Cell Phones, Sports Betting, and Sales Taxes

The Cato Institute's annual Constitution Day symposium brings together leading experts to comment on their contributions to the *Cato Supreme Court Review*, analyzing major cases decided in the previous year's Supreme Court term. This year's lineup included Cato's Trevor Burrus on the groundbreaking Fourth Amendment case *Carpenter v. United States*; Arizona Attorney General Mark Brnovich on the intersection of sports gambling and the Tenth Amendment in *Murphy v. NCAA*; and Joseph Bishop-Henchman, executive vice president of the Tax Foundation, on the dormant commerce clause and the landmark online sales tax case *South Dakota v. Wayfair*.

TREVOR BURRUS: If you have a cell phone on you and it's currently turned on, it is pinging various cell towers all around us. Through that pinging mechanism, your cell phone company is able to know roughly where you are. It can't be as precise as "second row, third seat," but it can put you here at the Cato Institute or at least on this block.

Carpenter v. United States turned on the question of whether the government needs to obtain a warrant before getting that information from your cell phone provider, which can be obtained with a mere administrative subpoena under the Stored Communications Act, without needing to ask a judge for approval or to show probable cause. Timothy Carpenter was incriminated by his own cell phone when he took part in a series of robberies of RadioShacks. Once they had his name, the FBI subpoenaed his mobile carrier for the cell site location information—or "CSLI," as it's referred to throughout the opinion—during a four-month period. The request resulted in the government's obtaining 12,898 location points cataloguing Carpenter's movements at an average of 101 points per day. Carpenter was convicted and sentenced to more than 100 years in prison.

Over the past 10 years, many questions have arisen about the interaction of the Fourth Amendment and technology. In 2012 was *United States v. Jones*, which asked whether a warrant is required when a government agent attaches a GPS device to your car and tracks your movements. The Court ruled that a warrant is needed, because of the physical trespass to the vehicle that occurred upon attaching the GPS tracker.

And in *Riley v. California* in 2014, the Supreme Court considered whether the government needed a warrant to search your cell phone after an arrest. The question was whether in the same way as when you're taken to the police department after an arrest and are searched for weapons and contraband, the police could also search the contents of your cell phone. The Court ruled that police needed a warrant to search the cell phone. Chief Justice John Roberts, in that opinion, strongly emphasized how important our cell phones are to us now and how much information about us is in those cell phones.

So you could look at *Carpenter v. United States* as a compilation of these two cases: your cell phone keeps a lot of data tracking your locations, but it doesn't have the trespass element from Jones because you voluntarily "attached" your cell phone to yourself.

Since 1967, the case of *Katz v. United States* has guided all our conversations about the Fourth Amendment with some small caveats. *Katz* dealt with the question of whether the Fourth Amendment is bound to property rights, specifically whether the government could put a listening device in a phone booth and record the conversations in it without the warrant.

In *Katz*, the Court said that the Fourth Amendment protects "people not places," and therefore they were going to define the word "search" using a "reasonable expectation of privacy" test. Now this might sound strange to anyone who has ever used the word "search" in common parlance and did not mean violating a reasonable expectation of privacy. But the big question in Fourth Amendment law is, when does the Fourth Amendment apply? And it applies when police and law enforcement and other government agents have performed a search. So what does that mean? *Katz* told us at least one definition of a search is when it violates your reasonable expectation of privacy.

Katz led to *Smith v. Maryland* and *United States v. Miller*, which gave us something called the third-party doctrine. Third-party doctrine seems to follow inevitably from the reasonable expectation of privacy test. The reasoning is that if you give up your information to a third party, then it is now theirs, not yours, so you don't have any expectation of privacy in that information. That includes trash you put out on the curb, your bank records, and the numbers you dial on your phone. And that all seems quite problematic now, because the amount of information held by third parties on all of us is quite vast.

So third-party doctrine seems to violate the basic premise of the Fourth Amendment, which is that the government shouldn't be able to obtain so much information about me without a warrant. Under the third-party doctrine the Fourth Amendment doesn't protect my Google searches, or information held by my cell phone company, or my bank records. That's the question that came before the court in the *Carpenter* case.

In his dissent, Justice Neil Gorsuch wondered why under current Fourth Amend-

ment law the government can apparently demand a copy of all your emails from Google or Microsoft without implicating your Fourth Amendment rights. Can it secure your DNA from a company like 23andMe without warrant or probable cause? *Smith* and *Miller* say yes it can, following the logic of *Katz*, but that strikes me and others as a result that's difficult to accept. It also seemed to strike Chief Justice Roberts as difficult to accept, but it's not exactly clear why. Roberts seemed uncomfortable with the possibility of overturning the third-party doctrine, or overturning *Katz*, which would be a huge move.

In the majority opinion, Roberts tried to fit protection for cell tower information within the third-party doctrine and the reasonable expectation of privacy test, and how he does that is rather muddled. The doctrine that we get from his majority opinion is a sort of a balancing test, what Orin Kerr has called the "equilibrium-adjustment theory of the Fourth Amendment." As Roberts put it, "As technology has enhanced government's ability to encroach upon areas normally guarded from inquisitive eyes, this Court sought to assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."

He ends up deciding that cell site location information is a unique type of information that is different from bank records and different from the phone numbers you dial when he says that it is a "new phenomenon qualitatively different from telephone records and bank records and has a unique nature." Therefore, he creates a narrow holding that cell phone location data of a certain sort is a special case worthy of special protection, and thus the government must obtain a warrant for it in most cases.

So when I first saw the opinion, I was a little bit befuddled by the scope of it, and lower courts are still chewing it over. We haven't seen a lot of decisions, especially at the appellate level, applying it yet. I looked it up, and most of the cites of *Carpenter* are people having their case reconsidered and remanded in light of the decision.

But I hope Gorsuch's dissent is his first salvo in a career-long battle against existing Fourth Amendment doctrine, against *Katz* and the reasonable expectation of privacy


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> "The third-party doctrine violates the basic premise of the Fourth Amendment."

test unmoored from property rights, and I hope to engage in that. Gorsuch's reading of the Fourth Amendment is that it's tied to property rights, and that you can have various sorts of contractual property rights in information held by third parties, like your bank or your cell phone provider. There are many open questions to be addressed. But now we can start working through what this means, and it will be exciting to watch how it goes.

MARK BRNOVICH: Gambling has a strange or rich history in this country depending on one's perspective. Benjamin Franklin ran the Philadelphia lottery. The Continental Army was financed through various lotteries. There are buildings at Harvard that were financed through lotteries. Going back to Greek mythology, it was said that Poseidon, Hades, and Zeus gambled for who would control the heavens, the earth, and the seas. Even in the Old Testament and the New Testament, there are references to gambling. So gambling's always been around, and we've always had a bit of a love–hate relationship with it. And I would submit to you that part of that is because historically gambling has been a cash-intensive industry with associated social costs.

As a society, we will tolerate a certain amount of gambling. But when it causes a scandal or incurs a social cost, there's a backlash, and suddenly people don't want it around anymore. And that's important to consider when analyzing *Murphy v. NCAA* because changes in society's attitude toward gambling over the past few decades provide context for *Murphy*. Any time the Court makes any decision, it doesn't happen in a vacuum; it happens in a certain social context.

When the Professional and Amateur Sports Protection Act (PASPA) was passed in 1992, we had just gone through a wave of gambling expansion. In 1954, a state senator proposed the first modern lottery to help finance public schools in New Hampshire. And he tried for 10 years before it was finally passed in 1964. Then in 1967, New York got the lottery. Then, we start having this explosion. The Indian Gaming Regulatory Act was passed in the late 1980s, which led to tribal casinos throughout the country. In reaction to this expansion, Congress looked for a way to stop or minimize the amount of gambling on sports, and passed PASPA to ban sports betting in most of the country. But PASPA didn't create a direct federal prohibition of sports gambling. Rather, it sought to prohibit the states from legalizing it or repealing their state-law bans. PASPA grandfathered certain states that had legal sports betting, most notably Nevada.

You may recall that New Jersey legalized casino gambling in Atlantic City in the

1970s, in a measure approved by a public vote. Casinos really kicked off in the late 1970s and into the 1980s. But when PASPA was passed, New Jersey did not have legal sports gambling, so it was not included in the grandfather provision. New Jersey eventually passed a constitutional amendment in 2011 to allow sports gambling. This amendment was challenged. It did not go to the Supreme Court; the appellate court upheld the PASPA anti-authorization rule. But then the legislature made a second effort to allow sports gambling in 2014. That case did eventually make it up to the Supreme Court in *Murphy*.

It was a 7–2 decision, with Justice Samuel Alito writing the opinion. The focus of the opinion was on PASPA's anti-authorization provision, which banned states from authorizing sports betting. The Court held that the provision violated the anti-commandeering doctrine. Under this doctrine, Congress can't tell a state what to do, because it's essentially commandeering the state's resources and abrogating the state's sovereignty. This principle had come up in prior cases, including *New York v. United States*, which arose when Congress attempted to impose obligations on the states regarding nuclear waste disposal. In *New York*, the Court said Congress cannot force state agents to do something, in this case to take title of radioactive waste. Five years later in *Printz v. United States*, again using the anti-commandeering principle, the Supreme Court said the federal government could not tell the states that they had to do background checks on individuals purchasing firearms. In other words, Congress cannot commandeer the resources of the states to do something the federal government wants done.

One of the interesting things about *Murphy* is that Justice Alito outlined how the anti-commandeering doctrine applies in two ways: Congress can't command the states to do something in the spheres covered by the doctrine, but Congress also can't command the states *not* to do something. In this case, Congress can't forbid the states from passing laws authorizing gambling. Alito said it's a distinction without a difference, between forbidding the states to do something and commanding the states to do something. Action and inaction are two sides of the same coin, two ways of the states' exercising the same reserved power. That's a very important principle, and we've already seen some of the consequences of it being articulated in *Murphy*.


MARK BRNOVICH

> "Congress can't command the states to do something or not to do something."

In the several months since *Murphy* was handed down, we've already seen some ramifications of the decision—for example, cases regarding the legality of sanctuary cities. In *Philadelphia v. Sessions*, the district court applied the anti-commandeering doctrine to strike down 8 U.S.C. § 1373, which told states they couldn't preclude local governments from assisting federal immigration enforcement. As explained in *Murphy*, the federal government can neither tell state or local law enforcement officials what they must do, nor what they can't do. Recently, a similar analysis came from another district court in *United States v. California*.

These cases are still winding their way through the court system. It will be interesting to see what happens, because I do think that immigration enforcement is a little bit different from, say, sports gambling. But it does seem to me at first blush that *Murphy* is a pretty broad decision.

The anti-commandeering doctrine doesn't care whether the intrusion on state sovereignty is affirmative or negative. The Court is going to limit the power of Congress to tell states both what they must do and what they can't do. This holding could have broad implications in other areas of the law, such as immigration and taxation.

When we talk about checks and balances, people tend to think about it in traditional terms: the legislature being a check on the executive, and the executive being a check on the judiciary. And there's that triangle you learned in elementary school where they all check each other. But the reality is that the Framers of our Constitution fully expected the states to be a check on the federal government. And the idea is that we would preserve liberty by limiting the federal government's powers and authorities, and having states zealously guard the rights of their citizens. That was a part of the Constitution's original system of checks and balances, and it's why I think that *Murphy* is intriguing on a lot of levels. It really does restore this balance. It helps push back against Congress and its ability to micromanage the states. In the end, I think *Murphy* will be a great victory for individual liberty.

JOSEPH BISHOP-HENCHMAN: "Commerce clause" is a dirty word among libertarians. But the commerce clause I'm speaking about today is not the evil, bad, interstate commerce clause—the one that's allowed the federal government to ban even intrastate noncommerce—but the good interstate commerce clause, the one that bans

state laws that discriminate against or unduly burden interstate commerce. It first emerged in the case of *Gibbons v. Ogden* in 1824 when, who else, New Jersey and New York were squabbling about who got to monopolize ferry trade traffic between them. Chief Justice John Marshall ruled, in effect: "Neither of you; the Constitution's commerce clause gives the power over interstate commerce to the federal government, even when the Feds have done nothing." So states cannot harm interstate commerce, and free trade between New Jersey and New York proceeded.

So for a long time after *Gibbons v. Ogden*, the rule was "states cannot tax interstate commerce at all." And that worked well enough when interstate commerce was properly defined and was a tiny portion of our economy. But it became increasingly unworkable as we entered the 20th century, and increasing numbers of jobs, companies, transactions, and people crossed state lines frequently and routinely. In the 1930s and the 1940s, the Supreme Court greatly expanded the definition of interstate commerce to include nearly everything. The flip side of that is that a total prohibition of state taxation of interstate commerce consistently applied under that definition would deprive states, counties, and cities of all tax revenue, except for maybe property taxes. Now maybe that's not so bad, but it's not the path that we took. Instead, the Supreme Court had to modify its total prohibition, to allow states to tax interstate commerce in certain circumstances. The gist of it is that a tax has to be nonsurprising, nonburdensome, and nondiscriminatory. Let me take those in reverse order.

First is nondiscriminatory. That means a tax on an activity out of state should be no more than the tax on identical activity in state. States love trying to get around this—taxing outsiders to benefit voters—and the Supreme Court deserves full credit for slapping this down almost every time.

Nonburdensome means the state enactment cannot be so costly, so complex, and so damaging that it's really just a tariff with the purpose of banning imports to benefit instate producers. That's a no-no, and you'll get even Justice Clarence Thomas angry at you. The hard part for lawyers like me is finding that line between normal, everyday, ordinary tax compliance and burdensome, tariff-like, unconstitutional tax compliance. It's a fun job.


JOSEPH BISHOP-HENCHMAN

> "*Wayfair* affirmed the dormant commerce clause—that's good news."

Nonsurprising—and that's where this year's decision comes in—means whomever you're taxing has to have some kind of connection, some kind of nexus, with the state. To me, that sounds an awful lot like due process; that class I had first year. When can you be sued in a jurisdiction? Do you have enough minimum contacts? It sounded like due process to just about every constitutional scholar who's taken a look at the question. But in 1967, the Supreme Court looked at it and said, "That's not a due process question, that's a commerce clause question." The case involved a mail-order company that sent catalogs and sold stuff through the mail to people in Illinois. The case was *National Bellas Hess v. Department of Revenue of Illinois*, and the Court essentially said: "No, nexus is a separate test under the commerce clause and a separate standard. The nexus has to be sufficient or substantial." Well, what does that mean? This they defined as "physical presence of the seller inside the state."

Now that itself is a difficult term because corporations are never actually physically present. They are metaphysical entities, truly only present in the form of a piece of paper and a filing cabinet, usually in Delaware. Their employees, their building, their correspondents, their packages, and their advertisements—these things can be physically present, but they are representations, or proxies, for corporations, not corporations themselves.

Now I once thought physical presence could be a restraint on state governance. A decade of experience dealing with that standard has taught me that it is not. Independent contractors who are nonemployees that do certain functions for you who are physically present in a state count as physical presence. New Jersey saw a truck as it entered the state and demanded back taxes before allowing it to go on and deliver its goods, because even a fleeting physical presence legally counts as physical presence. Washington State demanded seven years of taxes from a CEO who flew into the state to visit family, because unrelated-to-business physical presence counts as physical presence. And Massachusetts now says that any website that places cookies on the computers of Massachusetts residents is subject to state taxes, because physical presence of electronic "ones" and "zeros" counts as physical presence.

But the direct issue in *South Dakota v. Wayfair* was whether the commerce clause restrains South Dakota from collecting sales tax from Wayfair on Wayfair's sales to South Dakota residents. It's not discriminatory. The exact same tax is collected by South Dakota businesses on their sales to South Dakota residents. It's not burdensome.

South Dakota actually has a pretty-easy-to-comply-with sales tax system: just a couple of rates, a pretty broad base that is uniform across the state, and the state even provides "lookup" and "definition" software, and they've centralized collections so you only have to deal with one entity in the state. South Dakota is also 1 of 22 states that is a member of a multistate compact, streamlined sales tax governing board to make interstate sales tax collection a "one-stop shop."

So the *Wayfair* case came down to—not surprisingly—does Wayfair have a minimal level of activity to have to collect South Dakota sales tax? Is there a sufficient nexus? There is, the Supreme Court ruled. In a 5–4 decision—but not the usual conservative–liberal 5–4—the Court said "nexus" is not physical presence. Now it's worth noting that the Court was actually 9 to 0 on the physical presence rule—with even the dissenters saying that *Bellas Hess* was wrongly decided. The four dissenters' beef was that Congress should fix this, not the Court.

So if nexus is not physical presence, then what is? Here's where I was worried, and where many others were worried too, but luckily Justice Anthony Kennedy—who wrote what turned out to be his last-ever majority opinion—left us with some guidance that we have called the "*Wayfair* checklist."

- The tax cannot be applied to only minimal fleeting activity. South Dakota applies its tax only if you sell at least $100,000 a year or 200 transactions into its state. The Court found that reasonable.
- The tax can't be retroactive. Compliance has to be easy, with simplified rates and uniform definitions. If there are lots of taxes in a state, the state has to provide one place to pay them all and access to software to look up that information.
- It can't be discriminatory, of course, and the taxpayer has to have enough activity in the state to meet due process minimums.

Today, Constitution Day, honors the day in 1787 when the Framers sent the Constitution to the states for action. You may recall that our independence was declared in 1776. Within that 11-year interim was a period of interstate squabbling, interstate tariffs, and interstate trade wars. One of the big reasons James Madison and others desired to call the Constitutional Convention was to give the federal government the power to restrain state tax overreaching. One of the legacies of that experience is the dormant commerce clause. States cannot discriminate against, or unduly burden, interstate commerce—even interstate commerce that has fleeting physical presence, unrelated physical presence, or electronic physical presence.

I'm still convincing fellow libertarians and conservatives that this standard—aside from being constitutionally rooted—will be better for individual liberty and state tax restraint than the now-overruled physical presence standard ever was.

Wayfair reaffirmed that the dormant commerce clause is a thing—that's good news. And it reaffirmed that its purpose is to ensure a free trade zone within the United States—that's also good news. *Wayfair* also reaffirmed that parochial state interests do not get to burden interstate commerce. And that's why James Madison is now making you pay sales tax for the stuff you buy online. ■