



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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### **Supreme Court Update | Oct. 24, 2021 | OAS Episode 144**

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.

*“If last term was the term of consensus, this is likely to be the term of disagreement.”*

That was Lisa Soronen, the executive director of the State and Local Legal Center. Soronen is my guest on the podcast. In her role at the State and Local Legal Center, Soronen keeps a sharp eye on the U.S. Supreme Court and monitors the court for cases that affect state and local governments. The center also files amicus briefs in some cases.

We discussed the court’s new term and high-stakes cases around abortion, gun rights and the so-called shadow docket. She also discussed cases from the previous term. Here’s our discussion.

Ed: Lisa, welcome back to the podcast.

Lisa: Thanks for having me, Ed.

*Time Marker (TM): 01:13*

Ed: We’re going to talk about some of the cases coming up before the Supreme Court this term that will have particular relevance to state and local governments, but before we get to that, how about a quick recap from last term.

There were several big cases that did not necessarily go as people predicted, so what are your thoughts on last term?

Lisa: Last term the Supreme Court decided two cases that were of particular interest and importance to states. Probably the most significant one is *Brnovich v. the Democratic National Committee*.

That case was decided 6-3 on the more predictable, ideological lines. The court held that two Arizona voting requirements didn't violate Section 2 of the Voting Rights Act.

Section 2 prohibits discrimination based on results or on disparate impact. The two laws that were at issue involved so-called ballot harvesting where you can give your ballot to someone, and they can turn it in for you. Arizona also disallows any aspect of a ballot to be counted if it's filed in the wrong precinct.

So, the argument in this case was that these two requirements fall more heavily on minority voters and therefore violate Section 2 of the Voting Rights Act. The court held that they didn't, and the court looked at what became a five-factor non test.

So, the court said this isn't a test; we're just looking at five factors. And the factors that the court looked at were the burden that these elections rules impose, whether the rules deviate from typical voting laws in 1982 when Section 2 was adopted, whether there is, in fact, a disparate impact on minority voters, how open a state's voting system is in general, and how strong a state's interest is in the voting rules.

So, the general consensus following this decision is that most things that state legislatures will want to do, most changes they'll want to make to their election laws won't, in fact, be held to be violations of Section 2. But there is one caveat and that is that getting a lot of attention is the second factor I mentioned, which is: Was this particular law in place in 1982?

Many things like voter ID were definitely not in place in 1982, but remember, it's a multi-pronged, non-task that looks at a bunch of factors. So, that's only one factor.

A second case of interest to states is *Fulton v. City of Philadelphia*. This, again, was supposed to be a really big case, likely to be decided on ideological grounds, and it ended up being a 9-0 decision decided on very narrow grounds. But it still has some interesting points for states.

Basically, the court held in this case that the City of Philadelphia violated Catholic Social Services' First Amendment free exercise rights when it refused to contract with Catholic Social Services to certify foster care parents because Catholic Social Services wouldn't work with same-sex couples.

Philadelphia basically said to Catholic Social Services: we have a non-discrimination clause; you have to follow it just like everybody else does. And the court said: Not so fast. Actually, that non-discrimination clause has some exceptions, and if it has exceptions for other things, it should have exceptions for religion.

So, like I said, in large measure this case is considered pretty narrow, but I think there are two important points for states. The first important point is this: In 2015, the court said that gay couples have a constitutional right to marry. Since then, there has been a good deal of tension between gay rights and religious liberty.

The Supreme Court has at every turn dodged providing clear guidance on where the lines are between religious liberty and gay rights, and this case is no exception. So, states are still stuck in the middle without a lot of guidance.

The second reason I think this case is interesting to states is that a number of commentators have said that if you take this case and you combine it with a bunch of other COVID cases where churches basically argued that the state legislatures and the governors were violating their religious freedom rights by not allowing them to have church services and requiring masks and those sorts of things, if you take those cases in combination, what the court is really saying is that religion should be given a most-favored-nation status and that if an exception is made for a secular activity, an exception has to be made for religion.

Only time will tell if this is really what the court is saying, but this is a new reality that states have to think about and deal with as we get more information as to whether or not this is definitively where the court is now coming from when it comes to religion.

TM: 05:58

Ed: I think those of us who are not close followers of the court often expect decisions to come down that offer absolute clarity. But as you just explained, it seems like most of the time, it's subtler than that.

Lisa: I think for the court, clarity is aspirational, but I think sometimes because of disagreement or because of narrow agreement, a lack of clarity seems the way to go.

TM: 06:24

Ed: Okay, so let's turn to the new term that started this month. It actually was just earlier this week based on when we're recording this. Do you have any big-picture observations about this term?

Lisa: If last term was the term of consensus, this is likely to be the term of disagreement. The court is hearing two extremely big cases, one on guns and one on abortion. Now, the court has heard a gun case before and abortion cases before, but rarely has the court heard guns and abortion cases of this magnitude.

So, where the justices were able to find consensus last term, they're going to have a lot more difficulty on these really hot-button issues.

TM: 07:06

Ed: Let's start with that. Let's start with abortion, the topic that has probably gotten the most media attention in the past few months. The court is hearing *Dobbs v. Jackson Women's Health Organization* in December, a Mississippi case many abortion-rights advocates fear will overturn *Roe v. Wade*. And if I understand this correctly, Mississippi is asking for just that, for the court to overturn *Roe v. Wade*.

Lisa: That is correct. Mississippi has explicitly and directly asked the Supreme Court to overturn the *Roe v. Wade* decision. So, per *Roe* and *Casey*, a woman can have an abortion until 24 weeks, or about 24 weeks, which is viability – that's the term that the court uses. So, Mississippi's law says that women can no longer get an abortion after 15 weeks. Clearly, that's in conflict with *Roe v. Wade*.

The arguments that Mississippi makes for overturning *Roe v. Wade* are pretty much what you'd expect. Of course, there is no abortion clause in the Constitution, as we all know, and Mississippi also argues that it should be a legislative branch and not the courts that decide whether or not abortion is lawful.

The abortion clinic in this case defending *Roe v. Wade* and *Casey* has basically said *Roe* and *Casey* were carefully raised in precedence and there's no reason to overturn them.

*TM: 08:29*

Ed: So, let's talk about the Texas abortion law, which got a tremendous amount of attention. In September, the Supreme Court allowed Texas' abortion law preventing abortions after about six weeks to go into effect temporarily. We also know the law was written in such a way as to bar state officials from enforcing it and created a difficult legal path for those who want to challenge it. Does that case give us any indication of how the court might rule in the *Dobbs* case?

Lisa: The short answer is, in theory, no. But in reality, we really have no idea. So, as you point out, the Texas law is clearly unconstitutional per *Roe* and *Casey*, but it's difficult to enforce because state officials don't enforce the law; it's private parties.

So, when the Supreme Court heard this case on an emergency basis, five justices said: we can't grant an injunction preventing this law from going into effect because you've sued state actors. State actors can't enforce the law. We as the Supreme Court don't enjoin laws; we enjoin actors. And the court explicitly said, these are the five justices: we are not commenting on the merits of the case.

So, that's what they wrote. But I think a lot of people think even given the odd posture of the case, that it's even more odd that the Supreme Court allowed to go into effect a law that clearly violates their precedent.

In summary, they were pretty explicit that they weren't tipping their hat on the *Dobbs* case. On the other hand, it's easy to read into what they said, even if what you're reading in is a contradiction to what they said.

*TM: 10:17*

Ed: Let's stay with that for just a minute. As I understand it, *Dobbs* was decided under the Supreme Court's so-called shadow docket. This is something quite familiar to those following the court, but not so much for the rest of us.

Why don't you fill us in on what that shadow docket is and why it's controversial?

Lisa: The term shadow docket was coined by a law professor a couple of years ago. And what it refers to is the court's emergency docket. And this docket is not new at all. The shadow docket started receiving a lot of attention a couple of years ago because the court kept on granting emergency relief to the Trump administration.

So, on this emergency docket, or so-called shadow docket, parties can ask the court to overturn a lower court decision that allowed or prevented a law from going into effect. And basically, the standard that the court is using... this isn't legalese... this is just kind of colloquialism... is if the lower court got it obviously wrong, then the Supreme Court can overturn the lower court.

Here's why people are annoyed by the shadow docket. There are a number of reasons, but here are the main ones. When the court makes a decision on the emergency docket, it isn't getting full briefing and it's not holding oral argument. It's often making a decision in a very short timeframe. Sometimes only one justice is deciding without even getting a response from the other side.

Finally, sometimes there aren't even written opinions. This happened with the COVID cases. The court would sometimes issue short statements that didn't flesh out all the issues and it just led to more complexity and confusion. But you might find it interesting that even though the court sort of sets itself apart and seems like it wouldn't or shouldn't be influenced by public opinion, there is some evidence that the court is being sensitive to the criticism over the shadow docket.

There was a recent death penalty case where the condemned person asked for emergency relief. He wanted to have his execution stayed until the court could make a decision about whether or not his minister could accompany him and pray out loud and put his hands on him as he died.

The court moved this case from the shadow docket, so didn't decide it on an emergency basis, and moved it to the merits docket. Like I said, I think the court is hearing the criticism, but the shadow docket isn't new. It's just that the court has decided a bunch of high-profile cases on a temporary basis and it's not the normal thing, so it bothers people.

Ed: Thanks Lisa. We're going to take a quick break and come back to talk about guns, religion and politics.

## MUSIC and Gene VO

Hey, listeners of "Our American States," we are just days away from the return of the NCSL Legislative Summit. It takes place November 3<sup>rd</sup> through the 5<sup>th</sup> and if you haven't made plans to attend, please listen to what we have in store.

For our general sessions, we have the author of *Brain Rules*, John Medina, who will offer strategies on how to make the most of the mind and how to improve communications with legislative colleagues. And if you haven't seen the fly girl in action, you'll need to see Vernice Armour, who is America's first Black female combat pilot.

And we'll have a session on infrastructure featuring former U.S. Transportation Secretary, Ray LaHood. And there's much, much more. We have sessions on the economy and budgeting, the effects of the pandemic on health, education, juvenile justice and other issues, and there are sessions on mental health, transportation, policing, redistricting, elections, and the workforce. And if you need more reasons, there will be professional development on negotiation, storytelling, leadership and civil discourse.

Go to [www.ncsl.org/summit](http://www.ncsl.org/summit) and learn more. Register today, and we hope to see you there.

*TM: 14:18*

Ed: I'm back with Lisa Soronen from the State and Local Legal Center. Now Lisa, guns are another hot-button issue in this country and the court has two cases on its docket.

New York State Rifle and Pistol Association v. Corlett is one of them. Tell us about that case.

Lisa: This is what I always like to remind people when we talk about gun cases. I think this would surprise most Americans and it might even surprise most state legislators. The Supreme Court has only decided really one significant gun case in the entire time the Supreme Court has existed, and it's important to realize that the final say on the Second Amendment is the Supreme Court, and they've really only spoken once.

The one time they spoke was in Heller in 2008 where they said the individuals have a right to a handgun in their home for self-defense. The court has never held whether any individual has a right to a gun outside the home.

So, New York and a number of other states say that if you want to carry a concealed firearm, you have to show proper cause. Wanting a gun, liking a gun, that's not proper cause. The Supreme Court will decide whether a state having a proper cause requirement to have a concealed carry permits violates the Second Amendment.

So, it's a huge gun case. I mean, it's like one of two.

Ed: Well, that is quite surprising. I didn't realize the effect that case could have on a state's ability to regulate firearms. We'll be interested to see what happens there.

*TM: 15:46*

Ed: Now, in the last few years, the Supreme Court has heard a series of cases involving state aid to religious entities. Tell us about the most recent case from Maine.

Lisa: Maine is very interesting in how its schools are operated. Basically, in a number of school districts, Maine doesn't have secondary schools at all. So, if you plan on attending a secondary school in Maine, which all kids do, you have to find somewhere to go. And basically, your options are you can go to another public school or you can go to a private school that's non-religious or sectarian as the case may be.

Perhaps unsurprisingly, a number of Maine parents have said: we want to send our kids to religious schools and have the state pay for them. These Maine parents have pointed to two recent Supreme Court cases where the court said that religious entities had to receive government funding where secular entities were receiving government funding.

But the first circuit ruled against these parents. It said in those cases that the Supreme Court said that religious entities were being treated differently based on their status as religious

entities, and that that was what was unconstitutional: treating religious entities differently based on status.

Now, in Maine, religious entities are, at least according to the first circuit, only treated differently on the basis of use. So, if a Maine school uses money for religious instruction, they can't receive tuition assistance. But let's say the Catholic Church wanted to operate a school in Maine, but it was non-religious and nonsectarian. It could receive aid just as long as it wasn't operating a religious school.

So, what this case really comes down to is this: Is this distinction between religious status and religious use a real thing, or just a distinction without a difference? That's what the court will decide.

*TM: 17:41*

Ed: So, if I understand correctly, a Catholic school could receive aid if it offered a curriculum with no religious instruction whatsoever?

Lisa: Well, yeah. What Maine basically says is that if there was such a school like that, we would give them state aid. So, we're not against religious entities. What we're against is religious entities using money for religious purposes. And so, that's where we are drawing the line. And the court has only said to date that discrimination on the basis of religious status is unconstitutional. They haven't said what happens if you just want to use the money, but you're not using it for religious purposes.

*TM: 18:22*

Ed: So, we've been talking about cases that will be before the court this term. I'm wondering if you're seeing any petitions currently pending before the court that might be of interest to states.

Lisa: The petition that I'm most interested in that the court could grant and hear this term is a case called *Students for Fair Admissions v. Harvard*. The issue in the case is whether or not the Supreme Court should overrule *Gouter v. Bonger*, decided in 2003. The court held in that case that race may be a factor, one factor in college admissions for creating more diverse colleges and universities. The petition in this case asked for this holding to be overturned.

Now, what the court did with this case is in the spring of this year, they sent it to the United States solicitor general's office to offer an opinion on whether or not the court should hear the case. If the solicitor general says yes, the court is very likely to hear it. If the solicitor general says no, the court is still pretty likely to hear it.

The solicitor general doesn't have any deadlines, so the office can respond at its leisure. So, it's possible that the office won't respond until next February or March, in which case if the court agrees to hear the case, it won't be heard this term.

That is another ... earthshattering kind of case, which could really turn this docket from over the top to more over the top than I could ever have imagined.

*TM: 19:48*

Ed: Well, I don't want to let you go without asking about all these speeches recently from some of the justices. The theme has been that they're not political creatures or, to put it more in the vernacular, they're not political hacks. I'm not going to ask you if they're political hacks, but I do wonder what you think of this.

Lisa: All the justices are keenly aware of how crucial these cases are and how they will impact the everyday lives of Americans. I think they're feeling a sensitivity all over the ideological spectrum and a concern about the institution, and that is part of what they're expressing.

What I find interesting related to this topic is that Marquette Law School did some pretty deep polling on the Supreme Court at the end of the last term, and one of the questions they asked people was: Do you think the court decides cases on law or politics, or more on politics or more on law?

So, for decides cases more on law than politics: Republicans, 76% said that; independents 75%; Democrats 60%. So, the crucial thing for the rule of law, I mean the reason why people are willing to follow it, is because they believe it's a thing. I mean, they think law is really something. It's not just someone's opinion; it's not just someone's political opinion worse. And the court, if they saw these numbers... I don't know if the justices did... they would feel tremendous pride. But they want to keep those numbers because it's those high numbers that ensure that their institution that lacks both the sword and the purse is listened to.

I can empathize with any of their sensitivity and their desire to convey how they perceive their job. Now, whether the average American agrees with them at this point is hard to say. That polling from Marquette looks good, but the picture is getting more complicated and more muddy as time goes on.

Ed: Lisa, as always, thanks for walking us through this thicket of cases. Take care.

MUSIC

Ed: And that concludes this episode of our podcast. We encourage you to review and rate NCSL podcasts on Apple podcasts, Google Play, Pocket Casts, Stitcher, or Spotify. We also encourage you to check out our other podcasts: "Legislatures, The Inside Story," and the special series "Building Democracy." Thanks for listening.