Supreme Court Update for the South

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Overview of Presentation

- Overall observations about the term
- Brief look at some of the big cases
- Closer look at some of the big cases
- Tribute to Justice Kennedy
- Judge Kavanaugh and the crystal ball

Supreme Court 2017-18 Term Takeaways

- A significant term
  - Big cases in labor/employment, immigration, social issues, law enforcement
  - Some questions left unanswered: gerrymandering, cake case
- One Justice's first term, one Justice's last
  - Gorsuch impact
  - Kennedy retirement

Supreme Court Stats

- 72 cases decided
- Closer cases than normal:
  - 26% decided 5-4 (compared to an 18% average in the previous 7 terms)
  - 39% decided 9-0 (compared to 50% average)
- Conservative swing in the 5-4 cases
  - Kennedy sided with the right-leaning justices every time
- 37 cases set for oral argument for fall 2018
  - A little higher than average

Superlatives

- Most written opinions: Justice Thomas, 31
- Most questions at oral argument: Justice Sotomayor, 24.3
- Best buddies: Justices Sotomayor and Ginsburg (95.8% agreement)
- Least common ground: Justices Alito and Sotomayor (16.3% agreement in split cases)
- Most popular: Chief Justice Roberts (in the majority 93% of the time)
- Most appearances before the court: Paul Clement, Kirkland and Ellis (6 this term, 92 all time)

Looking to the Future

- Kennedy sided with the conservatives every time in close cases
  - *Janus*, *Hawaii*, *Wayfair*, *Husted*, etc.
- Some compromise to avoid making bigger decisions
  - *Masterpiece*, *Gill*
- Roberts is most likely now the swing Justice
  - How much swinging will be happening?
  - Only voted with the liberals **three times** in close cases

Trump v. Hawaii

- Travel ban
- Indefinitely prevents immigration from six countries: Chad, Iran, Libya, North Korea, Syria, and Yemen
- Upheld as lawful and constitutional
- 5-4
- Learned the hard way that the travel ban is relevant all over the country
- Not about state power; state was a party

Trump v. Hawaii

- Two most important facts
  - The **third** travel ban restricted entry of nationals of counties "whose systems for **managing and sharing information** about their nationals the President deemed **inadequate**"
  - While campaigning for office and during his tenure, including after the third travel ban was adopted, the President and various advisers made **anti-Muslim statements** and indicated the travel bans were designed to exclude Muslims from the United States

Trump v. Hawaii

- Immigration and Nationality Act (INA) argument
  - The INA allows the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States"
  - This statute "**exudes deference** to the President in every clause," and the travel ban falls "**well within**" the statute

Trump v. Hawaii

- Establishment Clause argument
  - Proclamation is neutral on its face
  - Because this case involved a "**national security directive regulating the entry of aliens abroad**" the Court only applied "rational basis review" where it would uphold the travel ban "so long as it can **reasonably be understood** to result from a **justification independent of unconstitutional** grounds"
  - "It cannot be said that it is impossible to 'discern a relationship to legitimate state interests' or that the policy is 'inexplicable by anything but animus'"

Overall Observations

- Mainstream media has overstated the Court's view of the irrelevance of the President's statements
  - National security directive regulating the entry of aliens abroad
  - Little comfort to those challenges the President's other immigration-related activities
- Win for Jeff Sessions
- Was this a hit or miss for Kennedy?

Overlooked Issue of Lasting Impact

- Travel ban will go away…lower courts issuing nationwide injunctions will not (unless the Supreme Court curtails the practice)
- Ninth Circuit issued a "nationwide"/"global"/"cosmic"/beyond the parties injunction against the Trump
- Supreme Court didn't have to address this issue because it ruled in favor of Trump (so no injunction)
  - Thomas: "I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality."
- Looming in sanctuary cities dispute (and many, many others)

Masterpiece Cakeshop v. Colorado Civil Rights Commission

- No public accommodations ordinances in the South protect against sexual orientation discrimination
- Case of popular culture interest
- Court didn't decide anything in this case so this issue will be back before the Supreme Court

Masterpiece Cakeshop v. Colorado Civil Rights Commission

- Court reverses a ruling against the owner of a cake shop who refused to create a wedding cake for a same-sex couple because of his religious beliefs
- Colorado Civil Rights Commission acted with hostility toward religion "inconsistent with the First Amendment's guarantee that our laws be applied … neutral[ly] toward religion"
- Court fails to rule whether the cake maker **had** or **didn't have** a First Amendment free speech or free exercise of religion right to not make a wedding cake for a same-sex couple

Masterpiece Cakeshop v. Colorado Civil Rights Commission

- Many believe this will be the enduring language from the Court's opinion: "**Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law**.
- *Brush & Nib Studio v. City of Phoenix*—gay couples wins
- *Arlene's Flower's v. Washington* petition—sent back to consider animus toward religion

South Dakota v. Wayfair

- Supreme Court held states and local governments can require vendors with no physical presence in the state to collect sales tax in some instances
- In this case "economic and virtual contacts" between South Dakota and Wayfair were enough to create a "substantial nexus" with South Dakota allowing the state to require collection
- Between $8-$33 million big deal a year
- 5-4 decision

Precedent

- 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*

Hope

- In March 2015 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* in *Direct Marketing Association v. Brohl* for many of the same reasons the State and Local Legal Center (SLLC) stated in its *amicus* brief in that case
- Specifically, internet sales have risen astronomically since 1992 and states and local governments are unable to collect most taxes due on sales from out-of-state vendors

States Respond

- Following the 2015 Kennedy opinion a number of state legislatures passed laws requiring remote vendors to collect sales tax in order to challenge *Quill*
- South Dakota's law was the first ready for Supreme Court review
- It requires out-of-state retailers to collect sales tax if they annually conduct $100,000 worth of business or 200 separate transactions in South Dakota

Oral Argument

- Before oral argument
  - Three likely votes for overturning *Quill*
    - Justice Kennedy
    - Justice Gorsuch
    - Justice Thomas
- After oral argument
  - Kennedy, Gorsuch, and **Ginsburg**, (safe to assume Thomas)
- No clear 5th vote

Why Get Rid of *Quill*?

- The physical presence rule is not a necessary interpretation of the requirement that a state tax must be "applied to an activity with a substantial nexus with the taxing State"
- *Quill* creates rather than resolves market distortions
- *Quill* imposes the "sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow"

Ignoring *Stare Decisis* is a big Deal

- The economy has moved on; so must we
  - In 1992, less than 2 percent of Americans had Internet access. Today that number is about 89 percent.
  - In 1992, mail-order sales in the United States totaled $180 billion. Last year, e-commerce retail sales alone were estimated at $453.5 billion.
  - In 1992, it was estimated that the States were losing between $694 million and $3 billion per year in sales tax revenues as a result of the physical presence rule. Now estimates range from $8 to $33 billion.

Why Not Wait for Congress?

- "Courts have acted as the front line of review in this limited sphere; and hence it is important that their principles be accurate and logical, whether or not Congress can or will act in response"

Nice Shout Out to the States

- Forty-one States, two Territories, and the District of Columbia now ask this Court to reject the test formulated in *Quill*

Votes

- **Kennedy**, Thomas, Ginsburg, Alito, and Gorsuch
- **Roberts**, Breyer, Sotomayor, and Kagan
- Why might have Justice Alito provided the 5th vote?
- Conservative Justices allow states and local governments to raise taxes!?

What Did the Court Say about South Dakota's Law?

- To require a vendor to collect sales tax the vendor must still have a "substantial nexus" with the state
- The Court found a "substantial nexus" in this case based on the "**economic and virtual contacts**" Wayfair has with the state
  - "A business could not do $100,000 worth of business or 200 separate transactions in South Dakota "unless the seller availed itself of the substantial privilege of carrying on business in South Dakota"
  - "And respondents are large, national companies that undoubtedly maintain an extensive virtual presence"

What Did the Court Say about South Dakota's Law?

- Three features of South Dakota's tax system that "appear designed to prevent discrimination against or undue burdens upon interstate commerce"
  - Provide a safe harbor to those who transact only limited business in South Dakota
  - Don't collect retroactively
  - Join the Streamlined Sales and Use Tax Agreement

Dissent

- Short, predictable
  - "I agree that ***Bellas Hess*** **was wrongly decided**, for many of the reasons given by the Court. The Court argues in favor of overturning that decision because the 'Internet's prevalence and power have changed the dynamics of the national economy.' But that is the very reason I oppose discarding the physical-presence rule. **Ecommerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules**, including the physical-presence rule. Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be **undertaken by Congress**."

Dissent

- Is this really a crisis where we need to change the rules--Amazon is collecting
- Congress has more "flexibility" to deal with this problem
- Small businesses will struggle to calculate taxes

Majority Response to Burdens on Small Businesses

- Someone will come up with software
- South Dakota is protecting small businesses
- Concerns of a complex state tax system are not before us
- Dissent calls these responses "breezy"

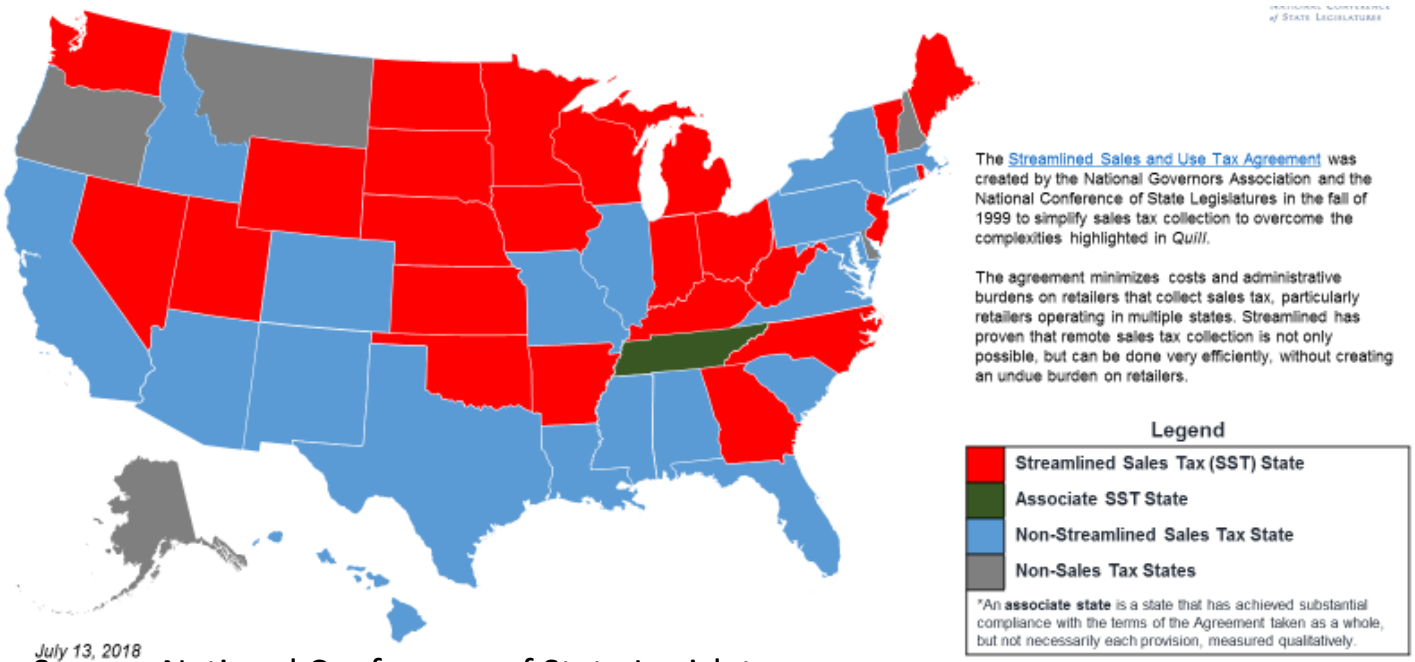
State Sales Tax Collection After *Wayfair*

Key Components:

- Streamlined Sales and Use Tax Agreement (SST)
- Economic Nexus Laws
- Notice and Reporting Laws
- Marketplace Collection Provisions
- Implementation Dates

Streamlined Sales and Use Tax Agreement (SST)

- Agreement between states to simplify sales tax collection and minimize costs and administrative burdens on retailers operating in multiple states



Source: National Conference of State Legislatures

In the South

SST States:

- AR
- GA
- KY
- NC
- OK
- TN (Associate State)
- WV

Non-SST States:

- AL
- FL
- LA
- MO
- MS
- SC
- TX
- VA

Economic Nexus/Notice and Reporting

- Economic Nexus:
  - Require businesses that have a certain amount of economic activity (sales volume, etc) to collect and remit applicable sales taxes
- Notice and Reporting Requirements:
  - Impose notification and reporting requirements on out-of-state retailers that do not collect sales tax in a state

In the South

Economic Nexus:

- MS
- TN

Notice/ Reporting:

- SC
- TX

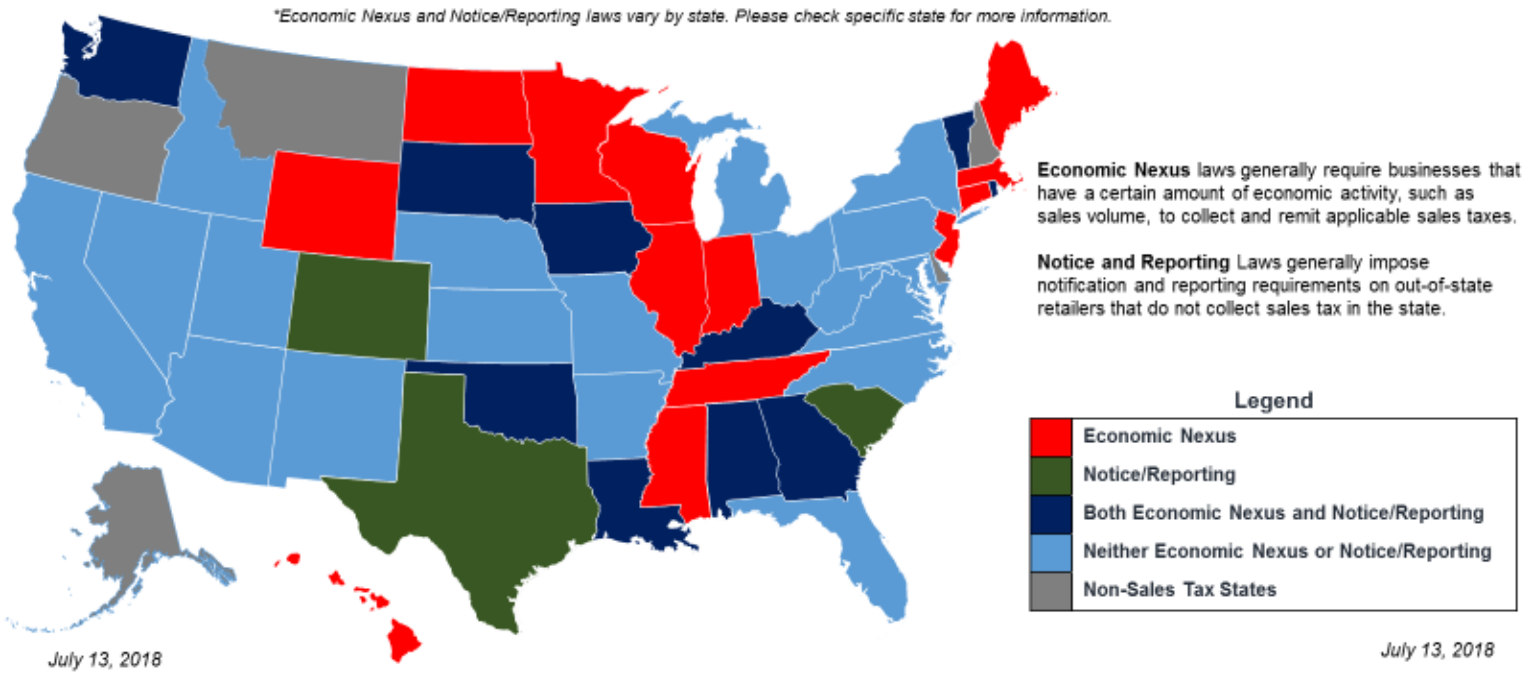
Both:

- AL
- GA
- KY
- LA
- OK

Neither:

- AR
- FL
- MO
- NC
- WV
- VA

Economic Nexus/Notice and Reporting



Source: National Conference of State Legislatures

State Marketplace Laws

- Marketplace collection:
  - Provisions that aim to require online and other marketplaces to collect and remit sales and use tax if a retailer sells products on the marketplace
- Standard/Traditional Marketplaces:
  - Multiple sellers sell products on a single platform
- “Referral” marketplaces:
  - Customers may search for products and then are referred to purchase those products

In the South

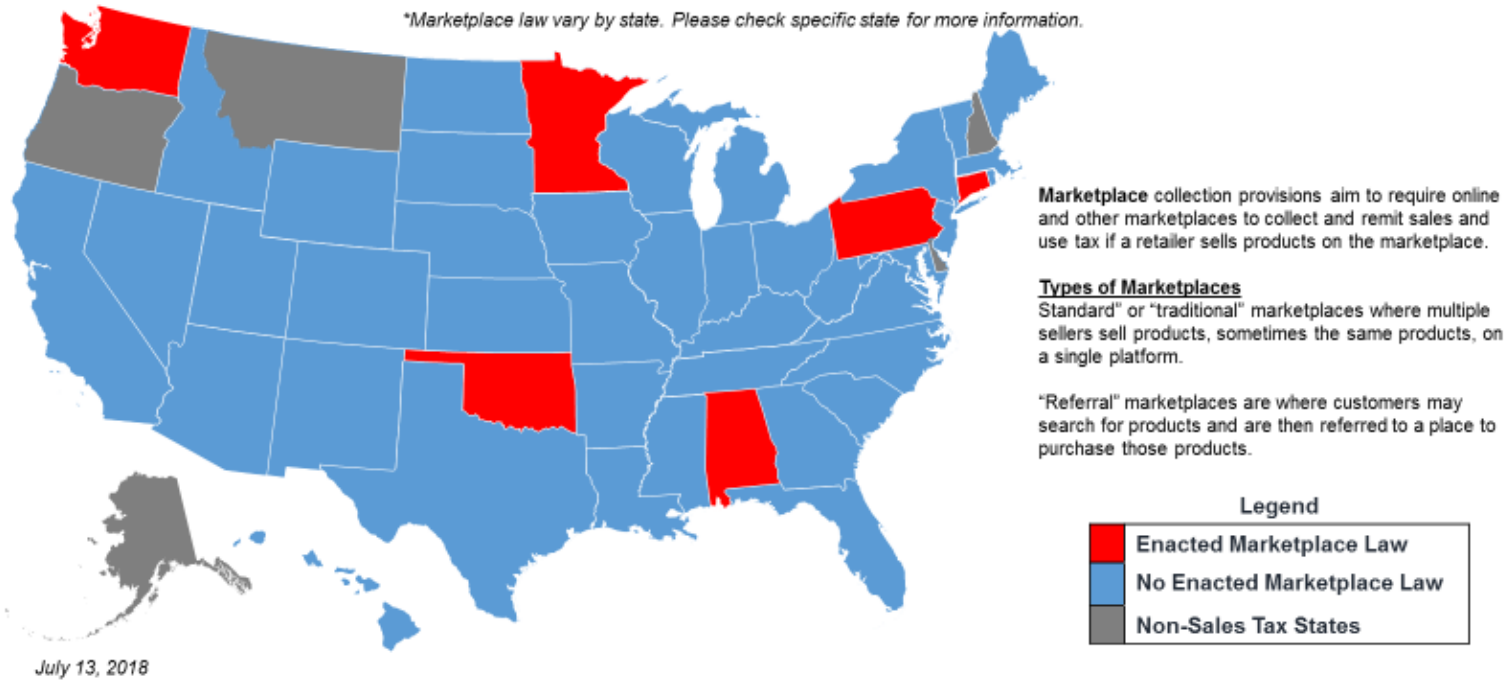
Marketplace Law Enacted:

- AL
- OK

Not Enacted:

Everyone Else!

State Marketplace Laws



Source: National Conference of State Legislatures

Remote Sales Tax Enforcement Dates

No State Action

- AR
- FL
- MO
- NC
- TN
- WV
- VA

State Commented/TBD

- SC
- TX

Gradual Phases

- AL

June 21, 2018

- MS

July 1, 2018

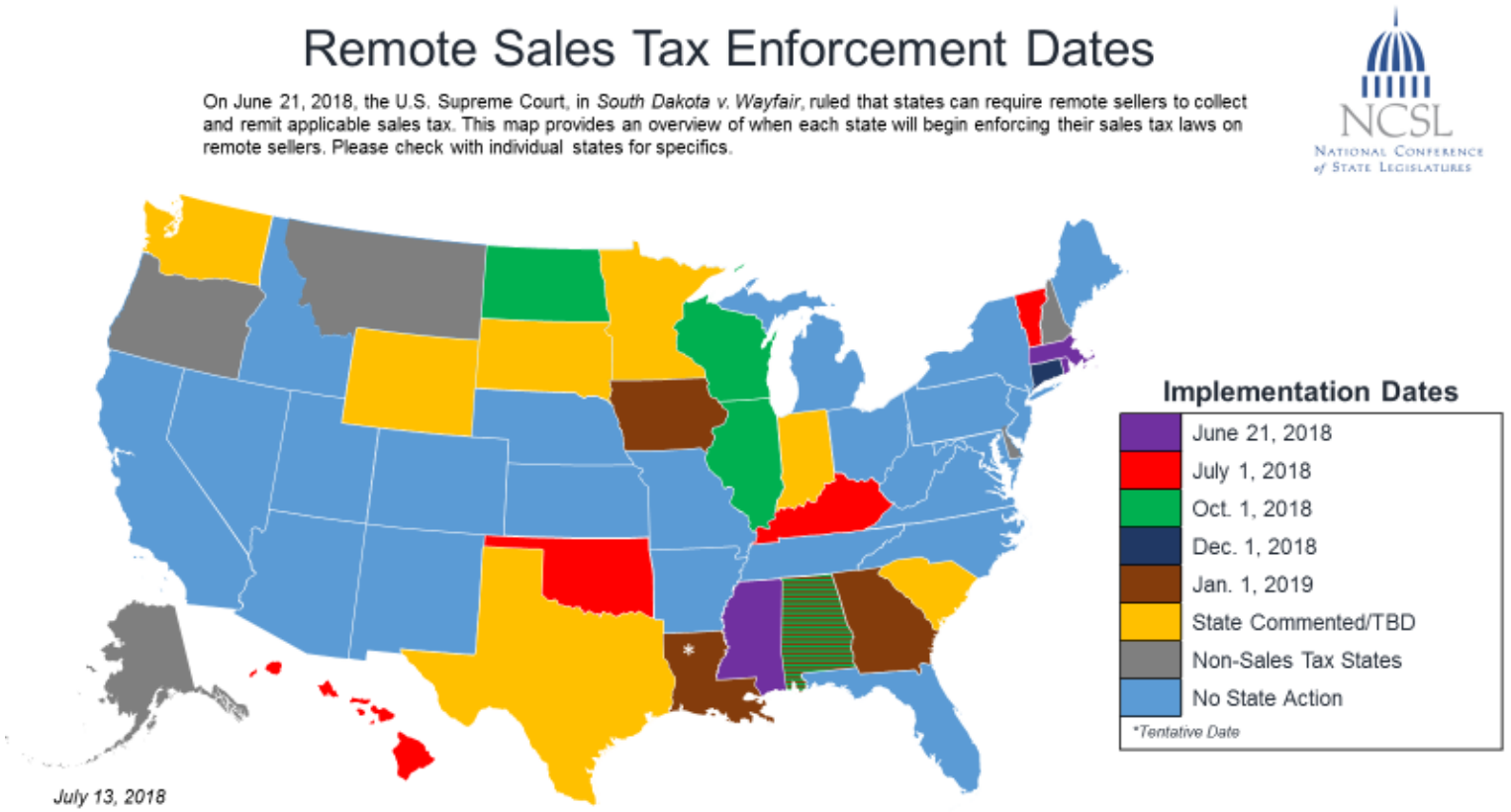
- KY
- OK

Jan 1, 2019

- GA
- LA (Tentative)

Other Information

- Sales Thresholds: $100,000 or 200 transactions (*Wayfair* standard)
  - KY, LA, SC
  - AL and GA have higher sales thresholds
- Home Rule States: AL and LA
- Only one state (Hawaii) has made its tax retroactive



Source: National Conference of State Legislatures

Justice Thomas

- Justice Byron White joined the majority opinion in *National Bellas Hess*. Twenty-five years later, we had the opportunity to overrule *Bellas Hess* in *Quill*. Only Justice White voted to do so. I should have joined his opinion. Today, I am slightly further removed from Quill than Justice White was from *Bellas Hess*. And like Justice White, a quarter century of experience has convinced me that *Bellas Hess* and *Quill* "can no longer be rationally justified." The same is true for this Court's entire negative Commerce Clause jurisprudence. Although I adhered to that jurisprudence in *Quill*, it is never too late to "surrende[r] former views to a better considered position." I therefore join the Court's opinion

Partisan Gerrymandering—A Brief History

- Partisan gerrymandering claims are justiciable--*Davis v. Bandemer* (1986)
  - Supreme Court may rule some amount of partisan gerrymandering is too much and violates the Equal Protection Clause
  - Six votes for this position
  - Weren't five votes to lay out a standard for when partisan gerrymandering is unconstitutional
- Still no standard for partisan gerrymandering cases--*Vieth v. Jubelirer* (2004)
  - Justice Kennedy: "The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering"

Partisan Gerrymandering Cases Overview

- Supreme Court had an opportunity in two cases to lay out a standard for partisan gerrymandering
- Failed to do so for procedural reasons
- Neither case is over
- Many cases are following in the wake

Partisan Gerrymandering Cases

- Lower courts in both cases laid out (different) standards for when partisan gerrymandering is unconstitutional
- *Gill v. Whitford* involves a statewide Equal Protection vote dilution and First Amendment association challenge to state legislative redistricting (Wisconsin)
- *Benisek v. Lamone* involves a single-district challenge to a congressional district based solely on First Amendment retaliation (Maryland)

Gill v. Whitford

- "Cracking" divides up supporters of one party among different districts so that they do not form a majority in any of them
- "Packing" puts large numbers of a party's supporters in relatively few districts, where they win by large margins
- Allegations
  - Wisconsin legislature "packed" and "cracked" Wisconsin Democrats into legislative districts to give Republicans a statewide advantage
  - In 2012, Republicans won 60 out of 99 Assembly seats with 48.6% of the statewide vote; in 2014, Republicans won 63 Assembly seats with 52% of the vote

Gill v. Whitford

- Argument
  - The "efficiency gap" compares each party's respective "wasted" votes across all legislative districts
  - "Wasted" votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win
  - "Large and unnecessary efficiency gap" in favor of Republicans violated the First Amendment right of association of Wisconsin Democratic voters and their Fourteenth Amendment right to equal protection

Gill v. Whitford

- Holding
  - To have standing (in general) a challenger must show individual harm
  - To have standing in a vote dilution case a challenger must "prove" her or she lived in a "packed" or "cracked" district
  - None of the challengers tried to prove this (though 4 alleged they did)
  - The efficiency gap may prove **statewide** harm to a **party** but not harm to an **individual**
  - Four challengers living in allegedly "packed" or "cracked" districts get another shot at proving standing

Gill v. Whitford

- Justices Kagan, Ginsburg, Breyer, and Sotomayor "imagine"
  - Not so hard to prove a person lives in a packed or cracked district
    - Statewide remedy might be appropriate if enough districts are packed or cracked
  - What if challengers tried harder to argue this case as a First Amendment association case?
    - Proving standing shouldn't be too hard—"when the harm alleged is not district specific, the proof needed for standing should not be district specific either"
- Justices Gorsuch and Thomas would have given the challengers another shot at proving standing

Overall Observations

- Kennedy could have joined the Kagan opinion but didn't; why?
  - Lays out a roadmap for successfully bringing partisan gerrymandering claims which would have been "the law" had it had five votes
  - Very speculative and hypothetical
- Future of partisan gerrymandering leaders will be Roberts and Kagan
  - Both consensus builders with moderate leanings
- Is it now harder or easier to bring partisan gerrymandering cases?
  - Easier because of **clarity**; harder because of **rigor**

Is Partisan Gerrymandering Dead?

- If and as long as the Court has five solid conservatives—probably
- But…
  - Lower courts want a standard and will continue to push the Court to give them one
  - Cases exist which have much worse efficiency gaps than Wisconsin's
    - NC: The 2016 efficiency gap, was 19.4% favoring Republican candidates; the thirteenth highest in all of the United States from 1972 to 2016
  - State constitutions offer a possible remedy (Pennsylvania)

Murphy v. NCAA

- Supreme Court rules Federal Professional and Amateur Sports Protection Act (PASPA) unconstitutional
- PASPA prohibited states from authorizing sports gambling
- Violates Constitution's Tenth Amendment anticommandeering doctrine
- 6-3 decision
- Formerly "Christie" case

Murphy v. NCAA

- History of the case is complicated
  - Atlantic city was struggling
  - New Jersey wanted to allow sports gambling
  - PASPA prevented it from doing so
  - If PASPA is unconstitutional…New Jersey could authorize sports gambling

Murphy v. NCAA

- What is anticommandeering?
  - Justice Alito admits it "sounds arcane"
  - "[S]imply the expression of a fundamental structural decision incorporated into the Constitution, i.e., **Congress lacks the power to issue orders directly to the States**"

Murphy v. NCAA

- Why anti-commandeering here?
  - By telling states they could not authorize sports gambling (either outright or by repealing bans on the books) PASPA violates the anticommandeering rule
  - "[PASPA] unequivocally dictates what a state legislature may and may not do. . . . [S]tate legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."

Why is this case a Big Deal?

- Supreme Court has only twice ruled a law amounted to anti-commandeering
- This case was different than previous case because it didn't require a state to do anything
  - "The distinction between compelling a State to enact legislation and prohibiting a State from enacting new laws is an empty one. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event"
- Court struck down the entire law
  - PASPA contains provisions prohibiting states from operating a sports betting lottery, private actors from operating sports betting schemes pursuant to state law, and restrictions on both state and private actors regarding advertising sports gambling

Why is this case a Big Deal?

- Court rejects the notion PASPA amounts to valid preemption provision
  - "[I]n order for the PASPA provision to preempt state law, it must satisfy two requirements. First, it must represent the **exercise of a power conferred on Congress by the Constitution**; pointing to the Supremacy Clause will not do. Second, since the **Constitution 'confers upon Congress the power to regulate individuals, not States,'** the PASPA provision at issue must be best read as one that regulates private actors."
  - "[I]t is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors."
- Dissents were very short and mostly focused on severability

Not A Get Rich Quick Scheme

- In the South only **Mississippi** and **West Virginia** have authorized sports gambling so far
- Nevada 2017
  - Total tax collections on all gambling: $875 million
  - Total tax collections on sports gambling: $16.6
- Why?
  - "Handle" (total bets made) aren't taxed; "hold" (sports book winnings) are taxed
  - Hold percent is 5% of the handle
- In Vegas sports gambling is one of many "amenities"

Murphy v. NCAA

- Beyond sports gambling
  - Where else has Congress prohibited states from acting?
  - Potentially problematic federal laws include:
    - Federal legislation related to sanctuary cities
    - Federal restrictions on state tax laws
    - FCC infrastructure mandates
    - Federal ban on state benefits for aliens
    - Potential future attempts to prohibit state legalization of marijuana use

Murphy v. NCAA

- Sanctuary cities impact
  - 8 U.S.C. 1373 prohibits states and local governments from restricting employees from sharing immigration status information with federal immigration officials
  - DOJ has interpreted this statute very broadly (provide advance notice of release of "criminal aliens" from local government custody; hold "criminal aliens" for pick by ICE without a judicial warrant
  - Federal district court in *City of Philadelphia v. Sessions* ruled the statute unconstitutional
  - "8 U.S.C. §§ 1373(a) and 1373(b) by their plain terms prevent 'Federal, State, or local government entit[ies] or official[s] from' engaging in certain activities. These provisions closely parallel the anti-authorization condition in PASPA which was at issue in *Murphy*."

Husted v. A. Philip Randolph Institute

- Ohio's processes of removing people from the voter rolls does not violate federal law
- If a person doesn't vote for two years Ohio sends them a confirmation notice
- If they don't respond to the notice and don't vote in the next four years, Ohio removes them from the voter rolls
- 5-4 vote
- (First Ohio compares the names and addresses contained in Ohio's Statewide Voter Registration Database to the National Change of Address database)

Husted v. A. Philip Randolph Institute

- National Voter Registration Act (NVRA) explicitly allows the Ohio process
- So what is the problem?
- The "Failure-to-Vote Clause" in the NVRA says a state program "shall not result in the removal of the name of any person . . . **by reason of the person's failure to vote**"
- Challengers' argument: Ohio's process violate the NVRA's Failure-to-Vote Clause because "the failure to vote plays a prominent part in the Ohio removal scheme"
  - Failure to vote is used as a trigger for sending the confirmation notice and as a requirement for removal

Husted v. A. Philip Randolph Institute

- Why does Ohio win?
  - Other language in the NVRA states that registrants may not be removed "*solely* by reason of a failure to vote"
  - The NVRA simply forbids the use of nonvoting as *the sole criterion* for removing a registrant, and Ohio does not use it that way
  - Ohio removes registrants only if they have failed to vote *and* have failed to respond to a notice

Husted v. A. Philip Randolph Institute

- Why is this case a big deal?
  - It involves voting
  - It involves voting in Ohio
  - It involves people getting **tossed from the voter rolls**
  - 12 states use the Ohio process; others use a similar process; now all 50 states can use the Ohio process
  - Lots of great language in the opinion about legislative authority

Husted v. A. Philip Randolph Institute

- The case is seen as political
  - Justice Alito's opinion sticks to the statute
    - JUSTICE SOTOMAYOR's dissent says nothing about what is relevant in this case—namely, the language of the NVRA—but instead accuses us of "ignor[ing] the history of voter suppression" in this country and of "uphold[ing] a program that appears to further the . . . disenfranchisement of minority and low-income voters." Those charges are misconceived.
  - Justice Sotomayor isn't having it
    - "Congress enacted the NVRA against the backdrop of substantial efforts by States to disenfranchise low-income and minority voters, including programs that purged eligible voters from registration lists because they failed to vote in prior elections. The Court errs in ignoring this history and distorting the statutory text to arrive at a conclusion that not only is contrary to the plain language of the NVRA but also contradicts the essential purposes of the statute, ultimately sanctioning the very purging that Congress expressly sought to protect against."

Husted v. A. Philip Randolph Institute

- The decision is seen as political
  - CNN headline: "Democrats fret court's Ohio decision could lead more states to purge voter rolls"
  - President Trump tweet: "Just won big Supreme Court decision on Voting! Great News!"

Husted v. A. Philip Randolph Institute

- What about good governance?
  - Numerous local governments have been sued for having too many ineligible voters on the rolls
  - In settlements local governments have agreed to the Ohio process
  - There must be **some process** for removing voters who have moved other than relying on the Postal Service Change of Address

Southern States with the "Ohio Process"

Same process

- Georgia
- Alaska
- Florida
- Missouri
- Oklahoma
- Tennessee
- West Virginia

Similar process

- Arkansas
- Kentucky
- Louisiana
- Mississippi
- North Carolina
- South Carolina

Minnesota Voter Alliance v. Mansky

- States can't: ban (all or a confusing body of) political apparel at the polling place
- States can: regulate campaign-related at the polling place
- Where is the line?
  - Who knows
- 7-2 decision
- Very good loss for state and local government

Minnesota Voter Alliance v. Mansky

- Minnesota law which prohibits voters from wearing a political badge, political button, or anything bearing political insignia inside a polling place on Election Day
- Andrew Cilek was temporarily prevented from voting for wearing two items: a T-shirt with the words "Don't Tread on Me" and the Tea Party Patriots logo and a "Please I. D. Me" button
- He argued Minnesota's ban on political speech at the polling place violates the First Amendment because it is **overly broad**
- Supreme Court agreed

Minnesota Voter Alliance v. Mansky

- Supreme Court had a long list of problems with this statute
  - Bottom line: law lacked a "sensible basis for distinguishing what may come in from what must stay out"
  - Statute doesn't define "political"
  - Minnesota stated that apparel on "any subject on which a political candidate or party has taken a stance" is disallowed. To this the Court responded: "A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable."
  - Minnesota interpreted the statute to ban apparel "promoting a group with recognizable political views." The Court pointed out this could include associations, educational institutions, businesses, and religious organizations who have stated an opinion on issues confronting voters in a given election

Minnesota Voter Alliance v. Mansky

- Without opining on their constitutionality the Court cited to some more "lucid" examples
  - Cal. Elec. Code Ann. §319.5 (West Cum. Supp. 2018) (prohibiting "the visible display . . . of information that advocates for or against any candidate or measure," including the "display of a candidate's name, likeness, or logo," the "display of a ballot measure's number, title, subject, or logo," and "[b]uttons, hats," or "shirts" containing such information)
  - Tex. Elec. Code Ann. §61.010(a) (West 2010) (prohibiting the wearing of "a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election")

Southern States Accessories or Apparel in the Polling Place

Don't Regulate

- Alabama
- Florida
- Kentucky
- North Carolina
- Oklahoma
- Virginia
- West Virginia
- Wyoming

Regulate

- Arkansas
- Georgia
- Louisiana
- Mississippi
- Missouri
- Tennessee
- South Carolina
- Texas

Kennedy Focused Observations

- Justice Kennedy ruled the world
  - In the majority in all the big cases
  - *South Dakota v. Wayfair*—his idea, his opinion
  - Cake case—he writes the opinion, his theory of the case triumphs
  - Partisan gerrymandering—Roberts and Kagan were fighting for his heart and mind

Kennedy Focused Observations

- Why was he so indecisive/narrow this term?
  - Cake case—really torn?
  - Partisan gerrymandering—waiting for something worse?
- Because he knew he was leaving?
- Why was has so conservative this term?
  - He is a conservative

Kennedy Focused Observations

- He was angry about something you all should care about—misbehavior by the government
  - Cake case—discriminatory statements by Colorado Civils Rights Commission members
  - Retaliatory arrest case—look up Fane Lozman getting arrested at a City of Riviera Beach board meeting
  - Travel ban—government officials speaking and acting with discriminatory animus

His Parting Words are to Elected Officials

- There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does **not mean those officials are free to disregard the Constitution and the rights** it proclaims and protects. The **oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do**. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

His Parting Words are to Elected Officials

- The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. **An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts**.

What Does This Term Say

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

Supreme Court is Incredibly Powerful

- They decide
- Pick and choose what they decide, when they decide, how they decide
- Never stop, rarely slow down
- Decide many of the most important issues of the day
- Final say on constitutional matters

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 were lucky to have Justice Kennedy right where he was
  - 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 has been our collective voice and conscience; Justice Kennedy made it a moderate, thoughtful, cautious, and open-minded one
- And now he is leaving

Where did He Provide the Critical 5th Vote?

- Anything, everything
  - Gun rights
  - Death penalty
  - Affirmative action
  - Abortion
  - Same sex marriage
  - Land use
  - *Citizens United*

Where Was Justice Kennedy "Liberal"?

- GLBTQI issues
- Death penalty
- Race (sometimes)
- Abortion (sometimes)

Who is Judge Kavanagh?

- We know three things about him for sure
  - Very conservative (could be an even more reliable conservative)
    - In between Thomas and Gorsuch/Alito
  - Over 1/3 of his opinions involve administrative law
  - D.C. Circuit doesn't decided many cases involving bread and butter issues for states and local governments
    - First Amendment
    - Public employment
    - Takings
    - Qualified immunity
    - Fourth Amendment

Will He Get Through?

- Conventional wisdoms says he gets YES but there is no issue like abortion
- Only needs 51 votes
- Has that in Republicans **exactly** (-McCain +Pence)
- Possible Republicans to vote AGAINST him: Collins, Murkowski, Paul
- Possible Democrats to vote IN FAVOR of him: Manchin, Donnelly, Heitkamp, McCaskill, Jones