



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, the politics that compel them, and the important work of democracy.

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### U.S. Supreme Court | OAS Episode 20 | Oct. 26, 2017

Welcome to Our American States, a podcast of meaningful conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them, and the important work of democracy. For the National Conference of State Legislatures, I’m your host Gene Rose.

Our topic on this edition of Our American States is the judicial branch of government and specifically the United States Supreme Court. In a few minutes we’ll talk with Susan Frederick who is a Senior Federal Affairs Counsel at the National Conference of State Legislatures, who will talk about cases involving state voter rolls and a case by New Jersey Governor Chris Christie who challenged the National Collegiate Athletic Association. She’ll tell us how this case has turned into a much broader suit involving the rights of states.

First we’ll talk with Lisa Soronen, executive director of the State and Local Legal Center, who discusses three important cases involving redistricting, the rights of a cake maker and labor unions.

Tell us, Lisa, what does your organization do?

Lisa: The State and Local Legal Center files amicus curiae briefs to the United States Supreme Court in cases affecting state and local government on behalf of seven national organizations which represent the interests of state and local government, one of them being the National Conference of State Legislatures.

Gene: Tell us what prompted your interest in tracking U.S. Supreme Court cases. How long have you been doing this?

Lisa: So I’ve been working at the SLLC now for almost six years and probably any law student is a Supreme Court junkie. So when I think back to my years in law school, I could never have imagined myself having a job as cool as this.

Gene: We have three U.S. Supreme Court cases that I’d like to get your perspective on, all of which have some relevance to the work of state legislatures. Why don’t we start with *Gill v. Whitford*,

which involves a Wisconsin case that appears to have some potential consequences for redistricting procedures? Tell us what's at stake here.

Lisa: I should start by saying that *Gill v. Whitford* could be the biggest case of the decade; it could be that significant of a case, depending on what the Supreme Court does. The issue in the case is whether partisan gerrymandering is unconstitutional and, a little bit more specifically, whether the court can come up with a standard for how much partisan gerrymandering is unconstitutional.

So the impact for state legislatures is pretty apparent. In most states it is state legislatures which are doing the redistricting, so if the court says a certain amount of partisan gerrymandering is too much, that essentially takes away some of the authority from state legislatures.

People on the other hand would say: What is the advantage of partisan gerrymandering, especially extreme partisan gerrymandering? Why should it be tolerated and how is it a benefit to anyone?

Gene: What would be at stake if the court ruled against the state legislature there?

Lisa: The challengers in this case asked them to adopt a three-part test, so in theory the Court could adopt that three-part test. And so every time a legislature would engage in redistricting, it would have to ask itself: Does our redistricting meet the requirements of this three-part test?

The three-part test has mathematics as a part of it, but to the extent that there is some discretion in it, it may be difficult to know every single time whether or not a redistrict would be constitutional.

So as a practical matter, if the court says some amount of partisan gerrymandering is too much, state legislatures would have to ensure that when they redistrict, they don't fall short of this ruling, which could be complicated.

Gene: And what would those complications be?

Lisa: Well, it really depends on what the test is. More specifically the complications are if you didn't meet the test, you'd get sued, and then presumably your plan would be considered unconstitutional and then you'd have to go back and retry it, or a court would end up retrying the legislative boundaries for you.

Gene: Citizens across the country have seen examples of redistricting and gerrymandering maps where the districts look pretty convoluted. Would this have any effect on that type of procedure?

Lisa: Yeah, absolutely. Some of the facts alleged in Wisconsin were that the Carson gerrymandering was unapologetic, that the Wisconsin legislature was controlled by Republicans and there was a Republican governor, the districts were created as favorable as possible to Republicans. Any time gerrymandering takes place and even redistricting takes place, you can see some funny maps. But often the very funny shapes are designed for a specific reason: for getting particular voters in a particular area.

Race has to be a factor in redistricting, but it can't be too much of a factor. So courts are constantly struggling to figure out what's the right amount of use of race in redistricting. As a practical matter, race and political parties are often correlated, most specifically, African-Americans vote in large numbers with the Democratic Party. So racial gerrymandering and partisan gerrymandering are closely related, if not directly correlated.

Gene: So let's go on to our next case here. This case has received considerable media attention: *Masterpiece Cakeshop Ltd. v. the Colorado Civil Rights Commission*. What's the background on this case and why is it important to states?

Lisa: So basically there is a cake maker in Colorado who objected to making a wedding cake for a same-sex couple, and Colorado, along with 22 other states, has a public accommodations law that protects people on the basis of sexual orientation. And the cake maker said: I have a first amendment free speech right to not have to make a cake that supports a message I don't believe in. In one clause I have a free-exercise-of-religion right to not have to make this cake.

So that is the controversy in this case, whether essentially an exception can be created for public accommodations laws that protect people on the basis of sexual orientation for a first amendment reason or for a religious reason perhaps.

Gene: And, again, what would be the consequences for the state on either way the court might decide on this?

Lisa: About 22 states have these public accommodations laws and since they were adopted decades ago, there haven't been any exceptions to them. Of course in the '50s and '60s people tried to make exceptions for race and those exceptions went nowhere.

So essentially if the court says it's okay to create an exception for speech or for religious reasons to sexual orientation, that exception will be read into all the state statutes that are similar.

Gene: Let's talk about *Janice v. the American Federation of State County and Municipal Employees*. How would this impact state governments?

Lisa: About 25 states have what's called fair share or agency fee statutes. These statutes allow management and unions in the context of public sector employees to agree that if an employee who is eligible to join the union doesn't want to join the union, he or she still has to pay the part of union dues that relate to collective bargaining, contract administration and grievance processing.

So about 25 of the states have these statutes and what the Supreme Court could rule in this case and what they're likely to rule in this case is that these statutes are unconstitutional. And the court's rationale would basically be that they violate a person's first amendment association rights.

Essentially what these laws allow is for management and unions to agree that if people don't want to be in a union, they still have to pay a certain amount of money, associate with that union, even if they really don't want to. Essentially these laws could all be struck down and

they're very important to public sector collective bargaining. They're really a cornerstone provision of collective bargaining because they basically lead to significant funding by unions.

If you don't want to join the union, but you still have to pay a good deal of the dues, the unions get a good deal of money. So this case has been the "citizens united of public sector collective bargaining" and I think that's a fair title for it.

The Janice case has a very long history, not the case specifically, but the issues specifically. When Justice Scalia was on the bench, the court looked poised to overturn these fair share laws in a case called *Fredericks*; it was out of California. But what happened is oral argument was heard and Justice Scalia died shortly thereafter. Then the court issued an opinion; it was a 4/4 decision, meaning basically that nothing happened in the case. So everyone knew it was just a matter of time until the Supreme Court would rehear this case.

All eyes are on Justice Gorsuch who is the newest member of the court, and the question is: What will he want to do in this case? He never decided this issue when he was at the 10<sup>th</sup> Circuit because it didn't come up, but he's already sort of shown himself to be a fairly conservative conservative, meaning that he's very likely to vote against these statutes.

It's hard to predict the outcome in any Supreme Court case, but the Janice case is probably the case where it's the easiest to predict the outcome because we basically know how eight of the justices already voted; we just need to know how one more will vote. And in fairness, I have to say, that in the *Gill v. Whitford* case, it's widely believed that the only person who matters in that case is Justice Kennedy and, in oral argument when the issue was if the court should accept the test that the challengers offered, Justice Kennedy was silent, so we don't have any sense of how he feels about that test.

The other interesting thing that's worth thinking about in terms of these cases is Masterpiece Cake – when the Supreme Court gets a case in front of it, it can decide immediately whether to accept the case, whether to not hear the case, or it can hold onto the case for a while and decide what to do with it.

So for about 16 conferences, maybe about a year, the Supreme Court held onto this cake case, held onto it, held onto it, and didn't make a decision. Justice Gorsuch joined the court and it was expected that immediately the petition would be granted. It wasn't, but shortly thereafter it was granted. I think the consensus view on this case is that it will come down to Justice Kennedy, his vote.

The trouble for Justice Kennedy is that a lot of the things he really believes in converge in the cake case. He believes in same-sex marriage. He believes in religious liberty. He believes in states' rights. He believes in free speech. And all those concepts are sort of coming to a head in this cake case and it will be very interesting to see what Justice Kennedy does.

But these are Supreme Court cases. They're unpredictable. So it's not always the best strategy to just look at what the conventional wisdom is. But the conventional wisdom says: these are all 5/4 cases and that largely Justice Kennedy holds the cards except in the Janice case.

Gene: And what kind of timeline are we looking at, Lisa? When do we expect the decisions to come down on these cases?

Lisa: The Supreme Court operates on a term basis, so its term basically ends around June 30<sup>th</sup>. Unless something extraordinary were to happen like another justice would leave the court for some reason, there should be a decision in all of these cases by the end of June.

So for court watchers, it's often the last week of June where a lot of the big cases come down. It's possible that any of these cases could come down as early as March, but these are all kinds of cases that may come down later at the end of June.

Gene: We'll ask Lisa one more question after our promised discussion about two other Supreme Court cases. Our guest is Susan Frederick, a senior federal affairs counsel for the National Conference of State Legislatures in their Washington, D. C. office. So tell us, Susan, why does the National Conference of State Legislatures monitor activities of the United States Supreme Court, and why is October such a big month on your calendar?

Susan: NCSL monitors Supreme Court cases because many of these cases have significant state impact, and that's what we look for when we decide whether or not we want to file an amicus brief in one of these cases. Will the case impact state law in any way? Is it a federal preemption of state law? Is there a fiscal impact if the court rules one way or another?

And October is a significant month because that's the beginning of the Supreme Court term. A lot of the cases that we file in will be heard between October and June, and the rulings will come out by the end of June on any case that we do file on. We look attentively to the October calendar to see when our cases are coming up and if there are new cases being reviewed that we want to take an interest in and file, then we will look for those as well.

Gene: Let's talk about a couple of cases that I know you're going to be monitoring this year: first, *Houston v. A. Philip Randolph Institute*, which centers on states' voting rolls in Ohio. Tell us about the parameters of this case and why you're watching it.

Susan: This case concerns the Ohio process for voter list maintenance, and voter list maintenance is the process by which election officials remove inactive or voters who have moved away from current voting rolls. Now there are two statutes at issue in this case: the first is the National Voter Registration Act or NVRA, which authorized the use of this national change of address form and other information indicating inactivity to remove voters from voter rolls.

And while the NVRA prohibits removal of voters for failure to vote, the other statute in this case, which is the Help America Vote Act, or HAVA, requires the removal of ineligible voters to maintain accurate voting lists.

So these two statutes cause a little bit of tension with each other. On the one hand, you're not allowed to remove voters for certain things, and on the other hand, you're supposed to remove inactive voters to keep your voter list current and accurate. So while both of these statutes serve the very laudable goal of accurate and fair elections, they put states and even localities which do the bulk of the election administration in the country, sort of at odds with how to manage that.

In this particular case we've got Ohio, which is looking to keep its voter list maintenance procedure in place – they have a two-step process – they use the NVRA's national change of address process, but then they also do another piece of this, which is to say that the Secretary of State compares the statewide voter registration database to the national change of address list and mails a confirmation notice to voters with conflicting data.

In addition to that, after four years, if the individual has not had any election activity at all, they are removed from the voter rolls. So it's a two-part process in Ohio and Ohio is being sued over that process as unconstitutionally removing voters from the voter lists in violation of the constitution and the elections clause.

We are filing in this case to protect Ohio's right to use this two-step process. We want to protect the rights of states under the Help America Vote Act to implement the statewide voter registration database in a way that is appropriate for that state. It is a complicated case; it involves the nuts and bolts of elections administration; and NCSL has often been active on issues that involve states' rights to manage elections both under the 10<sup>th</sup> amendment and under Article 1, Section 4, which gives us the authority to regulate the time, place and manner of elections.

Gene: And if the court were to rule in your favor, would you see other states following up on what Ohio is doing?

Susan: If the court ruled in favor of Ohio and said that Ohio's regime was constitutional, then I would imagine that that would set a clear standard for what states can permissibly do with respect to voter list maintenance, which right now is kind of a murky area. And so I think that there may be some states that would like to emulate the Ohio way of dealing with it because the Supreme Court will have ruled that it's okay to do so.

Gene: Let's talk about another interesting case that you're following: *Christie v. the National Collegiate Athletic Association*. As I understand it, the Governor is trying to allow for sports betting in his state. What's his argument here?

Susan: His argument is, and NCSL's argument is that the Federal Professional and Amateur Sports Protection Act, which we call FPASPA, is violating the 10<sup>th</sup> amendment because under this federal law, states cannot authorize sports wagering or modify or repeal existing states' restrictions on sports wagering.

New Jersey in 2012 passed a voter-backed state constitutional amendment allowing the legislature to authorize by law sports gambling at specific establishments. After that the state legislature passed another law authorizing sports gambling at various locations in New Jersey, sports associations sued the State of New Jersey, asserting that the 2012 law violated FPASPA by authorizing sports gambling. So this was the first part of this case.

New Jersey did not contest that the 2012 statute violates FPASPA. Instead it argued that FPASPA violated the 10<sup>th</sup> amendment's anti-commandeering principle that says that the statute chilled the ability of states to regulate in this area and essentially impermissibly forces its dominance over state law; so it commandeered state law by forcing states to act in a certain way, in an

unconstitutional manner, because there's no authority in the federal statute to require states to do what the federal government is asking them to do.

We have the second phase of this case in which, after this 2012 issue, New Jersey passed another law repealing sports gambling prohibition only at existing racetracks and casinos, and the stated purpose for both the 2012 and the 2014 statutes was to help grow New Jersey's gaming businesses. And the 2014 law is the subject of the current case.

We have weighed in on this case because in the bigger picture, if the court rules against the State of New Jersey, it could lead to Congress' ability to order states and localities to freeze or chill state and local law, not just on the issue of sports wagering, but on other issues important to states and localities in the absence of comprehensive federal regulations.

So we don't want to start a precedent. We don't want to have the ruling come down against New Jersey, because we would argue that that would begin a precedent for allowing the federal government to commandeer or force states to act a certain way in issue areas that it felt they wanted to have states respond in without necessarily having the authority under the law.

Gene: So while it started out as a sports wagering case, it's turned into something much bigger, sounds like?

Susan: Yes. We are looking at the bigger picture and what an adverse ruling against the State of New Jersey would actually mean for future federal regulations and state activities down the road.

Gene: And you work in NCSL's Washington, D.C. ,office. Tell us about the services that you and your colleagues provide there regarding the monitoring of federal activities.

Susan: Our primary goal is we work to enhance the role of states in the federal system and, in so doing, we advocate various policy positions on behalf of states. Our policy positions are created by our members, which are the 50 state legislatures and those of the territories, and we come together and discuss current federal-state relations issues. Based on those discussions, we pass policy resolutions and directives that tell the staff in my office how to advocate for states on every issue you could possibly imagine, in addition to the work that we do in the U.S. Supreme Court.

Gene: How does NCSL go about deciding what Supreme Court cases they want to weigh in on?

Susan: We have our State and Local Legal Center counsel, Lisa Soronen. She flags cases that she believes have significant state or local impact and sends them out to our various clients, which are state and local government associations of elected officials – there are seven of us. And when I get a case from Lisa, I send it out to our general officers and the officers of the committee that I staff, which is the Law Criminal Justice and Public Safety Committee.

If the case deals with a specific substantive issue that has expertise residing in a different committee, I will also send the case summary to that committee as well. Each officer gets one vote and if the vote is unanimous, then we will join the case. If there is even one dissenting vote, we will not join the case.

Gene: Susan Frederick, the Senior Federal Affairs Counsel for the National Conference of State Legislatures, we appreciate you being a guest on Our American States.

Susan: Thank you.

Gene: Now let's return to Lisa Soronen with the State and Local Legal Center to talk about an explosive case that may or may not make it to the Supreme Court's docket this year. Lisa, what is this potential case and why is it so important to states?

Lisa: The Supreme Court might overturn the *Quill* decision this term. *OAS* was a 1992 case where the Supreme Court said that states and local governments couldn't force out-of-state retailers to collect sales or use tax unless they had a physical presence in the state. But in 2017 this case is like cataclysmic. The estimates are that states and local governments lose 23 billion dollars a year in tax revenue that's owed but that isn't collected because vendors aren't collecting a tax.

So it's a really, really, really long story, but the short version is that in 2015, the Supreme Court heard a challenge to this case called *Direct Marketing Association v. Brohl*. Colorado had passed this statute where if you bought goods online, the vendor had to send you a statement at the end of the year saying how much you bought, and the same statement went to the Colorado Department of Revenue. The idea was that Colorado taxpayers would then say on their tax forms how much they bought and how much they owed.

Well, the question that the Supreme Court had to contemplate in 2015 – there was a challenge to this law and the challenge was: Did it violate the (unknown) Act. But the question the court was hearing was: Should this challenge be heard in state court or federal court? Who cares, right? Well, the State and Local Legal Center filed an amicus brief. We said the case should be heard in state court. But the requirements of our amicus brief talked about how bad of a decision *Quill* is.

Justice Kennedy writing alone wrote a concurring opinion, you know, he had signed onto the *Quill* decision in 1992 and he said basically: I think I was wrong in *Quill*. I think the court was wrong in *Quill*. And we need to rehear this issue. And he said this famously at the end of his opinion: legal system, bring us a case to decide whether or not to overturn *Quill*.

So what had to happen was some state legislature had to pass a law basically saying: if you're not a state retailer and you have no physical presence, you're collecting use tax and we don't care; you just have to do it. South Dakota was the first state to do that and, of course, their law was declared unconstitutional by the South Dakota Supreme Court as it should have been. And South Dakota just filed a petition a couple of weeks ago asking the court to overturn *Quill*.

It is possible that the Supreme Court could hear that case this term. It is equally possible that the paperwork won't be done for the court to hear the case this term and will have to hear it next term. It's also important to remember that the Supreme Court doesn't have to accept any cases. It can accept zero cases every term if it wants. So it could also refuse to hear this case. But Justice Kennedy said he wanted to hear the case and he is the most powerful voice on the court.

There's another interesting tidbit about this case and that is though the issue came out of this *Direct Marketing Association v. Brohl* case, and when the Supreme Court ruled that the case had

to go back to federal court, it went back to Justice Gorsuch, who was then Judge Gorsuch, who wrote an opinion saying basically: I think it's time for *Quill* to go as well.

So all this is to say that this is a blockbuster term no matter how you cut it for state legislatures. But NCSL has lobbied since 1992, probably before 1992 as hard as they can to get the Marketplace Fairness Act passed, which could overturn *Quill*. And Congress has been silent, and here we have the most powerful Supreme Court justice in the United States saying: I want to help overturn *Quill*, and a couple of partners in crime would be willing to go along with it.

So this term is yet to come. This term could go from high octane to like whatever is higher than high octane. But the thing is it's really a nail biter because we don't know when the papers will essentially get to the court; we don't know what the justices will do; and we've got to worry that Justice Kennedy will continue on the bench. It's possible that when it comes to this term, the best is yet to come.

Gene: That's a great case to add Lisa. I'm really glad you brought that to our attention.

So we've been talking with U.S. Supreme Court expert Lisa Soronen, the Executive Director of the State and Local Legal Center. Thanks for being a guest on Our American States.

Lisa: You're welcome. Thank you for having me.

Music and Gene VO:

And that concludes this edition of Our American States. We invite you to subscribe to this podcast on iTunes and Google Play. Until our next episode, this is Gene Rose for the National Conference of State Legislatures. Thanks for listening.