving qualified immunity claims isn't mandatory; courts can just decide the clearly established prong.

Since 2009, *Pearson* has provided the Supreme Court with frequent opportunities to reverse circuit court denials of qualified immunity, without actually creating new law. This trend is evident in *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), where the Court declined to decide whether the Americans with Disabilities Act applies to arrests but granted police officers qualified immunity even though they failed to accommodate an armed, violent, and mentally ill woman when bringing her into custody.

While not a qualified immunity case, *Los Angeles County v. Humphries*, 562 U.S. 29 (2010), is of particular importance to local governments. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court held that local governments can be liable for constitutional violations only when their actions are the result of official policy or custom. In *Humphries* the Court held that *Monell* applies even if the plaintiff is seeking *prospective* relief (i.e., declaratory and injunctive relief) rather than *retroactive* relief (i.e., monetary damages).

Eighth Amendment

The Roberts Court has decided at least 10 cases involving the death penalty. More have favored the defendant than the state at least partially because Justice Kennedy tends to join his more liberal colleagues in these cases.

Five cases in particular are noteworthy. In *Kansas v. Marsh*, 548 U.S. 163 (2006), the Court held that the death penalty may be applied when mitigating and aggravating sentencing factors are both present. In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Court held that the Eighth Amendment bars imposing the death penalty for the rape of a child where the child did not die. More recently in *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Court held that if a capital defendant's IQ falls within the standard error measurement for intellectually disabled, the defendant must be allowed to present additional evidence of intellectual disability.

In *Baze v. Rees*, 553 U.S. 35 (2008), the Court held that lethal injection using a particular three-drug protocol is constitutional. The Court upheld lethal injection using midazolam in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). The Court accepted the trial court's conclusion that this sedative was sufficient to render an inmate insensate to pain, and held that the inmates challenging the practice failed to produce evidence of a viable alternative, as required by *Baze*. In dissent, Justice Breyer, joined by Justice Ginsburg, called for the Court to consider the "basic question" of whether the death penalty is constitutional at all.

Two 5-4 cases involving juveniles and life in prison without the possibility of parole are noteworthy. In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that juveniles cannot be sentenced to life in prison without the possibility of parole for any crime short of homicide. Then in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Court held that a state cannot impose life in prison without parole on a minor without considering mitigation evidence about the defendant's youth. In its October 2015 term the Court will decide whether *Miller* should apply retroactively in *Montgomery v. Louisiana*.

Fourth Amendment

Due to the heavy volume of Fourth Amendment cases it is beyond the scope of this article to discuss the Roberts Court jurisprudence beyond a few generalities.

First, many Fourth Amendment cases are close and involve an odd line up of Justices. For example, in a 5-4 decision in *Navarette v. California*, 134 S. Ct. 1683 (2014), Justice Scalia joined a dissent with the more liberal Justices Ginsburg, Sotomayor, and Kagan, regarding whether anonymous telephone calls are sufficient to establish reasonable suspicion to stop a driver. The four *Navarette* dissenters plus Justice Thomas were in the majority in *Florida v. Jardines*, 133 S. Ct. 1409 (2013), holding that a drug sniff at the front door of a house is a Fourth Amendment search.

Second, Justice Scalia continues to rule in favor of criminal defendants on a regular basis and espouse his own Fourth Amendment theories, most notably his property-rights theory. One of the most important decisions where Justice Scalia did this was *United States v. Jones*, 132 S. Ct. 945 (2012). Justice Scalia's majority opinion reasoned that placing a GPS tracking device on a vehicle was a search under the Fourth Amendment because it is a "physical intrusion" into the protected space of the vehicle owner.

Third, the Court has relaxed the restrictions of the exclusionary rule, which bans criminal evidence obtained through a Fourth Amendment violation. This began with *Hudson v. Michigan*, 547 U.S. 586 (2006), holding that a violation of the "knock and announce" rule does not require suppressing evidence, and continued in *Herring v. United States*, 555 U.S. 135 (2009), holding that honest mistakes by police acting "in good faith" were not grounds for suppressing evidence.

But perhaps most significantly the Roberts Court has made it clear that it isn't going to allow new technology to undermine traditional Fourth Amendment protections. For example, in *United States v. Jones*, the Court unanimously held that putting a GPS device on a car constitutes a search. More recently the Court again held unanimously in *Riley v. California*, 134 S. Ct. 2473 (2014), that police generally need a warrant to search a cell phone incident to an arrest.

Gun Control

The Roberts Court has decided two landmark gun control cases, and many anxiously await further gun control rulings. Both were decided 5-4. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court held the Second Amendment protects an individual's right to possess a gun for traditionally lawful purposes, such as self-defense, within the home. In *McDonald v. Chicago*, 561 U.S. 742 (2010), the Court held that the Second Amendment right of individuals to keep and bear arms in self-defense is incorporated through the Fourteenth Amendment to apply against state and local government as well as the federal government. Another big issue the Court could decide soon is whether and how state and local government can regulate guns carried outside the home.

Conclusion

State and local government are affected by most Supreme Court cases. That is unlikely to change no matter who is Chief Justice or who is on the Court. The Roberts Court in its first 10 years hasn't shied away from controversial issues no matter who the parties are or who is affected. That is also unlikely to change in the future. But how the Roberts Courts will decide cases over the next 10 years for state and local government—and everyone else—may be largely in the hands of future Justices who will be appointed over the next 10 years.

Until then, Justice Kennedy will remain literally the central figure of the Roberts Court. In the Court's October 2014 term Justice Kennedy expressed interest in considering the constitutionality of solitary confinement and overturning *Quill v. North Dakota*, 504 U. S. 298 (1992), which prevents state and local government from taxing internet sales. Before long the Court is likely to rule on both of these issues.