

Supreme Court and Internet Sales Tax

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Supposed to Talk about Internet Sales Tax Case

- And I will
- But bear with me...

Second Most Powerful Person in the Country

- 81 years old
- Rarely in the news or the spotlight
- He has the same last name and one of America's most famous (and tragic) families

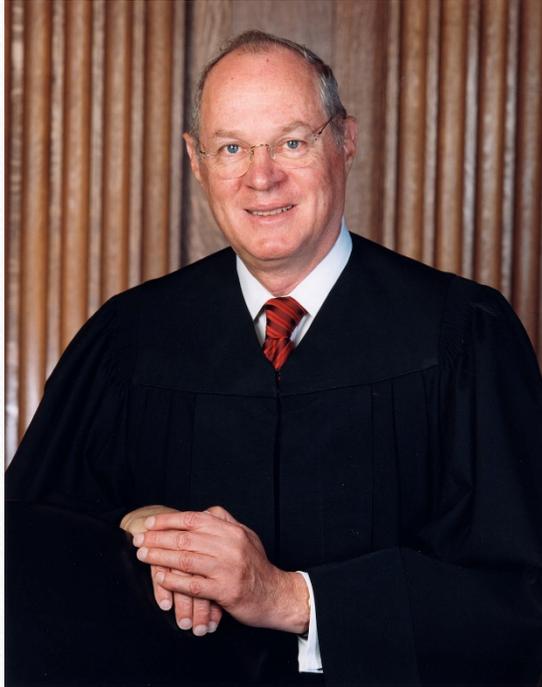
He Has Provided the Critical Fifth Vote

- Gun rights
- Death penalty
- Affirmative action
- Abortion
- Same sex marriage

One Final Hint

- *Citizens United*—corporate campaign contributions Supreme Court case

Justice Kennedy



Our Current Court

Conservative

- Chief Justice Roberts
- Kennedy*
- Thomas
- Alito
- Gorsuch

Liberal

- Ginsburg
- Breyer
- Sotomayor
- Kagan

Really Only a 5-4 Court in the Big Cases

- About 45% of decisions are unanimous
- About 20% of decisions are 5-4
- Most “blockbuster” cases are 5-4

Really it's the Kennedy Court

- Justice Kennedy is almost always in the majority in 5-4 cases
- Justice Kennedy is generally considered a **moderate conservative** who is more **liberal** on **social issues**
- More liberal over time?
 - 2015: voted against a restriction on abortion, in favor of an affirmative action plan
- Occupied this role since Justice O'Connor left in 2006
- Complicated, powerful, never-say-never

How Does Justice Kennedy Relate to

- The internet sales tax case currently before the Supreme Court?

When You Shop Online...

- Have you noticed that (unless you are buying from Amazon) the vendor doesn't collect sale tax
- Why?
- Because the Supreme Court has said if a retailer doesn't have a physical presence (warehouse) in the state it doesn't have to collect sale tax
- Tax is still owed but almost no one pays it

South Dakota v. Wayfair

- Issue: may states and local governments require retailers with no in-state physical presence to collect sales tax?
- GAO estimates in November 2017 states and local governments are losing between \$8 and \$13 billion a year
- Some estimates are much higher

Overview of *South Dakota v. Wayfair*

- How we got here
- What I think will happen
- Why this is your story to tell

Legal Background

- In 1967 in *National Bellas Hess v. Department of Revenue of Illinois*, the Supreme Court held that per its Commerce Clause jurisprudence, states and local governments cannot require businesses to collect sales tax unless the business has a physical presence in the state
- Twenty-five years later in *Quill v. North Dakota* (1992), the Supreme Court reaffirmed the physical presence requirement but admitted that “contemporary Commerce Clause jurisprudence might not dictate the same result” as the Court had reached in *Bellas Hess*

But that Seems so Old-Fashioned

- Exactly...the physical presence test is so 1967
- An online retailer could be doing millions of dollars in sale in a state but have no warehouses so meaning it does not have to collect any sales tax

Fast Forward to 2010

- To improve sales tax collection, in 2010 Colorado began requiring remote sellers to inform Colorado purchasers annually of their purchases and send the same information to the Colorado Department of Revenue
- The Direct Marketing Association sued Colorado in federal court claiming that the notice and reporting requirements were unconstitutional under *Quill*

DMA v. Brohl

- The issue the Supreme Court decided in *Direct Marketing Association v. Brohl* (2015), was whether the Tax Injunction Act barred a federal court from deciding this case
- The Supreme Court held it did not
- The State and Local Legal Center (SLLC) filed an *amicus brief* in *Direct Marketing Association v. Brohl* describing the devastating economic impact of *Quill* on states and local governments

Justice Kennedy to the Rescue

- Justice Kennedy wrote a concurring opinion stating that the “legal system should find an appropriate case for this Court to reexamine *Quill*”
- Justice Kennedy criticized *Quill* for many of the same reasons in the SLLC *amicus* brief
- Specifically, internet sales have risen astronomically since 1992 and states and local governments have been unable to collect most taxes due on sales from out-of-state vendors

South Dakota Rises to the Occasion

- South Dakota doesn't have income tax
- Passed a law requiring remote sellers to collect sales tax if they sell more than \$100,000 in good or engage in 200 separate transactions
- Law is clever—encouraged retailers to sue the state immediately, imposed a stay on the law as litigation proceeded, no retroactive tax collection
- Unsurprisingly, the South Dakota Supreme Court struck the law down as unconstitutional

Timeline

- SCOTUS accepts case: January 12, 2018
- Oral argument: April 17
- Opinion: By end of June; week of June 18?

Court Has Four Options

- Keep the physical presence test (not overturn *Quill*)
- Overturn *Quill* and replace the physical presence test with an economic nexus test (bless the South Dakota law only requiring collection if \$100,000 in good sold or 200 separate transactions made)
- Overturn *Quill* and allow states to require all out-of-state vendors to collect sales tax
- Hold that a website may give an online vendor a physical presence in all 50 states (United States)

Going into the Argument

- Three likely votes for overturning *Quill*
 - Justice Kennedy
 - Justice Gorsuch
 - Justice Thomas
- Less clear whether all these Justices would require an economic nexus approach

How Did the Justices Seem to Come Down?

- Yes
 - Kennedy, Gorsuch, **Ginsburg**—firmly in favor of overturning *Quill*; no economic nexus needed
 - Thomas always silent
- No
 - Sotomayor—firmly in favor of keeping *Quill*
- Maybe
 - Roberts and Alito—somewhat in favor of keeping *Quill*; open to an economic nexus test
 - Breyer—totally not sure what to do (how much money is really on the table, is compliance easy or hard, what to do about retroactivity)
 - Kagan—in favor of keeping *Quill*—Congress solve the problem

To Get to 5 Votes We Only Need One

Votes we Have

- Kennedy
- Gorsuch
- Thomas
- Ginsburg

Need One of These

- Roberts
- Breyer
- Alito
- Kagan

Doesn't Seem Likely

- Can we get to 5 votes to require no economic nexus
- Most states and local governments would be fine with an economic nexus test
- Congress could always add/modify an economic nexus test
- Unclear what/how much guidance the Court will give state legislatures on adopting an economic nexus
- No Justice expressed any support for keeping *Quill* and interpreting physical presence to cover websites

What is the State and Local Legal Center?

- SLLC files *amicus* briefs to the Supreme Court in cases affecting states and local governments on behalf of the “Big Seven” national organizations representing elected and appointed state and local government officials

You are all Members of the SLLC

- By virtue of being members of NLC and NACo
- NLC and NACo are members of the SLLC
- Utah League of Cities and Towns contributes annually to the SLLC

Why is this Your Story to Tell?

- NLC and NACo joined the SLLC who filed an *amicus* brief in *Direct Marketing Association v. Brohl* describing the devastating economic impact of *Quill* on states and local governments
- Justice Kennedy didn't cite the SLLC *amicus* brief in his opinion BUT
 - He cited two pieces of research from our brief
 - We were the only group to file an *amicus* brief criticizing *Quill*

Challenges will Remain for Local Governments

- States (particularly in non-streamline sales tax states) don't always turn over to local governments taxes owed to them
- Local governments would prefer a legislative solution which could have done more to guarantee locals would get from the state the local government tax money the state collects
- Legislative solution is still possible

Justice Kennedy's Role in this Case is Critical

- He asked for this case
- He voted against North Dakota in 1992 and has (almost certainly) changed his mind!
- We need his vote

If You Think Internet Sales Tax is Big...

- I have another issue to tell you about where Justice Kennedy's vote is critical
- Might not have a big impact in Utah...today
- Could have a seismic impact on American politics

What Do These Five States Have in Common?

- Wisconsin
- Florida
- Michigan
- North Carolina
- Ohio

Supreme Court Has Two Opportunities

- To “do something” about partisan gerrymandering
- Lay out a standard for when partisan gerrymandering is too much
- What is partisan gerrymandering?
 - Configuring voting districts to advantage one political party

Over the Years

- At least 5 Justices have agreed partisan gerrymandering claims may be litigated
- Have not been able to agree on the standard for when partisan gerrymandering is too much
- *Veith v. Jubelirer* (2004) Justice Kennedy—might be justiciable under the First Amendment; “a workable standard” is needed

Will the Court Come Up with a Standard?

- I think they might this time around
 - Things have gotten really bad
 - Math models are amazing
 - Lower courts are pushing
 - Wisconsin
 - North Carolina
 - Pennsylvania
 - Maryland

What Do These Two Issues Say

- About the Court?
- About our democracy?
- Justice Kennedy?

Supreme Court is Incredibly Powerful

- They decide
- Never stop, rarely slow down

Supreme Court is Incredibly Powerful

- Decide many of the most important issues of the day
- Final say on constitutional matters
- Pick and choose what they decide, when they decide, how they decide

Should it Be?

- Only 9 people
- Not elected
- Appointed for life
- Relatively homogenous, not “average,” never young

For Better or Worse

- These qualities make the Court
 - Nimble
 - Decisive
 - Skewed

If It is This Way

- We are lucky to have Justice Kennedy right where he is
 - Everyone in this room agrees with many of his votes
 - In *South Dakota v. Wayfair* we see his humility and curiosity
 - Whether we like it or not the Supreme Court is our collective voice and conscience; Justice Kennedy makes it a moderate, thoughtful, and open-minded one
- We won't have him much longer

Resources on *South Dakota v. Wayfair*

- [Supreme Court to Decide Billion Dollar Sales Tax Case](#)—800 word article
- SCOTUS, Wayfair, North AND South Dakota...Why—30 minute podcast
- Internet Sale Tax: From 1967 to Oral Argument in *South Dakota v. Wayfair* (webinar)
- *South Dakota v. Wayfair*: Times Have Changed (webcast)
- All available on the SLLC website