



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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Supreme Court and the States: 2019 Wrapup | OAS Episode 69

Gene: 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.

So, we have returning to our program Lisa Soronen, who is the executive director of the State and Local Legal Center. She keeps a close eye on decisions made by the United States Supreme Court, in particular how they affect state and local governments. Lisa, welcome back to the program.

Lisa: Thanks for having me, Gene.

Gene: Let’s talk about what the court did this term on cases that are of interest to state legislators and state legislative staff. I’ve got a handful of cases on which I’d like to get your perspective.

Time Marker (TM): 0:54

Gene: First, let’s talk about partisan gerrymandering. It was high on the list of cases to watch. What did the court tell states about how they create legislative districts?

Lisa: Well, the partisan gerrymandering case, it’s hard to overstate its significance. So the Supreme Court held, on a 5-4 decision, that it will no longer hear or allow federal courts to hear cases alleging unconstitutional partisan gerrymandering.

So just to get a little background on this issue—partisan gerrymandering is of course the practice of drawing state legislative districts to favor one party versus the other. And since the ‘80s the court has said some amount of partisan gerrymandering is unconstitutional. But the court has never laid out a standard.

In the case this term, the court said: We’ve never laid out a standard and we’re not going to going forward. We’re not going to lay out any standard at all. We’re simply not going to hear these cases. They are left to state legislatures to decide how they want to gerrymander without any federal court intervention.

The court's reasoning was basically that if it was going to involve itself in the political thicket, as it called it, it wanted to come up with a really good standard for when partisan gerrymandering was unconstitutional. But the court said it was unable to come up with something like that and that what parties ultimately want is they want something fair, and it's hard to know what's fair. People don't agree on what fair is and the court doesn't exist to be the arbiter of fair; it exists to be the arbiter of laws and the meaning of the Constitution.

TM: 2:22

Gene: What will happen in the future if states want to bring cases to the Supreme Court? Do you think they will just not hear them anymore on this issue?

Lisa: So, the Supreme Court and federal courts will no longer hear this issue, but that doesn't mean that partisan gerrymandering cases are dead altogether. Pennsylvania—maybe a year ago, maybe a little bit longer—ruled that a gerrymander violated its state constitution and the court cited a case out of Florida that had the same sort of ruling.

The court also talked about other possible remedies for partisan gerrymandering. They include having a neutral redistricting commission, changing state laws to more clearly delineate what the redistricting factors are, disallowing partisan gerrymandering or a certain amount of partisan gerrymandering by ballot measures, and those sorts of things.

So the fighting over partisan gerrymandering isn't over. It's just over in the federal courts if not indefinitely, at least for now.

TM: 3:15

Gene: Well, let's jump to another issue that state legislatures were keeping a close eye on, and that is how the court reacted to the Commerce Department wanting to put a question on the census asking whether respondents are citizens. Did the court provide a clear direction here?

Lisa: Well, some may say that the court did, but at this point it's hard to say. So, in a sort of rather long and complicated ruling, the Supreme Court said that the reason that Wilber Ross suggested for adding the citizenship question, which was to get improved data for the Voter Right's Act enforcement purposes was pretextual; it wasn't the real reason that Secretary of Commerce Ross wanted this information.

The court said if you dug a little bit deeper into the record, you would find out that the secretary of commerce had asked a variety of federal agencies to request this question. When they refused to do so, he reached out personally to Jeff Sessions and said: Jeff Sessions, can you request this information? And the court described Wilber Ross' explanation for why he wanted this information as a distraction instead of actually articulating the real reason.

So, all this is to say that on the day the decision came down it seemed pretty clear that the court was saying the secretary could correct himself. But the problem with that is that the secretary has really run out of time. The census was supposed to start being printed a couple of days ago at the end of June. It was the case that Secretary Ross said in early July that the controversy was over, the question wasn't going to go on the census, and then the president started tweeting to

the fact that he wanted the Commerce Department and the Department of Justice to continue to fight for the question to be on the Census.

I think the initial reactions to the case were similar to mine, which was: Oh, well, the secretary can easily provide another reason, but the reality is time ticked away pretty quickly and it seems hard for the administration to change course at this point.

TM: 5:13

Gene: Another case concerned a statue honoring soldiers from Prince George County in Maryland who had died in World War I and, through a series of events, that statue eventually ended up in public land and there was a dispute on whether such a memorial could remain. What did the court say in this case?

Lisa: So this case involved the Bladensburg Peace Cross, which you describe very well as this very large cross that the county acquired in the '60s largely because it's at a busy intersection and it has to be maintained and there weren't funds at the time to maintain it.

So the question was whether or not this cross violated the establishment clause, and on a 7-2 decision the court said it didn't. Justice Alito interestingly reasoned that it would be sort of worse to take down the cross for establishment clause purposes than to keep it.

But, more significantly, what the court focused on was the fact that the cross was really old and the court kind of made a general pronouncement that if you're talking about old religious symbols, old religious traditions and other religious practices that have been going on for a long time, that the court is going to look at those with a favorable eye, a presumption of constitutionality if you will.

And the court also cited other factors that indicated the statute was constitutional, like the fact that it wasn't designed to exclude non-Christian soldiers and that it was to honor particular people that died in a war, and that the cross had become a symbol sort of, of World War I. So the cross will stay.

TM: 6:41

Gene: Let's look at a couple of legal issues here. One was where the court weighed in on whether a person could be charged with the same crime by two different jurisdictions. Tell us what this case was about and what the ramifications are for states.

Lisa: So, everyone has heard of the double jeopardy clause. It's the clause in the Constitution that prevents someone from being tried twice for the same crime. But there's also a dual sovereignty doctrine that basically says that if two different sovereigns charge a person for a crime, that's OK because they're separate sovereigns that have their own laws, and so you can violate the laws of both of the sovereigns at the same time.

The Supreme Court for a long time has recognized this dual sovereignty doctrine or exception as the case may be, and the challenger in this case was trying to claim that at common law, the

dual sovereignty exception didn't exist and that two sovereigns could not prosecute someone at the same time, or for the same offense rather.

So the Supreme Court decided not to overturn precedent and to leave this dual sovereign doctrine in place. In other words, if a state and the federal government both want to prosecute someone for the same underlying criminal misconduct, they can do so.

So this is one of those cases that would have been a much bigger deal had the court ruled the opposite way and said: Only the state or the federal government can prosecute a crime. And the reason why that would have been significant is really twofold: One, states have historically prosecuted crimes, not the federal government as much; and second, if only one, the federal or the state government, could prosecute, that would lead to competitions over who would prosecute first and turf battles and the like. So that was a nice win for states.

TM: 8:20

Gene: Another legal issue tackled whether obtaining and testing blood from someone who is unconscious was legal or not. What's the message to law enforcement agencies about this case?

Lisa: So this is an interesting case. Basically, the Supreme Court has said that if there's probable cause to believe that someone has been drinking, you can give them a breathalyzer, but you can't take their blood unless they consent. Well then the question is: What if someone is so drunk that they're unconscious and they can't say one way or the other whether or not they want to consent—can blood be taken in that case when they're unable to give a breath test?

The Wisconsin Supreme Court had said yes, and about 28 states have state statutes that allow this practice, and the Supreme Court in a 5-4 decision also said that this is OK. Basically, there's an exigency exception to the Fourth Amendment—it's the idea that you don't need a warrant if a situation is essentially an emergency.

And the court said, you know, if someone is so drunk or appears to be so drunk that they have passed out, you have a medical emergency on your hands. A police officer shouldn't have to worry about whether or not they can get a warrant; they should worry about whether or not they can get this person essentially to medical treatment as soon as possible.

So, in general, police officers don't need a warrant if they have probable cause to believe that someone has been drunk driving and is also unconscious.

TM: 9:42

Gene: And for wine drinkers and buyers, the court made a decision on a Tennessee wine case that could change the way retailers do business. Is that correct?

Lisa: Yes. So the Tennessee wine and spirits case involves a law from Tennessee that required someone, if they wanted to sell alcohol in the state, to live in the state for two years. And this provision put two constitutional principles at odds. One is the 21st Amendment which basically allows states to regulate alcohol as they like. The second requirement in the Constitution

relevant to the case is the Dormant Commerce Clause, and this says that states can't discriminate against each other in commerce.

And the Supreme Court said, well, you know, in general it's true that states can regulate alcohol as they like, but they can't do it if they're also violating another constitutional principle. And the court said here that it would be OK to discriminate against interstate commerce basically by disallowing people to sell alcohol unless they've lived in the state for two years if there was some relationship with health and safety. But there isn't a significant health and safety relationship to having someone have residency in a state for two years.

It's worth noting that about 20 states have these durational residency requirements for selling alcohol and those requirements probably will not stand following the Supreme Court's decision in this case.

TM: 11:00

Gene: OK, so overall, Lisa, how did states fare in this term of the court?

Lisa: Well, it's interesting. As usual, the two blockbuster cases went to states or involve states, and from the perspective of state legislatures, having absolute authority to draw district lines the way they like is a huge victory. And the census case I guess, again, is very relevant to states. It's a little bit hard to say who won that case and even if we know whether the question is on or off the census, some states can be winners and some states can be losers depending on whether the question is in and how it affects who answers the citizenship question.

In terms of like the two cases dealing directly with: were state statutes constitutional or unconstitutional, those went as a draw as I was talking about with the Tennessee wine and spirits was a loss, but *Mitchell vs. Wisconsin* involving drunk driving was a win.

So it's kind of a typical Supreme Court term—a lot of cases involving the states going in different ways and also different states perceiving victories or losses differently depending on what their laws are and what their policies are as well.

TM: 12:08

Gene: And, finally, can you tell us about whether we learned anything about the new justices, Gorsuch and Kavanaugh, and whether you have any indication how they will address state issues in the future?

Lisa: Yeah, absolutely. So the most interesting thing I would say about Justice Gorsuch and Justice Kavanaugh is that they were very much in agreement on the big cases, and that's where the ideological differences really matter. The Supreme Court overall is unanimous about half of the time, so it's only in those big cases that the ideological differences make a big difference.

Now, with that said, Justice Gorsuch and Justice Kavanaugh showed themselves to be very different justices, at least so far, in the smaller cases. For example, Justice Kavanaugh was the justice most in the majority this term, and previously probably for all of the last 12 years, it was

Justice Kennedy. So he's kind of occupying that center role, but again, not necessarily in the big cases.

Justice Gorsuch also sided with the liberals four times, maybe five times, taking some Libertarian positions in favor of criminal defendants where liberals and Libertarians might sort of join forces. Justice Kavanaugh I think also, people have noted that he's taken a more pragmatic position, and that probably explains why he's more in the center. The set of words that are associated with Justice Gorsuch are like Libertarianism, formalism, originalism, whereas Justice Kavanaugh I think has shown himself to be more of a pragmatist.

Now all of this can play out differently for states depending on the issue. I always think that the ideal Supreme Court justice for states is a moderate conservative with a pragmatic streak, and actually that's kind of Justice Kavanaugh, and Justice Roberts as well. So it will be interesting to watch the nuances of both justices develop over time.

Gene: We've been talking with Lisa Soronen, who is the executive director of the State and Local Legal Center. Lisa, thank you so much for sharing your knowledge with us today.

Lisa: You're welcome, Gene. I look forward to talking to you soon.

Gene: We'll talk more about the citizenship question right after this short break.

BREAK

Gene: To give us some extra perspective on the Supreme Court's decision on the citizenship question, we are talking with Susan Frederick, a senior federal affairs counsel with the National Conference of State Legislatures.

TM: 15:01

Gene: Susan, can you walk us through what states use the census data for?

Susan: Sure, Gene. So, census data is really important to states simply because some of the largest funding streams that states receive from the federal government are based on formula calculations using census information.

For example, Medicaid, \$312 billion go toward Medicaid funding. Highway funding is \$38.3 billion. SNAP, which is the supplemental nutrition program, \$69.4 billion. State education programs receive funding based on census information. Title I grants receive \$13.9 billion. The Head Start program receives \$8.3 billion.

Housing programs also receive funding based on census data. For example, Section 8 housing receives \$19.1 billion based on the last decennial census. The LIHE program, which is the Low Income Home Energy Assistance program, receives \$3.4 billion.

So those are just some very basic examples of the larger funding streams, and we're talking in the billions of dollars that states receive based on census information.

TM: 16:18

Gene: So obviously it's very important. Now, has NCSL taken a position on whether the citizenship question should be included on the census?

Susan: We did not file a brief in this case. We did not participate as an amicus. We have, however, sent letters to Congress to advocate for full and complete funding for the census and that's important because our position is that we would like a fair and accurate count. We want to be able to maximize the participation in the census. But we did not take a position on the citizenship question.

Gene: We've been talking with Susan Frederick, a senior federal affairs counsel with the National Conference of State Legislatures. Susan, thanks for being back on our program.

Susan: Oh, you're very welcome, Gene. 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.