

Murray: SCOTUS tech rulings reflect changing times



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In a pair of 5-4 decisions issued at the end of this year's term, the Supreme Court recognized that some long established legal principles were outdated because of technological advancements. The Court recognized the growth of our digital economy and reversed two long held legal doctrines.

In *South Dakota v. Wayfair, Inc.*, the Supreme Court overturned existing law that restricted state laws that internet sellers collect sales tax to only those companies that have a physical presence in a particular state. The Court initially noted that the concept of being physically present in a state has become outdated, recognizing that a website may leave cookies saved to the customer's hard drives, or customers may download the company's app onto their phones.

The Court also recognized that at the time of its prior decisions less than two percent of Americans had internet access. Today the number is approximately 89 percent. The Court also stated that at the time of its previous decisions, it could not have envisioned that the world's largest retailer would be a remote seller, Amazon. The Court went on to explain that "the internet's prevalence and power have changed the dynamics of the national economy".

The Court also considered that at the time of its prior decision states were losing between \$694 million and \$3 billion per year in sales tax revenues as a result of the physical presence rule, but now estimates range from \$8 billion to \$33 billion per year. This changing reality required a change in the law. States can now require internet sellers to retain and forward sales tax on items that are sold to residents of a particular state whether or not the vendor has a physical location in the state.

In *Carpenter v. United States*, the Supreme Court rejected long standing principles that there was no expectation of privacy in an individual's information maintained by a third party so that a warrant was not

required to obtain that information. Instead the Court held that a warrant was required to obtain location records from a wireless service provider. Again, the Court recognized the changing reality caused by the growth of technology, determining that to allow the government to obtain detailed location records of an individual by obtaining their Cell Site Location Information ("CSLI") from their wireless carrier without a warrant would violate the Fourth Amendment.

In *Carpenter*, a robbery suspect's location was determined from his CSLI and placed him at the location of various robberies, including the robberies of cell phone retailers. The Supreme Court held that, although generally information maintained by a third party, such as a bank, did not require a warrant or a determination of probable cause, the information regarding the locations of an individual available to a cell phone service provider are so significant that the rules had to change.

The Court reasoned that people carried their cell phones everywhere, including 19 percent that have them in the shower. Thus, almost every move an individual makes can be tracked through CSLI. The Court analogized a cell phone to an appendage such as an arm or leg.

The Court also explained that there were 396 million cell phone service accounts in the United States, whose population is 326 million people. The Court recognized that cell sites, although usually mounted on a tower, can now be found on light posts, flag poles, church steeples, or the sides of buildings, so that the CSLI information regarding an individual's location is now very detailed and specific.

The Court reasoned that the advancement in digital technology making it possible to not only track an individual's location for a short period, but for years, dictated that a warrant would be required to obtain this information. The Court observed that cell phones have become such a pervasive part of daily life that carrying one "is indispensable to participation in modern society". As a result, the old rules did not make sense.

Both *Wayfair* and *Carpenter* reflect the growing impact of technology on previously settled legal principles. The Supreme Court has properly recognized that changing times sometimes requires a change in the law.

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