



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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What the U.S. Supreme Court Told State This Term | July 26, 2018 | OAS Episode 39

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.

The United States Supreme Court finished its latest term at the end of June. Several cases have potential impacts on state governments. In Episode 20 of this podcast series in October, we delved into some of the cases as the court began its term. In this episode of “Our American States,” we talk with one of the nation’s foremost experts about how the 2017 term of the United States Supreme Court may affect state legislatures.

Lisa Soronen, executive director of the State and Local Legal Center, returns to the program and walks us through these important cases. We’ll get her analysis on online sales tax collections, sports betting, redistricting, voting rolls, and labor dues paid by state employees.

We’ll also get her take on perhaps the biggest news of the session, the retirement of Justice Anthony Kennedy, and what it may mean for states. Here’s our interview.

Returning as our guest is Lisa Soronen, the executive director of the State and Local Legal Center in Washington, D.C. Lisa, thanks for being back on “Our American States.”

Lisa: Thank you for having me, Gene.

Gene: So the last time you were on the program, we were discussing several cases before the United States Supreme Court that you were watching on behalf of states, and we wanted to follow up and get your assessment of how those decisions they made will be affecting states. The first, which you correctly said would be “higher than high octane,” was the case *Wayfair v. South Dakota*. I wanted to find out from you if you believed it created the fireworks that you were expecting.

Lisa: Well, absolutely. It was a 5-4 decision, so it was close, but the fireworks I guess are more the fact that the State of South Dakota won and that states in general won. So the Supreme Court got rid of the Quill physical presence requirement that said basically that states couldn’t require out-of-state retailers without a physical presence in the state to collect.

The court got rid of the physical presence rule and said that for states to require online sellers to collect sales tax, they just need to have a substantial nexus with the state.

So that case went about as well as anyone could have hoped for and it will be providing billions of dollars in tax revenue to states as states begin to collect. So it was a nail-biter, but it came out the way we were hoping for and it was a great victory for states, perhaps one of the biggest victories in this century.

Gene: So next let's go on to a couple of other cases that were looking at redistricting, gerrymandering and voting rights. Did any of those decisions provide clear directions to the states this year?

Lisa: So the partisan gerrymandering cases, depending on your perspective really, were somewhat of a dud. What the Supreme Court could have done in those cases is to lay out a standard for when an amount of partisan gerrymandering is unconstitutional. Since 1986 the court has been asked to lay out a standard. It has never said that it won't lay out a standard, but it has never actually laid out a standard.

So there were two opportunities this term for the court to say: this is a mathematical formula, or this is the test that we're going to use to apply when partisan gerrymandering is just too much. And in both cases they failed to lay out a standard, which is the same thing that they've been doing essentially for decades.

The cases were dismissed and sent back both for procedural reasons. So both of the cases will actually still continue, so the court will have another opportunity possibly with these cases or other cases like a case in North Carolina; there's a case in Michigan; to take a shot at laying out a standard for partisan gerrymandering.

But the reality is that this had been a 5-4 issue and Justice Kennedy had said in the 2000s that at some point he might be interested in laying out a standard. He's now leaving the court and presumably a more conservative justice who is going to be skeptical of taking authority from state legislatures and laying out a standard is probably going to join the court.

So it may be that for the time being, partisan gerrymandering is dead. That said, these cases will still continue and lower courts continue to lay out a standard for when they think partisan gerrymandering is too much. So I guess the people that were hoping for a big, clarifying decision in these cases didn't get it. For state legislatures, though, these cases are probably perceived as a victory because the court is not currently limiting their authority.

Gene: The Ohio voting rights decision – is that something that states are going to be looking at as well?

Lisa: Yeah, absolutely. That case got a fair amount of media attention because it came out before a lot of the big opinions did. Ohio uses a process that many, many other states use where if you don't vote for two years, you're sent a notice saying: Hey, do you still live at this address? If you don't respond to that notice and then you don't vote in two more federal election cycles, so essentially four years, then you're removed from the voter rolls.

And the Supreme Court said that that was okay under federal law and the reason why this is significant for so many states is that many, many other states use a process either identical to Ohio's or very similar for removing people from the voter rolls.

This case, I think, has been perceived as and described as sort of a tool to remove people from the rolls, but the reality for states is a little bit different. States and local governments had been sued for having too many people on the rolls and they need a process other than the postal process where people fill out a card, a change of address card, to get people off the rolls when they shouldn't be on the rolls.

And so the Ohio process, for whatever flaws it might have, does provide a way of giving people notice and giving them an opportunity to say: Hey, I'm still here; I'm still voting, before getting them off the rolls. So I think some of the ways that case was portrayed weren't entirely fair to the reality that states have of getting in trouble for keeping people on the voter rolls when they're no longer voting and, more importantly, no longer living in the district.

Gene: Let's move along to sports gaming. Was that decision a surprise to you?

Lisa: So, the sports betting case was interesting because at oral argument, it looked like the State of New Jersey was going to win, but it looked like it was going to be pretty close. I think the court's ultimate decision in the case was maybe 7 to 2. So the issue in the case was whether a federal law that prohibits states from authorizing sports gambling is constitutional or not, and the Supreme Court said in an opinion written by Justice Alito that it is not constitutional to tell states that they can't authorize sports gambling.

And so Justice Alito wrote, from a states' rights perspective, a sort of beautiful opinion talking about the fact that what the federal government essentially was doing was acting in the place of state legislatures by prohibiting them from acting in the sports gambling space.

So the case is an interesting victory for states on a couple of levels: 1) they can now authorize sports gambling, which a number of them will do; 2) like I said, the opinion was just sort of a celebration of states' rights; and 3) there are other areas where the federal government has prohibited state and local governments from acting.

And probably the most interesting and relevant area right now is in the sanctuary city space. There's a particular federal law that disallowed state and local governments from having their employees provide certain information to the federal government on immigrants in the community. And a day or two after the sports gambling case came down, a federal district court in Philadelphia struck this federal statute down.

So this case has implications beyond just sports gambling, but it was a really great case for states beyond that context.

Gene: And perhaps that's a good segue to go into some of the battles the Trump Administration had with states over immigration as well, Lisa.

Lisa: Yes. So the State of Hawaii had sued the Trump Administration over the travel ban and, in a 5/4 decision that got a ton of media attention, the Supreme Court upheld the travel ban. This wasn't

a totally surprising decision if you had listened to the oral argument. The court seemed in the oral argument and in the opinion very concerned about the authority of the President to act in the immigration space and to act in the national security space, more importantly.

I think it came as a surprise to a lot of people that the court didn't come down harder on the Trump Administration over the anti-Muslim statements that the Trump Administration and some of his advisors have made. But the court, and this didn't receive, I thought, the media attention that it deserved – the court was very circumspect in saying that: normally we wouldn't disregard these statements, or we wouldn't give them very little weight, but because this is a very narrow context – national security, immigration, where the President has a lot of authority – we're not going to give a lot of heed to those statements.

It's also worth noting, I think, that the last words that Justice Kennedy wrote on the bench were a concurring opinion in the Hawaii vs. Trump case where Justice Kennedy said: look, we're not reviewing these statements and there are many statements of state and local government officials that we cannot and will not review. But state and local government officials have an absolute authority to uphold the Constitution. They take an oath that says they will do that. And that oath is all the more serious knowing that the Supreme Court can't get involved in everything they do.

And the phrase that he had in the last sentence was: "an anxious world waits to see how our officials do at holding up the Constitution and speaking in a manner that embodies its ideals." I think there is more to that opinion that hasn't, like I said, received attention or been realized. But it was a loss for Hawaii; it was a loss for the states that were challenging the travel ban.

And there's another issue too that I just want to mention briefly that your constituents might be interested in, and that is that there was an issue about whether or not the lower court should have issued a nationwide injunction in this case, an injunction against not just the Trump Administration in terms of the parties that were suing, but in terms of other people that might be interested in coming to the United States.

The court, because it said that Trump won, didn't need to have an injunction, so it didn't make a ruling on the nationwide injunction issue, but lower courts have been giving nationwide injunctions right and left: Juarez vs. the United States on sanctuary cities; on all kinds of things. And the travel ban is going to go away. It's not going to be around forever. But this nationwide injunction issue is not going away, and it's going to end up before the Supreme Court possibly in the sanctuary cities context sooner rather than later and will have implications in other challenges that states bring before the Supreme Court and before lower courts.

Gene: And last time we talked, Lisa, we discussed the Janus vs. the American Federation State, County and Municipal Employees. Can you summarize that decision for us and what it means for state governments?

Lisa: Yeah, absolutely. So about 22 states have what's called "agency fees" or I should say had what's called "agency fee laws." So these laws allowed state and local government employees to agree that if they were unionized, that they would have what's called "fair share provisions." So these fair share provisions said: if you don't want to join the union, that's fine, you don't have to join

the union; but you have to pay almost all the dues. You don't have to pay the dues for political costs, but you have to pay the other dues.

So this case sort of colloquially is described as mandatory union dues for nonmembers. But it's complicated from a state perspective by the fact that this practice was allowed by state law. So in 1977 the Supreme Court said: this practice is constitutional, the practice of requiring nonmembers to pay union dues even if they don't join the union. And the court's rationales were at the time that this prevented free riders, people that didn't want to pay union dues, but wanted the benefits of the union because the union has to represent everyone; and that agency fee created labor peace.

And the Supreme Court, in a 5-4 decision that was widely expected to go this way, written by Justice Alito who has been the champion of wanting to get rid of these fair share laws... The court wrote a long opinion striking down these fair share laws as unconstitutional. And, interestingly, Justice Kagan wrote a passionate dissent about the court using the First Amendment as a sword essentially and saying that this is something that state and local governments had agreed to and was a part of their tradition and a part of their history.

So the case creates kind of an interesting political situation because a lot of more right-leaning people and organizations thought that fair share agency fee laws were questionable and were a bad idea because they essentially forced people to pay for something they don't want to pay for. But on the other hand, the states' rights crowd recognized the fact that these laws were a function of state law and a function of an agreement about what the state would look like.

This case is a really big deal because agency fee essentially meant full funding for unions. If you were in an agency fee state, everyone who was eligible to be a union member had to pay some amount of dues to you, and a large amount of dues at that. So unions are going to lose significant funding. This case has been dubbed the "Citizens United of collective bargaining."

The other point I'll make about it is the decision was very much overshadowed by the travel ban that came down the day before, and then Justice Kennedy announcing his retirement. So I think this case has probably not gotten the attention that it has deserved.

Gene: And let's follow up on one other case. The court ruled in favor of a Colorado cake maker who had sued the Colorado Civil Rights Commission. Is this another one of those decisions where there wasn't a clear direction given to the states?

Lisa: Yeah. This case by almost any measure is considered a dud. The issue before the Supreme Court was whether or not this cake maker's free speech or free exercise of religion rights was violated when essentially the Colorado Civil Rights Commission told him: look, you have to make this cake because we have a public accommodations law in our state and it protects people on the basis of sexual orientation, and that trumps what other rights you perceive you have in this situation.

So the issue before the Supreme Court was whether or not this cake maker had these First Amendment free speech and free exercise of religion rights. The court made no ruling one way or the other about that issue. Instead what the court said in an opinion written by Justice Kennedy was that the Colorado Civil Rights Commission had shown discriminatory animus

towards the cake maker by disparaging his Christian beliefs, and saying that Christianity had been used to do all sorts of horrible things over history. And Justice Kennedy said, you know, he cannot be subjected to this sort of animus in the decision making about his case.

So people have speculated and people have wondered: Well, what does this case mean? Because on one hand the court said: you know, this man's religious freedom rights should be realized; on the other hand, as a practical matter, nine justices signed on to language in Kennedy's opinion that said: as a general rule, in our society gays and lesbians have to be served and treated the same as everyone else, that we've reached a point in our society where that's what the lay of the land is.

So there are kind of nuggets in the opinion for people on both sides of this argument, but what's interesting is that a day after the Supreme Court's case came out, there was another opinion issued by an Arizona state court that basically said: your religious freedom and free speech rights don't trump a city's public accommodation statutes that protect against sexual orientation. But then, a couple of weeks later, the Supreme Court sent a petition back called *Arlene's Flowers* where Arlene claimed that a lower court had also disparaged her religion and compared her to someone who wouldn't serve a black person out of racism and she felt that her religion had also not been treated with the respect that it deserves constitutionally or otherwise.

So this issue has essentially been kicked down the can, or the can has been kicked, as the case may be, and so we don't know exactly where the Supreme Court lies on this issue. More to be determined – stay posted on this issue because the court will have it again at some point.

Gene: So, several times in this interview, Lisa, you have referenced Justice Kennedy. His retirement obviously is creating a lot of discussion around the country right now. From your perspective, what's your reaction to his retirement and is there any way that you can speculate what it means for states?

Lisa: There's so much to say on this topic it's impossible to know where to begin. One theory I'm just going to put out there I say sort of tongue and cheek, but I think is worth sort of thinking about, is that Justice Kennedy seemed pretty indecisive this term on issues where he kind of set his opinion already, the partisan gerrymandering maybe not being the best example; but the best example being the *South Dakota vs. Wayfair* where he had sort of expressed views on overturning *Quill* before; another case where he had expressed his views before were the cases leading up to *Janus* and he was fairly decisive.

But then on other issues, the cake case, he wasn't very decisive. On partisan gerrymandering he wasn't very decisive. I have two theories on that. One is that he wasn't decisive because he knew he was retiring and he knew it won't be his voice going forward. Why make all these big decisions when really they're someone else's decisions to make? I also wonder if maybe he just got tired of deciding. And that's why he got so indecisive and decided to leave the court.

So much of the last 12 years, we as Americans, consciously or unconsciously, and I suspect mostly unconsciously, have put the big decisions that our country is facing in the hands of this one person, Justice Kennedy, and have asked him essentially to choose. And it's remarkable that

he won't be the one making these hard decisions for us anymore. And like I said, I only say it tongue and cheek to suggest that maybe he was just exhausted by all of it at the age of 81.

Now what does this mean for states? Well, Justice Kennedy was a swing justice and what have gotten, I guess, the most attention are his views on abortion. He voted against restrictions on abortion; he voted in favor of restrictions on abortion. But most notably, he kept *Roe vs. Wade* alive and *Casey*. And most recently he struck down a restriction on abortion.

So the big speculation is that state measures to do away with abortion under a more conservative court will happen. That's the issue that's gotten all the attention. But I want to talk about some of the more subtle things or smaller things that maybe just relate to states.

Property rights cases are one example. A conservative court tends to not favor state and local governments. To win a property rights case in the last decade, you needed Justice Kennedy's vote, which was hard to get. A more conservative court is going to be worse for state and local governments on property rights issues.

There's been a war on qualified immunity waged by academics who think that qualified immunity has been too generous to state and local governments. If we were looking at the prospect of a more liberal Supreme Court, I would be very, very worried about this. Justice Kennedy was favorable to qualified immunity. He will very likely be replaced by someone who is also favorable to qualified immunity.

Religion in public spaces has been an issue the Supreme Court has long dealt with and can be sort of a states' rights issue. Justice Kennedy, again, leaning more conservative, was sympathetic of those arguments. I would expect his replacement to be somewhat of the same ilk.

I think there are two particular issues that have not received enough attention that I'd like to highlight. One of them is that Justice Kennedy, I can't say singlehandedly because he did it with the other liberals, cut back the death penalty time and time again for juveniles, for people with intellectual disability, and cut back life in prison without parole. And those were cut back from state authority. They thoroughly changed the landscape of that particular area.

I think another area where Justice Kennedy was particularly important was guns. So Justice Kennedy voted in the majority in the *Heller* decision where the Supreme Court said that you have an individual right to a gun in your home. But what has happened since then is the court has been... about 80 petitions, maybe more, maybe less... have been brought to the Supreme court where lower courts have upheld usually, but sometimes struck down gun restrictions, and the Supreme Court has refused to hear those cases. And sometimes justices, most notably Justice Gorsuch and Justice Thomas, have objected to those petitions, thinking the court should hear them and essentially overturn restrictions on guns.

I think there have been two justices that have refused to vote on those petitions. Those justices are Justice Roberts and Justice Kennedy. If another justice joins the court who is more conservative, that justice can provide the fourth vote to sort of push Roberts' hand or call the question to Roberts about what he wants to do then about some of these gun cases. But there has been a reason that the court has been silent on guns and I do believe Justice Kennedy was one of those reasons.

And I guess finally race – you know, Justice Kennedy was mixed on race. He wasn't a big fan of race-based distinctions, most notably, in my opinion, the very notorious University of Michigan affirmative action cases. He was with the dissent. It was Justice O'Connor that was more open to race-based decision making. But he came around in some instances and most recently he had voted to uphold an affirmative action plan out of Texas.

So Justice Kennedy was by no means a reliable vote for race-based decision making or allowing that, but you could get a vote or two out of him here and there. States have varying approaches to how they want to handle race-based decision making and Justice Kennedy's opinions on that were very important.

So there isn't an issue, if you're a state or otherwise, that Justice Kennedy didn't touch and there's hardly a position that Justice Kennedy had that was absolute. So replacing him with anyone will be a change, but replacing him with a more dogged conservative will be a big change.

Gene: As always, very thoughtful and provocative comments from our guest Lisa Soronen, who is the Executive Director of the State and Local Legal Center. Lisa, thanks again for being a guest on "Our American States."

Lisa: Thank you for having me, Gene.

Music and Gene VO:

And that concludes this edition of "Our American States." If you enjoy this program, we ask that you take a moment to give us a rating on your favorite podcast app and even leave a brief review. Those small actions help to raise the podcast profile and make it easier for your colleagues across the nation to find us. For the National Conference of State Legislatures, this is Gene Rose. Thanks for listening.