



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: What to Watch This Term | OAS Episode 76

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.

Returning to our program is Lisa Soronen, the executive director of the State and Local Legal Center. We count on her to keep an eye out on cases before the U.S. Supreme Court. The court opened this year’s term on the first Monday in October of 2019. Lisa, welcome to the program.

Lisa: Thanks for having me, Gene.

Time Marker (TM): 0:48

Gene: Let’s dive into some of the cases that you believe are especially important to states this term. Let’s start off with the *Department of Homeland Security v. Regents of the University of California*, where the Supreme Court will decide whether the Department of Homeland Security’s decision to end the Deferred Action for Childhood Arrivals, or DACA program, is judicially reviewable and lawful.

How will this case affect states?

Lisa: Well, it will affect states in a number of ways. Numerous states have DACA recipients in their states. Sometimes they’re working for state government. Oftentimes, though, they’re just people living in the state who receive the benefits and protections of the DACA program, and those were specifically that you can live temporarily in the United States without fearing deportation and, more importantly perhaps, work in the United States lawfully.

So, a number of these DACA recipients, like I said, may have been working for states. They were certainly living in states and contributing to the state economy, and also they just had the security of knowing that at least in the short term, they were guaranteed a place in our country.

TM: 1:51

Gene: And what’s your sense of how the court is going to react to this case?

Lisa: So it's a difficult case to predict in some ways because this case has an unusual emotional charge to it. These DACA recipients all would have come to the United States as young children and presumably would have had no choice whether or not to come here or not. And so I think there isn't a person or a justice whose heart wouldn't be pulled a little bit by this case.

On the flip side, there's a program similar to DACA called DAPA and it was sort of like DACA, but for parents. And the Supreme Court held 4-4 ... this was when Justice Scalia had died—there were only eight justices on the bench ... had held 4-4 that the DAPA program was legally infirm. So presumably it's not such a stretch for the Supreme Court with a new conservative member to think that the DACA program is also legally infirm.

But there's kind of an interesting wrinkle in this case. The question in the case really isn't whether President Trump, or his administration rather, could get rid of the DACA program. Everyone agrees that the president could. The question is whether the administration could get rid of the program because they said the program was illegal.

The supporters of DACA say this program isn't illegal and the Administrative Procedures Act says that agencies can't act in an arbitrary and capricious way. So the supporters of DACA say look, it's not fair or correct under the APA for the Trump administration to get rid of the DACA program because they say it's illegal when, in fact, it's not actually illegal.

So that's sort of technically the legal issue in the case, whether or not the Trump administration filed the right procedure, and so that's one way the court could look at it, versus whether it's actually in and of itself illegal.

The other thing is the Trump administration has come and said, well, there are other reasons we wanted to get rid of the program other than the fact that we think it's illegal, like it encourages undocumented people to come to the United States. And the supporters of DACA say that's post hoc information that came up after the fact.

So the court has a number of legal issues to grapple with in this case, along with the emotional issues of what to do about DACA recipients. And, of course, the court can always turn to Congress and say why haven't you taken care of this problem, which is the plea that many people have been making for decades.

TM: 4:15

Gene: In this term we see the court taking up some controversial issues. *New York State Rifle and Pistol Association v. the City of New York* addresses transportation of guns. Tell us what is at stake here.

Lisa: Well, this is the first gun case the Supreme Court has taken since the Heller decision in 2008. In Heller, the court said you have a right, we all have a right, an individual right to have a gun in our home for lawful purposes, a handgun specifically.

The question in this case is: Do you have a right to a gun outside your home? Now, most Americans assume that you do. But the Supreme Court has never, in fact, decided whether or

not people have a right to a gun outside the home. But this case is pretty complicated and pretty snarky you might say.

So, under New York's ordinance and state law, which has now been repealed, you could have what was called a premises license, so you could keep a gun in your house. People objected because they said: Well, we have a house in the Hamptons and we want to take our gun there. And you could also shoot at the shooting range in the city, but you couldn't take your gun outside to, let's say, New Jersey to a shooting range.

And the 2nd Circuit said: Well, if you want a gun in the Hamptons, just buy another gun. And if you want to shoot your gun in New Jersey at a target practice, just rent a gun. You don't have to transport your gun to have the gun you essentially want, or a gun when you want it. That's what the 2nd Circuit said.

But most people think that the Supreme Court is likely to strike down this law. It's very prescriptive; it's very unique; there might not be another one like it in the country. So, New York, wising up to the problems that they have with this case, has actually passed a law and an ordinance saying we repeal these measures; there is no such thing as a premises license where you're limited in these ways.

So one of the questions in this case is whether or not it's moot, meaning there's no live legal controversy. The people that are challenging the gun regulation in this case say it's not moot to us because now we can take our gun to a New Jersey range, but what if we had to use the bathroom? Are we in trouble then? And they want a judicial ruling that New York can't essentially readopt these requirements.

From the perspective of a lawyer, the real issue of this case is called scrutiny, which is basically a legal term for saying: How close will the court look at a law? How critically will they look at it? With how much of a negative eye will they look at the law?

And so the Supreme Court has never said what level of scrutiny or how closely it looks at gun regulations outside the home. And so that's something that could come out of this case. I mean, everyone agrees that this law is probably going to get struck down if the court doesn't moot the case, but if the court goes forward with the case, they may say something about how carefully they want to look at gun laws. And if they apply what's called strict scrutiny, meaning looking really carefully at a gun law, most gun laws in the United States will be unconstitutional.

So, it's a case with potentially seismic implications or really kind of no implications at all.

TM: 7:19

Gene: The court is also expected to address an abortion issue from the State of Louisiana. Is this a case that will have a nationwide effect?

Lisa: So the Louisiana case is very interesting because it's an awful lot like a Texas case that the Supreme Court heard a couple of terms ago. Both of these cases involve what's called admitting privileges. So admitting privileges are like if you're a doctor being a member of a hospital or being able to perform surgery at this hospital.

So a number of states have passed admitting privileges requirements for abortion doctors. And in Texas ... this is the old case from a couple of years ago ... to get admitting privileges, you had to send a certain number of patients to the clinic. Well, abortions, as we all know, are safe procedures and rarely does an abortion doctor send someone to a hospital. So in that case about half of the abortion clinics would close as a result of the admitting privileges requirement because these doctors in Texas couldn't get admitting privileges.

And the reason why the court said that this was unconstitutional was it would create an undue burden on women if half the clinics close as a result of the requirement.

Now the situation in Louisiana is a bit different. So to get admitting privileges in Louisiana, all you have to do is have the right credentials. So the 5th Circuit, the lower court basically said almost every abortion doctor, five out of six, could get admitting privileges in the state if they just tried a little bit harder. And there will be no clinics closing and if there's one less doctor, the other five doctors can pick up the slack.

So I think that the Supreme Court's reasoning is probably likely to mirror the reasoning of the 5th Circuit. They'll distinguish, if you will, the 2015 Texas case from this, what will be I guess a 2020 Louisiana case. But because this case comes up in an abortion context, it's going to get extraordinary attention and if the court does distinguish the cases, it'll be interesting to see whether the average American perceives this case as the court sort of cutting back on *Roe v. Wade* or maybe doubling down on *Roe v. Wade* because they haven't used the case as an opportunity to overturn *Roe v. Wade*.

So in some ways there have been abortion cases where there has been much more at stake than this case, but it's a particularly significant case because it comes at a time when Justice Kennedy is no longer at court. He was no huge fan of abortion, but in the Texas case he provided the fifth vote to say the Texas law was unconstitutional. So his absence will probably make a difference, and presumably he's been replaced by a more conservative justice, Justice Kavanaugh.

TM: 10:03

Gene: There's also a case regarding sexual orientation. Can you explain the conflict here?

Lisa: Yes, absolutely. This is a very, very interesting case because it's one that is fairly easy for every American who works to understand and relate to. The Federal Employment Discrimination Law is called Title VII of 1964 and it prohibits discrimination because of sex. So the question in this case is: Does "because of sex" cover people on the basis of sexual orientation and gender identity or transgender status?

So one way to look at this case, just to try to make sense of it, is to ask yourself if you think that sexual orientation and gender identity are a subset of "because of sex," or a totally separate category. If you think they're a subset of "because of sex," then actually they may be protected under Title VII.

So people who are arguing in favor of these two categories being included in the definition of "because of sex" have a big argument on their side and that is that the Supreme Court has long

said that sex stereotyping is sex discrimination. And so those who want gender identity and transgender status covered point out that the ultimate sex stereotype is the idea that a man should be attracted to a woman and that someone who is biologically female should want to live as a female for the rest of her life.

And the other side of the argument is that Congress could not possibly have intended in 1964 that “because of sex” would mean sexual orientation and transgender status.

So the oral argument in this case has happened. It was very interesting. It looks like Justice Gorsuch might be in the middle. He called the case a text, if you will, or the language of the statute very close, but he’s very concerned about the disruption of having transgender persons in bathrooms of the gender or sex they identify with.

It’s also noteworthy that a number of states have passed laws outlawing discrimination on the basis of sexual orientation and transgender status. So if the proponents of that position lose, the loss may not be that big in all the states because there is state protection.

It’s a very, very interesting case and very relatable.

TM: 12:16

Gene: There’s also a case that addresses the separation of church and state. Can you tell us what that is about?

Lisa: So I mean, it’s actually a really interesting case. Montana has what’s called a Blaine Amendment, sort of a super-establishment clause that says in Montana you really can’t establish religion. Nevertheless, the state legislature passed a voucher program and allowed students going to religious schools to get the voucher. And an administrative agency said, oh, no, no, that legislation can’t possibly be right because of this strong Blaine Amendment in Montana.

So what the lower court did was it said that the voucher program should be struck down because, again, Montana has this really strong Blaine Amendment.

But the real controversy in the case is this: The federal constitution establishment clause would allow for the voucher program in this case, but it’s not allowed for under Montana’s constitution; that’s what the lower court held.

So the dilemma is: Well, what if this was allowable by the free exercise clause of the federal constitution and the equal protection clause? So the most fundamental question is if and when the federal constitution can trump a state measure that is more prescriptive on religion.

TM: 13:40

Gene: In terms of criminal justice, there’s a case from Kansas that addresses the insanity defense.

Lisa: So, this is an absolutely fascinating case because the Supreme Court basically never gets into substantive criminal law. It totally leaves the states to decide this issue. The question in this case

is the kind of question that law students will be discussing throughout the ages after the court decides.

So the fundamental question is whether or not states can get rid of the insanity defense by state legislation. So traditionally what the insanity defense has said or part of it has said is that if, due to mental illness, you did not know the difference from right and wrong, you were not criminally responsible for your actions. You may have to go to a mental hospital for the rest of your life, but you won't be convicted of a crime if you committed a crime due to mental illness because you didn't know the difference between right and wrong.

So Kansas got rid of that scheme and they adopted a scheme called mens rea, which means like guilty mind; that's what it translates to from Latin to English. But the bottom line under the mens rea approach is that mental illness can only go towards whether or not you have the right mental state.

So, for example, mental illness could negate criminal intent, like you were so mentally ill that you didn't know what you were doing; you didn't intend to do something. So Kansas says that's OK. But not knowing the difference between right and wrong, that's completely irrelevant. That's what Kansas argues.

So the defendant in this case interestingly killed his estranged wife, two of his daughters and his mother-in-law, but he didn't kill his son who was in the room as well. And he killed them because his wife had left him for another woman and he felt his daughters were in cahoots with her, supportive of her, and he claims, look, I intended to kill them, and so Kansas' law won't help me. But I was so severely depressed that I didn't know right from wrong. I couldn't, as the lawyer put it, I couldn't tap into my brain to where I'd know the difference between right and wrong. So that is the issue in the case. Can Kansas get rid of this traditional insanity defense?

There's only a handful of states, five or less, that have gone the mens rea approach. Most states stick with the traditional: You have an insanity defense if you didn't know right from wrong due to mental illness.

But a couple of states have gone in another direction and in terms of federalism, the question is: How much authority do states have to define the crimes and the defenses? Is there some floor that the Supreme Court is going to set in saying that you have to have this kind of defense? You can go above it, but you can't go below it. Is the Supreme Court going to say that? Or is it going to say that states have whatever defenses you want, don't have any defenses at all?

So it's a great federalism case. It has significant implications for people who are mentally ill and commit crimes. Interestingly, I learned from the oral argument that the insanity defense is only raised very, very rarely, like in 1% of cases, and only works in less than that.

Justice Kagan laughed during the oral argument that no one would consider the guy in this case mentally ill. But there are certainly examples of people who are mentally ill and don't seem to know the difference between right and wrong as a result.

TM: 17:03

Gene: Now I also see there's an interesting case from Georgia that I can see having a direct effect on state legislatures. It focuses on who owns the copyright on annotations to state law. Tell us the details about this and tell us how it ended up on the Supreme Court's docket.

Lisa: So it is extremely rare for the Supreme Court to take a case that deals with the job duties of a state legislature outside of passing laws. So I've never actually seen the court take a case like this at all and, in fact, on the legal issue, which is called Government Edicts, they haven't taken a case since 1888.

So here's the deal. Georgia, like many state legislatures, works with Lexis to provide annotated statutes. So the annotations include things like case citations, links to attorney general opinions, citations to regulations, those kinds of things. So Georgia claims that it owns the copyright and has acted as if it owns a copyright, but it allows Lexis to sell these annotated statutes for a profit.

And so Public Resource Org said, oh, no, no, Georgia does not own the copyright in this case. The people own the copyright, meaning there can be, in fact, no copyright.

So, as I was saying, the relevant legal doctrine in this case is called Government Edicts. It's an old legal document from the 1800s and basically the Supreme Court said in a series of three cases that the law cannot be copyrighted because the law is owned by the people. Well, the 11th Circuit said you know, these annotations, they're not exactly law but they're law-like, and law-like is close enough, so we're going to say that Georgia cannot copyright them.

So, of course this has implications for numerous state legislatures who have similar relationships with Lexis who also compiles their annotated codes. And the argument of Lexis and other sort-of legal publishers is they don't have any incentive to do the work unless they can sell the work and actually make money. And it takes a good deal of effort and time to put these annotations together.

On the other hand, there's open government. Most people would like to have access to these compilations because they're very, very useful. So it's definitely an interesting case to watch if you're a state legislature.

TM: 19:19

Gene: What are some other cases that you're keeping a close eye on, Lisa?

Lisa: So, another case I'm keeping a close eye on here at the State and Local Legal Center is the Maui case. This case involves a question of whether or not owners of brown water that contains a pollutant have to apply for and receive a particular federal permit. EPA for decades has been ambivalent about whether or not federal permits are required in this case, and the EPA has taken the position in this case that they don't think that federal permits are, in fact, required.

But the 9th Circuit held that these permits are required, they're expensive and difficult for state and local governments to get. So the Maui case has been very interesting. There's also been a dispute over who has the authority to settle the case, the mayor or the county council. So that's been playing out in an interesting way.

And *Allen v. Cooper* is another interesting case. It's a copyright case. The State of North Carolina has been accused of violating the Copyright Act as related to photographs taken of a shipwreck repeatedly, and North Carolina has said not only have we not violated the Copyright Act, but that sovereign immunity applies.

And so the court will be deciding whether or not sovereign immunity applies to states under the Copyright Act or whether they can be sued for violating the Copyright Act.

Another case that's kind of interesting and very easy to understand is it's a search and seizure case involving a guy who police ran his license plate number and discovered that he had an expired license, so they pulled him over, and that was the only thing he was doing wrong. And he said I can't be pulled over because you don't have a reasonable decision to stop me because this car is licensed to me doesn't mean I'm likely the person driving it.

And, again, this is something we all can relate to. Some of us have spouses, children, friends, child care providers who drive our cars. And so it will be interesting to see how the court decides that case.

Gene: We've been talking with Lisa Soronen, the executive director of the State and Local Legal Center. Lisa, we'll catch up with you in a few months to get an update.

Lisa: Absolutely. Looking forward to it, Gene, thank you.

Music and Gene VO:

And that concludes this edition of our podcast. We encourage you to review and rate our episodes on iTunes or Google Play. You may also go to Google Play and iTunes 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 Gene Rose. Thanks for listening and being a part of "Our American States."