



The Our American States podcast—produced by the National Conference of State Legislatures—is where you hear compelling conversations that tell the story of America’s state legislatures, the people in them, and the policies, process and politics that shape them.

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U.S. Supreme Court Update | Oct. 12, 2020 | OAS Episode 109

Ed: Hello and welcome to “Our American States,” a podcast from the National Conference of State Legislatures. This podcast is all about legislatures: the people in them, the policies, process and politics that shape them. I’m your host, Ed Smith.

“I went down to the court and I saw all the candles, flowers and personal notes that people left for Justice Ginsburg and I realized she was many things to many people. She was also a friend to state legislatures of all stripes in particular cases.”

That was Lisa Soronen, the Executive Director of the State and Local Legal Center in Washington, D.C., and our guest today on the podcast.

Lisa is here to update us on the new term at the U.S. Supreme Court, which got underway on October 5th. We discussed the legacy for state legislatures of the late Justice Ruth Bader Ginsburg, the nomination of Judge Amy Coney Barrett to replace her, and the position of Chief Justice John Roberts on the shifting court.

Lisa also reviewed some significant cases affecting states from the last term, cases to watch out for this term, and, of course, the upcoming arguments over the Affordable Care Act. Lisa, welcome back to the podcast.

Lisa: Thanks for having me.

Time Marker (TM): 0:46

Ed: Well, we could hardly have a more opportune time to discuss the Supreme Court. Before we get to the cases themselves, let me ask you about some recent developments. First, Americans have mourned the death of Justice Ruth Bader Ginsburg. Which of her votes were particularly important to state legislatures?

Lisa: I went down to the court and I saw all the candles, flowers and personal notes that people left for Justice Ginsburg and I realized she was many things to many people. She was also a friend to state legislatures of all stripes in particular cases.

I would say her most important case for state legislatures is South Dakota vs. Wayfair. In that case the Supreme Court held 5:4 that states could require out-of-state vendors to collect sales tax. This has been a really big change in the law that has brought billions of dollars into the states.

The significance of Justice Ginsburg's vote is that she was the only liberal to join the more conservative justices. So, the word on the street was that at the time of the decision, the justices either knew or suspected Justice Kennedy was going to leave, and the more liberal justices, always nervous about Roe, were unwilling to overturn precedent. This case, by the way, involved that.

But Justice Ginsburg took a different tack. I mean, I think her view of the case was the precedent was, if not wrong, at least severely outdated, and it should go, and she was willing to vote in that direction. So, her vote was crucial in that case.

A second case of much less notoriety, though it was a dissent for Justice Ginsburg, is Gobeille vs. Liberty Mutual Insurance Company. There are two things in particular I like about this case. One is that Justice Ginsburg cited repeatedly the State and Local Legal Centers amicus brief. And the second thing about this case is that I think it shows Justice Ginsburg's pragmatism.

So, the issue in the case was whether state laws requiring health insurance companies to provide data to the state were preempted by ERISA. The majority of the Supreme Court said: yes, these state statutes are preempted, but Justice Ginsburg dissented, like I said, citing the SLC's brief and saying: states want and need this information. They use it to lower healthcare costs, to get better health outcomes.

So, I think those two decisions in particular highlight Justice Ginsburg's appreciation for the challenges that states and state legislatures in particular face.

TM: 04:00

Ed: The other big development, of course, is the nomination of Judge Amy Coney Barrett. If she is confirmed before the end of October, and we're recording this interview in early October, what will that mean for the Supreme Court generally and state legislatures specifically?

Lisa: So, there is so much to say on this topic, but I'll just make three points. In general, we're going to see the court switch to the right. For as long as I can remember in the big controversial cases, the court has been 5:4. First it was Justice Kennedy in the middle, and more recently it's been Chief Justice Roberts.

Well, Chief Justice Roberts is no longer going to be in the middle. The center of the court is now likely to be Justice Kavanaugh and he so far has proved to be a reliable conservative voter in the big and controversial cases.

So, commentators are focused basically on the ACA, guns and abortion as the three areas where Amy Coney Barrett could really provide an upset. I'll talk about the ACA later, but I'm going to talk about guns and abortion now.

Regarding guns, we have four justices on the record saying they want to hear a big gun case, and it only takes four votes to grant a petition. So, what's been holding those justices back? Well, Chief Justice Roberts has told or signaled something that is essentially holding them back. It appears that Judge Amy could be a very strong justice on the second amendment and be willing to vote with her conservative colleagues and be willing to hear a case.

Regarding *Roe vs. Wade*, I think it's fair to say that if she gets on the court, the decision will never be as vulnerable as it has to this point. This will be the point of its greatest vulnerability. That said, the court never has to take the question of whether they want to overturn the decision; that's always their choice. And it may be that the court does what she predicted, even with her on it, which is just to continue to sort of chip away at it more.

As for state legislatures, I know this is impossible, but try to sort of put your personal politics aside for a moment. I think if you do that, the best justices for states and state legislatures are moderate conservatives with a pragmatic bend, so, a justice like Chief Justice Roberts.

Many of the issues that the Supreme Court decides routinely that don't make the headlines are first amendment, takings, qualified immunity. These cases aren't decided on ideological grounds. Having one more conservative or one more liberal won't necessarily make a big difference in these cases.

TM: 06:37

Ed: So, let's talk about some more cases. Last term the court issued many important decisions for legislatures. What were your top three?

Lisa: It's painful to pick just three cases; I think it's almost like asking Judge Coney Barrett to pick her three favorite children out of her seven. But I'll do my best. My first case is probably *Bostock*. In this case, the court held that employees can sue their employers under Title 7 for employment discrimination on the basis of sexual orientation and gender identity.

So, this is a big deal for state legislatures for two reasons: first, a lot of state legislators had legislated in this space. So, it's not that the federal law makes this irrelevant. It's just that the federal law covers the entire country, is sort of preemptive, and provides another basis for employees to sue in numerous states.

The second reason is this: state governments are actually pretty big employers, and this is probably the biggest decision, or the biggest change in employment law since the Americans with Disabilities Amendments Act of 2008. It wasn't easy to say that 12 years ago; it's not easy to say it now. But it's probably the biggest change since that law.

So, the second decision without a doubt is the abortion case, *June Medical Services*. In this case you had five justices, the Chief Justice and the plurality, which were the liberal justices, saying

that if a restriction on abortion creates a substantial obstacle to obtaining an abortion, it's unconstitutional. This does not represent a change in the law.

But then, you had Justice Roberts and the dissenters all criticizing the so-called balancing test, which balances the burdens a woman might experience in trying to obtain an abortion versus the benefits of the law.

So, five justices criticizing this test, which was kind of newly breathed life into a couple of years ago when Justice Kennedy was on the bench, is a change in the law. And it's difficult to know what this change means. The court's decision was essentially what we call a 4:1:4 where you have one justice kind of joining the plurality and then joining the dissent.

So, the question is: Is this balancing test dead because Roberts criticized it along with his more conservative colleagues? And the answer is: We don't know. The 5th Circuit and the 8th Circuit so far have disagreed on that, but potentially that case was a pretty big decision for abortion law.

The third case is Espinoza. In this case, The Supreme Court held that if a state legislature wants money from a voucher program to go to kids that attend religious schools, that the federal constitution requires this resolved, even if there is a state constitutional provision that says clearly no state aid to religious schools.

Why this case is so significant is you have to look at the court's religious jurisprudence over the last 70 or 80 years, kind of on a continuum. It wasn't so long ago that the court had said the federal constitution prevents state aid to religious organizations. Then the court said around 2000, it might be permissible in some instances for there to be state aid to religious institutions. And here you have the court saying well, if state legislatures want it, it's required. So, that is a pretty significant change.

TM: 06:37

Ed: So, one of the big stories last term that you've already referenced was the voting record of Chief Justice Roberts who voted with the liberal justices in a number of these controversial cases. What's your take on his voting record? What does that tell you about where the court might be going?

Lisa: On one hand, it's undeniable that the Chief Justice joined the liberals in a number of big cases: the transgender sexual orientation Title 7 case is one example; the abortion case is another; and DACA is a third.

But I'm basically with Adam Liptak of the New York Times. He said: If you really look at his record, what he did was he doled out victories pretty evenly to the right and to the left. And one of his victories to the right was obviously Espinoza. But I think too, if you look at the abortion decision and the DACA decision, neither one of them was a blowout victory for the left. They were basically small victories and if you looked more carefully, hardly looked like victories.

That said, most people speculate that the Chief has left some of his legal instincts behind in some of these more liberal-leaning votes, and has really looked towards preserving the

institution of the court to have cases where the five justices appointed by Republicans are not all on the same side. And this appears to have been working quite well for the Chief Justice.

A Gallup Poll in August of 2020, right after the court's term ended, showed that 58% of Americans feel confident in the Supreme Court. It's the highest number since 2009, which interestingly was before Citizens United.

But now the story is this – the Chief Justice's role in the center is basically over. His ability to have left-leaning outcomes in big cases is going to be possibly zero going forward, or at least much smaller. So, it was somewhat of a shock to see the Chief kind of go left, but going forward, it's just not going to make much of a difference, at least in the big cases.

TM: 12:25

Ed: So, we can hardly get through a conversation these days without talking about COVID-19 and, even today as we're recording this, we've learned that the President and the First Lady have been infected.

So how has COVID-19 affected the Supreme Court? What have the greatest impacts been on the court?

Lisa: The court now has what I call a COVID-19 docket. It's basically deciding a bunch of cases on an emergency basis that relate to COVID, and in these cases it's just kind of giving a thumbs up or a thumbs down to what the lower courts have done.

The court has decided tons of COVID-related cases on an emergency basis, but the ones most relevant to state legislatures relate to stay-at-home orders and changes to elections.

So, the court has basically decided four cases on stay-at-home orders. All of the cases but one have religious claims at the center of the case. In all the cases but one, the challenges say that religion is being either treated better or worse than religious speech. In all the cases the lower courts allowed the stay-at-home orders to stay in effect, and the Supreme Court has essentially affirmed those decisions.

And it's been over some dissents. Some of the more conservative justices have not been happy at all about the fact that your religious rights in Nevada, for example, might be limited, but you can go to a casino with a thousand other people.

But I think the leader in this space has been the chief justice. He wrote a very nice little opinion, very pro federalism, pro state government, very early in the pandemic saying: these are decisions that have to be made based on scientific information; they've got to be changed frequently; this is just something for the branches of government close to the people to decide.

The second category of cases relates to elections. A bunch of judges have made changes to election rules due to COVID-19. A good example would be changing absentee ballot requirements. The Supreme Court has almost universally struck these election changes down. We don't necessarily know why, because the court often doesn't issue opinions.

But the first election change that was written by a judge that it struck down came out of Wisconsin and there we had a majority opinion and a dissenting opinion. And the majority looked at what's called a Purcell Principle. It's the idea that judges shouldn't at the very last minute come in and make changes to election rules.

There are more petitions before the court, or more emergency motions before the court on these issues; the Supreme Court is not done with it. But it is kind of interesting. They have a whole new docket of cases that they would never have but for COVID-19.

TM: 15:11

Ed: So, let's turn to this term. So far, the court has accepted a blockbuster case involving a topic that is quite familiar to the justices and quite familiar to most people in America I think, the Affordable Care Act. It has even become a focus in the election.

So, tell us about it. Tell us how that case is shaping up and what's at stake.

Lisa: Yes, I mean, the justices can run, but they can't hide from the ACA. They've decided countless cases not just on it, but on its constitutionality. So, the long and the short of it is this. In 2009, Congress made the ACA's shared responsibility payment zero. So, remember, the Supreme Court had said 5:4, with Justice Roberts in the majority, that the individual mandate was constitutional because it was a tax.

Well, once the shared responsibility payments become zero, it's hard to imagine how the individual mandate is a tax anymore. So, ultimately, I don't think that that's really the question in the case. The question is actually going to be one of severability.

This is how the severability analysis goes. Courts have to look at whether or not Congress would still have wanted a law to be in effect if part of it was unconstitutional. It seems to me that the arguments for severability are very strong, and the reason is because Congress, of course, got rid of the shared responsibility payment and it could have gotten rid of the entire ACA, but it didn't.

So, what better evidence of severability could there be than Congress killing part of the act effectively and not killing the rest of it? All this to say a lot of attention is focused on Amy Coney Barrett on this issue. We don't know what her thoughts on severability are, as they relate to the ACA, or even generally necessarily. But she has been critical of Roberts' decision on the tax question.

That said, I know I'm going out on a limb here that I probably shouldn't, but it is my own opinion that Amy Coney Barrett's vote will not matter in this case. I think that Roberts and Kavanaugh will both vote that the unconstitutional provision is severable; the rest of the law can remain in effect. And a good part of the reason why I believe this is that last term, Justice Kavanaugh wrote a glowing opinion talking about severability.

If I were Chuck Schumer, I would focus on this issue as well. Obviously, it's a reason for concern for Democrats. But I think the ACA is safer than most people think, and Adam Liptak, again, my

friend at the New York Times, described the arguments against severability as more creative than convincing.

Ed: Well, I've certainly heard a number of analysts take that approach that this is unlikely to be overturned, but I guess we'll see how your crystal ball works out. I'll check back with you whenever they make that decision.

Lisa: Ed, it often works very poorly. Your audience should know that.

TM: 18:11

Ed: So, let's drill down into some things that are maybe a little bit less known and how they may affect states. NCSL joined the State and Local Legal Center's brief in *Carney v. Adams*, which has to do with appointing state judges on a bipartisan basis in one state. How is that case of interest to legislatures?

Lisa: So, *Carney v. Adams* is a super interesting case. Basically, per the Delaware Constitution, three state courts have to be balanced between Republicans and Democrats. So, imagine, there are three Democrats on the Delaware Supreme court and two Republicans. One of the Republicans leaves. That seat has to be filled by a Republican even if Delaware has a Democratic Governor.

So, the question in this case is whether or not this scheme violates the First Amendment. The Supreme Court has said that in particular government jobs where your political views can make a difference, considering your political views is okay. And the term that the court has used is policymaker. If you're a policymaker in a state or local government position, it's okay for you to be hired or fired based on those political views.

The Third Circuit said judges aren't policymakers; they're impartial people who make decisions based on the law. So, what's interesting about this case is that Delaware is the only state in the nation where the judiciary has to be balanced, but state legislatures have created numerous bipartisan bodies that work on things like elections administration, judicial selection, ethics enforcement.

So, bipartisan organizations created by state legislatures are very common, and our amicus brief argues it can't be that these bodies are unconstitutional. So, take a step back and think about this case for a minute. The current governor of Delaware is a Democrat. He is asking the Supreme Court if it is okay if in some instances, he can be required to appoint a Republican to the Delaware Supreme Court. I mean, that is just an incredible argument to be making in this day and age.

TM: 20:23

Ed: Let's move on to *Rutledge v. Pharmaceutical Care Management Association*. This is a preemption case involving drug reimbursement rates and, as we know, most states regulate in this space and will be affected by the outcome. Run that one down for us.

Lisa: So, I have to confess, I had never heard of a pharmacy benefit manager until I read this case. I thought that when I went to a pharmacy and I got a drug, I paid my copay and then my health insurance company paid the rest. But that's not actually how it works for generic drugs in particular.

How it works is that the pharmacy benefit manager reimburses the pharmacy for generic drugs at a rate that it selects. In some instances, the pharmacy benefit manager may not reimburse the pharmacy for the full cost of the drugs. This apparently has caused numerous pharmacies to go out of business, in particular in rural areas.

So, Arkansas passed a law, and many states have passed similar laws, saying that these pharmacy benefit managers had to at least reimburse drug costs for the cost of the drug. So, the question is, again, whether or not these laws are preempted by ERISA. So, ERISA is a federal law that relates to reporting for employee benefit plans.

I think clearly, the policy arguments in this case go to Arkansas, but the Supreme Court has a nasty habit of interpreting preemption under ERISA very, very broadly.

TM: 21:53

Ed: *Torres v. Madrid* is an excessive force case with some, to call the facts remarkable is to understate the case. What's the legal dispute here?

Lisa: So, your listeners might be surprised to know that it wasn't until the mid-1980s that the Supreme court recognized excessive force by police officers as a violation of the Constitution.

So, specifically, the court has held that excessive force is an unreasonable seizure under the Fourth Amendment. The legal question in this case is: Can a seizure take place if the person got away? And remember, if there is no seizure, there can be no unreasonable force claim.

Now, the facts. Okay. So, police were executing a search warrant at a particular residence and they saw a woman standing outside the door, so they suspected she was a person they should give the warrant to. As they approached her, she jumped into a car. Even though they were wearing police markings, she claims that she thought she was being carjacked; she was also high on drugs.

So, she said that they knocked on the door, she couldn't see them because of tinted windows... she said when she felt someone flick the door, she basically took off. So, she was headed straight towards an officer and there was an officer on the other side of her that could have been crushed by her driving. Both of the officers shot at her and she was hit twice.

So, she gets away and she keeps on driving. Then she gets out of the car, she throws herself on the ground to surrender she says to her carjackers, who aren't there, and she tells someone to call the police. But she has an outstanding warrant against her. So, what she does is she jumps in another car that she steals, she drives 75 miles, checks herself into a hospital under an alias, and ultimately is flown to Albuquerque because of her wounds.

So, she said the police acted with excessive force, and the police officers said well, to have acted with excessive force, we have to have seized you, because that's the basis of an excessive force claim. We weren't able to seize you. You got away multiple times.

So, how I like to frame this case is: How can you be seized if you get away? How can you not be seized if you've been shot twice by the police? Interesting dilemma.

TM: 24:15

Ed: *Fulton v. the City of Philadelphia*. It sounds a lot like the cake case in Colorado from a couple of terms ago. What's the court expected to decide here and what are the facts on this one?

Lisa: So, let me start with the cake case. In that case, a gay couple wanted a baker to make them a custom wedding cake. He refused and he said he had a First Amendment free speech and free exercise of religion right not to make the cake.

Colorado argued that he had to make the cake because of a non-discrimination statute that prevented discrimination against people in public accommodations based on sexual orientation and other factors as well.

So, the Supreme Court was supposed to decide essentially in this case if the First Amendment trumped that nondiscrimination statute. But instead, what the court did is they said that the baker in this case experienced religious discrimination because essentially when the Colorado Civil Rights Commission heard its case, they made fun of his religion.

So, *Fulton vs. the City of Philadelphia* basically raises the same question, but in a completely different context. Here, the City of Philadelphia for years worked with Catholic Social Services to place kids in foster care. But then the city discovered that Catholic Social Services would not work with gay couples, and the city has a nondiscrimination ordinance.

So, Catholic Social Services said: Look, we have a First Amendment free speech and free exercise right to not have to work with same-sex couples if we don't want to, and then, of course, the city pointed to its ordinance and said: no, you have to follow this ordinance.

There's another issue in this case as well, and this one also has a good deal of relevance to state legislatures, and that is the question of whether the court should overturn *Unemployment Division vs. Smith*. This is a case from 1990 where the court basically said if a state or a local government has a neutral rule of general applicability, everyone has to follow it, and they can't ask for an exception based on their religion.

And states and local governments have liked this rule because it's a very bright line rule. This case is complex, it raises a lot of issues, and interestingly, it will be heard the day after the election. And this is one of those cases where I think if we have a justice Amy Coney Barrett, her vote could make a difference.

TM: 26:38

Ed: So, Lisa, thanks so much for running all these down. I'm wondering if you have any parting thoughts for our audience, things they might look for over the next several months as the court starts to do its work.

Lisa: I have two things of interest. First, on the day we are recording this, the court issued orders from its long conference. So, we have a bunch of new grants. One of them is out of Arizona and it involves challenges to some voting rules in Arizona. I have to admit that I have not even had time to look at the details of it, but I think that case will be of interest to your members.

The second thing is also in the election space. Every four years there is just a ton of litigation leading up to the election. Some of that litigation ends up in the Supreme Court; much of it doesn't. But this year because of COVID, the litigation is going to the next level. It is very hard to follow all this litigation.

So, Scotus blog and elections law at Ohio State have formed a website where you can track and follow all the elections-related litigation. And so, if you want to find this, just google 2020 Election Litigation Tracker. Those are my parting thoughts.

Ed: Well, I'll be sure to link to that website from the NCSL website when we post this because I'm sure that there are quite a number of people in our audience who would like to keep track of that, especially as we get down to the final days of the election.

So, Lisa, thank you so much for your time, your expertise as always, and stay safe.

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Ed: And that concludes this edition of our podcast. We encourage you to review and rate our episodes on iTunes, Google Play or Spotify. You may also go to Google Play, iTunes or Spotify to have these episodes downloaded directly to your mobile device when a new episode is ready. For the National Conference of State Legislatures, this is Ed Smith. Thanks for listening and being part of "Our American States."