Supreme Court Trends

Lisa Soronen
State and Local Legal Center
lsoronen@sso.org
Before the Roberts Court...

- There had been no changes in the Court for 11 years
- No President since Nixon had replaced two Supreme Court Justices
- The Court was 4-4 with Justice O’Connor leaning more left (particularly near the end of her tenure)
During the Roberts Court

- Roberts replaced Rehnquist
- Alito replaced O’Connor
- Sotomayor replaced Souter
- Kagan replaced Stevens
Talking Generalities

• (In the big cases) all Justices align themselves with the party of the President who appointed them
• (In the big cases) we have a 4-4 Court with a swing Justice who leans right
• Roberts and Alito (Alito more so because he replaced O’Connor) will be President Bush’s biggest legacy
• The Court has three good writers
This Presentation Won’t Cover…

• But I would be remiss if I didn’t mention the Roberts Court and…
  • Campaign finance
  • Environmental/land use cases
  • Tax
  • Corporations
  • Guantanamo Bay cases
  • Abortion
Roberts Court and Federalism

• Rehnquist Court was considered a high water mark for federalism
  • Federalism 5: Rehnquist, Kennedy, O’Connor, Scalia, and Thomas
  • Commerce clause jurisprudence received the most attention
    • *Lopez v. United States* (1995)—Gun Free Schools Act is unconstitutional because prohibiting guns near schools doesn’t affect interstate commerce
    • *United States v. Morrison* (2000)—parts of the Violence Against Women Act are unconstitutional because domestic violence doesn’t substantially affect interstate commerce
    • *But see Gonzalez v. Raich* (2005)—Commerce Clause gave Congress authority to prohibit the local cultivation and use of marijuana despite state law to the contrary
Roberts Court and Federalism

• Things started out a little slow...
  • All eyes were on the Justice Roberts right away to see where he stood on federalism
  • First federalism case the Roberts Court decided was *United State v. Georgia*
  • Court held unanimously that prisoners could sue state prisons for damages under the ADA
  • Linda Greenhouse, *Roberts Court Hears Its First Case in Federalism Debate*, *New York Times*, Nov. 10, 2005
Roberts Court and Federalism

• By 2011 things had really heated up...
  • *NFIB v. Sebelius* (Affordable Care Act individual mandate and Medicaid expansion constitutional?)
  • *Arizona v. United States* (immigration state law)
  • *Perry v. Perez* (judicial drawing of interim redistricting maps)
Roberts Court and Federalism

• How the Court viewed federalism in these cases matters...because these cases matter...
  • How the Court views federalism in these cases really matter because they involve issues that affect your average American’s live
  • Barry Friedman and Dahlia Lithwick, Not Your Gingrich’s Supreme Court, SLATE, Dec. 14, 2011
  • This trend continues today
Roberts Court and Federalism

- 2012 is just as big for federalism
  - *United States v. Windsor* (demise of the Defense of Marriage Act)
  - *Shelby County v. Holder* (demise of Section 4 of the Voting Rights Act)
Roberts Court and Federalism

• 2013 the Court turns its attention elsewhere
  • Court took a respite from federalism in its bigger decisions
  • Except for Schuette v. Coalition to Defend Affirmative Action
  • Bond v. United States could have been huge…but it wasn’t
Roberts Court and Federalism

- 2014 could be bigger than ever
  - Same-sex marriage?
  - *King v. Burwell* and *Halbig v. Burwell* (Affordable Care Act subsidies on federal exchanges)
  - *Armstrong v. Exceptional Child Center* (Medicaid private right of action)
Roberts Court and Federalism

• How has federalism fared in the big, recent cases?
  • *NFIB v. Sebelius*—Commerce Clause win, Medicaid win
  • *Arizona v. United States*—I consider this case a federalism win most controversial provision (“show me your papers”) wasn’t preempted
  • *Perry v. Perez*—federalism win
  • *United States v. Windsor*—federalism wins
  • *Shelby County v. Holder*—federalism wins
Roberts Court and Federalism

• Is it federalism or conservative v. liberal?
  • *NFIB v. Sebelius*—liberal because the individual mandate was constitutional as a tax
  • *Arizona v. United States*—conservative on “show me your papers”
  • *Perry v. Perez*—conservative
  • *United States v. Windsor*—liberal
  • *Shelby County v. Holder*—conservative

• Conservative position did well but federalism did better
Roberts Court and Federalism

• Federalism beyond the big cases
• Really hard to generalize about how the Court views federalism beyond the big cases because so many cases impact the federal/state relationship
• In many, many less significant cases federalism is respected
  • *Maryland v. Coleman*—employees cannot sue the state under the FMLA’s self-care provision
  • *McBurney v. Young*—Virginia’s “citizen’s only” public records law doesn’t violate the federal constitution
  • *Maryland v. King*—DNA arrest laws don’t violate the Fourth Amendment
Roberts Court and Federalism

- Federalism and individual rights
  - *Bond v. United States (Bond I)*
  - Court held Bond had standing to challenge the constitutionality of the Chemical Weapons Convention Implementation Act
  - Erin Murphy, Bancroft, calls this case Justice Kennedy’s Ode to Federalism
Roberts Court and Preemption

• Observations about recent preemption cases
  • Preemption docket has been pretty thin
    • Not a lot of cases last term and only one accepted for next term, Oneok v. Learjet
  • Many preemption cases are on really narrow issues
    • American Trucking Association v. City of Los Angeles (preemption of cargo trucks affixing placards with a phone number to receive complaints and a plan for off-street parking for the trucks)
    • Wos v. EMA (anti-lien provision of Medicaid statute preempts state’s irrebuttable statutory presumption that one-third of any tort recovery is attributable to medical expenses)
  • Fair number of unanimous decisions
    • Dan’s City Used Cars v. Pelkey (state-law claims stemming from the storage and disposal of a towed vehicle not preempted)
    • National Meat Association v. Harris (Federal Meat Inspection Act expressly preempts a California law regulating the treatment of non-ambulatory pigs at slaughterhouses)
Roberts Court and Preemption

• Drug cases
  • *Altria Group Inc. v. Good*—federal law does not preempt state law deceptive practice claims in connection with the advertising of “light” and “low tar” cigarettes
  • *Wyeth v. Levine*—federal law does not preempt state torts claims imposing liability on drug labeling that the FDA had previously approved (changing the label is possible)
  • *PLIVA v. Mensing*—federal drug regulations applicable to generic drug manufacturers preempt state-law tort claims alleging a failure to provide adequate warning labels (changing the label isn’t possible)
  • *Mutual Pharmaceutical v. Bartlett*—state-law design-defect claims that turn on the adequacy of a drug’s warnings are preempted by federal law

• Liberals (unsurprisingly) are against preemption in the drug context
Roberts Court and Preemption

• If you care about consumer protection you need to care about preemption
  • Well over half of the Court’s preemption docket somehow impacts consumer protection
  • Not limited to drug cases—pigs at slaughterhouses, airline frequent flyer miles program participation, purchasing natural gas, etc.
Roberts Court and Preemption

• Biggest case:
  • *Arizona v. United States*—mixed result for preemption
  • Most controversial provision not preempted
  • Three less controversial provisions preempted
Roberts Court and Preemption

• Preemption and state claims
  • Between 2007 and 2012 the Court decided 13 preemption cases involving litigation based on state law claims
  • In 9 cases state law was preempted
  • Two preemption of state law cases from last term were a draw
Roberts Court and Preemption

• SLLC didn’t get involved in either of last terms preemption cases
  • *CTS v. Waldburger*—state statute of repose **not preempted** by CERCLA (7-2)
  • *Northwest v. Ginsberg*—the Airline Deregulation Act **preempts** a state-law claim for breach of the implied covenant of good faith and fair dealing (if it seeks to enlarge the contractual obligation that the parties voluntarily adopt) (unanimous)
Roberts Court and Preemption

- Court might accept a big preemption case next term
- Remember *Douglas v. Independent Living*...it’s back!
- *Armstrong v. Exceptional Child Center* (does the Supremacy Clause allow private parties to sue states to enforce a Medicaid reimbursement statute)
Roberts Court and Preemption

- Hard to generalize if liberals or conservatives like preemption
- Hard to generalize if liberals or conservatives use preemption to get the results they want
- But...
  - *Wyeth v. Levine*—5-4 (liberals favor no preemption to get a liberal result)
  - *Mutual Pharmaceutical v. Bartlett*—5-4 (conservatives favor preemption to get a conservative result)
- More preemption means “closing the courthouse door”—Erwin Chermerinsky, *Closing the Courthouse Doors*, 14 Green Bag 2d 375 (Summer 2011)
Roberts Court and Race

• “Progressive groups are apoplectic these days about how the Roberts Court is supposedly the captive of Big Business and wealthy people, but that is not much different from the days when the Court regularly ruled for criminal suspects, or for minorities. Judges, too, come to the bench with a sense that some things in society need remedying, and that some of those are entirely fit for judicial resolution.”

Roberts Court and Race

• Do I think the Roberts Court has an agenda to hear cases involving race?
• Short answer is yes
• No circuit split in *Shelby County* or *Fisher*
Roberts Court and Race

• Could the conservatives on the Court do without the use of race in government decision making?
• Again, the answer is yes
• Roberts concurrence in Schuette (“But it is not ‘out of touch with reality’ to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and—if so—that the preferences do more harm than good.”)
• Chipping away at race-based decision making and taking a sledge hammer to race-based decision making
Roberts Court and Race

• Sledge hammer
  • *Shelby County v. Holder*
  • *Schuette v. Coalition to Defend Affirmative Action* (states can ban affirmative action)
  • Fair Housing disparate impact case--*Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*
Roberts Court and Race

• Chipping away
  • *PICS v. Seattle* (raced-based student assignment plans at K-12 level not narrowly tailored)
  • *Fisher v. University of Texas* (university affirmative action plan not narrowly tailored)
  • *Ricci v. DeStefano* (City violated Title VII when it discarded the tests favoring white and Hispanic applicants for fear of a disparate impact lawsuit)
Roberts Court and Race

• Conservatives don’t always get what they want
  • *PICS v. Seattle*
  • *Fisher v. University of Texas*
  • Why? Justice Kennedy holds out

• What’s next for race?
• What will happen with race in the next 10 years may be decided by three currently unknown new Justices
Roberts Court and Free Speech

• Roberts Court is very First Amendment friendly
• Most universally held opinion about the Roberts Court
• Mostly bad or irrelevant to state government
Roberts Court and Free Speech

• Apex of pro-First Amendment jurisprudence
  • *Citizens United v. FEC*
  • Corporations have First Amendments right regarding elections
  • 5-4
Roberts Court and Free Speech

- Be as obnoxious as you want
  - *Snyder v. Phelps* (protesting military funerals)
  - *Brown v. Entertainment Merchants Association* (state law regulating violent video games to minors)
  - *United States v. Stevens* (federal law criminalizing videos of violence against animals)
  - *McCullen v. Coakley* (abortion counselors)
- Justice Alito isn’t (always) buying it
Roberts Court and Free Speech

• The anomaly
  • *Morse v. Frederick* (BONG HiTS 4 JESUS--non-political drug speech at school may be regulated)
• What will the Court do with Gilbert’s sign code?
  • *Reed v. Town of Gilbert*
Roberts Court and Religion

- Overall the Roberts Court has been tolerant of religion in public spaces
- Roberts Court has (wisely?) stayed out of a lot of conflicts about religion
- I will focus on religion and state and local government
Roberts Court and Religion

• Biggest case that could have been bigger?
  • *Town of Greece v. Galloway* (legislative prayer at town board meetings)
Roberts Court and Religion

• Fixed structures
  • *Pleasant Grove City v. Summum* (monument)
  • *Salazar v. Buono* (cross)
Roberts Court and Religion

• Taxpayer money to religious causes
  • *Arizona Christian School Tuition Organization v. Winn* (no taxpayer standing to challenge constitutionality of a tax credit to religious organizations)
  • *Christian Legal Society v. Martinez* (public law school did not have to officially recognize a club that denied gays leadership positions or religious grounds)
Roberts Court and Religion

• Why is the Court not very interested in religion?
  • It’s a no win situation?
    • “[B]ecause the Court lays down these rules and everybody thinks that the Court is being hostile to religion and people get unhappy and angry and agitated in various kinds of ways….And every time the Court gets involved in things like this, it seems to make the problem worse rather than better.”
  • Other issues seem more pressing
• What is the state of circuit court precedent as a result?
Roberts Court and Public Employment

- Roberts Court has been pro-public employer
- But the Court only takes a public employment case about every other term
- Public employer acting as an employer v. acting as a sovereign
Roberts Court and Public Employment

- *Garcetti v. Ceballos* (no First Amendment protection for public employee speech about ordinary job duties)
- *Enquist v. Oregon Department of Agriculture* ("class-of-one" theory of equal protection does not apply in the public employment context)
- *Ontario v. Quon* (City of Ontario did not violate its employees' Fourth Amendment rights because the city's search of the employee's text messages was reasonable)
- *Borough of Duryea v. Guarnieri* (public employees have no First Amendment's Petition Clause claim unless their petition relates to a matter of public concern)
- *Lane v. Franks* (First Amendment protection for subpoenaed speech outside an employee's regular job duties)
- *Harris v. Quinn* (First Amendment prohibits the collection of an agency fee from home health care providers who do not wish to join or support a union)
Roberts Court and Qualified Immunity

• Big decisions
  • *Pearson v. Callahan*—reversed *Saucier v. Katz*
  • *Filarsky v. Delia*—temporary employees are eligible for qualified immunity
Roberts Court and Qualified Immunity

• Police cases
  • Keep the Court’s docket interesting
    • Reichle v. Howards—starring Vice President Dick Cheney
    • Wood v. Moss—starring President Bush
  • Tolan v. Cotton—first time in a decade the Court hasn’t a decided a qualified immunity case in favor of the officer
Roberts Court and Qualified Immunity

• Qualified immunity and last term
  • Unprecedented 5 cases
  • Government wins often because
    • Qualified immunity is very differential
    • Court doesn’t take a lot of close cases
    • It mostly takes a lot of case from the Ninth Circuit where police officers are denied qualified immunity
Roberts Court and the Death Penalty

- 10 death penalty cases
- More decided in favor of defendants than the state
- Justice Kennedy is more liberal
Roberts Court and the Death Penalty

• Four biggest death penalty rulings
  • *Kansas v. Marsh* (death penalty okay when mitigating and aggravating sentencing factors were both present)
  • *Baze v. Rees* (lethal injection is constitutional)
  • *Kennedy v. Louisiana* (no death penalty for rape)
  • *Hall v. Florida* (rigid use of 70 IQ score as cutoff for intellectual disability is unconstitutional)
Roberts Court and the Death Penalty

- Juveniles and life in prison
  - *Graham v. Florida* (2010) (juveniles could not be sentenced to life in prison without the possibility of parole for any crime short of homicide)
  - *Miller v. Alabama* (2012) (state law cannot require that juveniles be sentenced to life in prison without the possibility parole in homicide cases)
- Both were 5-4
Roberts Court and Fourth Amendment Cases

• Familiar Fourth Amendment themes
  • Court takes a lot of Fourth Amendment cases (4 last term)
  • Many are close and involve an odd match of Justices
  • Scalia continues to be the savior of the criminal defense bar
    • “Law enforcement agencies follow closely our judgments on matters such as this, and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop”
  • Scalia dissenting in Navarette v. California
Roberts Court and Fourth Amendment Cases

• The Court isn’t going to allow new technology to undermine traditional Fourth Amendment protections
  • *United States v. Jones* (putting a GPS devise on a car constitutes a search) (unanimous)
  • *Riley v. California* (a warrant is generally needed to search a cell phone incident to an arrest) (unanimous)
Roberts Court and Gun Control

  - Landmark decision
  - Second Amendment protects an individual's right to possess a gun for traditionally lawful purposes, such as self-defense, within the home

• *McDonald v. Chicago* (2010) (5-4)
  - Another landmark decision
  - Second Amendment applies to the states and local governments

• *Abramski v. United States* (2014) (5-4)
  - X cannot claim to be Y and buy a gun for Y
Roberts Court and Gun Control

- Last term the Court denied *cert* in a ton of gun cases
- Next big case maybe: whether and how states can regulate guns carried outside the home
Justice Roberts: the Man, the Legend

• After the Affordable Care Act case people wondered who is the real John Roberts

• Is *Shelby County* the real Justice Roberts?

• Has he kept his promises of narrow decision and unanimity?
  • Stealth overruling

• He hasn’t always gotten what he has wanted
  • *Fisher* and *PICS v. Seattle*
Good Questions

- Is the Roberts Court activist?
- How conservative is the Roberts Court?
- How does the Court measure up against public opinion on issues?
- How does the lack of Protestants affect the Court?