The Strange Death of *Stare Decisis*

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In this edition of Eyes on E-Commerce, Isaacson and Bertoni argue that the U.S. Supreme Court's overruling of *stare decisis* in its recent *Janus* and *Wayfair* decisions could have profound implications for jurisprudence in the tax arena and many other areas of law.

The doctrine of *stare decisis* has long been a bedrock of American jurisprudence. The Latin phrase is literally translated as "to stand by decided matters," and is itself an abbreviation of the longer Latin phrase "*stare decisis et non quieta movere*," which means "to stand by decisions and not to disturb settled matters." Because of this doctrine, in only the rarest circumstances has the U.S. Supreme Court reversed its prior decisions — particularly those upon which there has been substantial reliance. Indeed, in 1992 Justice Antonin Scalia expressed the then seemingly uncontroversial view that "reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance."[1] Scalia explained, "We ought not visit economic hardship upon those who took us at our word."[2]

However, two cases the Court decided in its just-completed term seriously undermine *stare decisis* and serve as a warning to businesses — and litigants more broadly — that precedent no longer carries the force the legal community and the public generally had come to expect, and that reliance on Supreme Court precedent now comes with considerable risks.

Background

Scalia's observations about reliance on Supreme Court precedent arose in the context of a discussion of *stare decisis*, which has been described by the Court as "a foundation stone of the rule of law,"[3] and also "the 'preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and

[1] *Quill Corp. v. North Dakota*, 504 U.S. 298, 320 (1992) (Scalia, J., concurring) (emphasis in original).

[2] *Id.*

[3] *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014).

contributes to the actual and perceived integrity of the judicial process.'"[4]

The two decisions, one involving sales tax nexus[5] and the other the assessment of union agency fees on nonunion members,[6] cast serious doubt on the continued vitality of *stare decisis*. In both cases, decades-old precedent was abandoned in narrow 5-4 decisions. *South Dakota v. Wayfair Inc.*, for example, abruptly ended the bright-line physical presence requirement for the imposition of sales tax collection obligations — a constitutional standard clearly articulated by the Court in *National Bellas Hess Inc. v. Department of Revenue of Illinois*,[7] applied consistently thereafter, and expressly reaffirmed in *Quill Corp. v. North Dakota*[8] on the basis of *stare decisis*.

Without *stare decisis* and the robust respect for precedent it engenders, constitutional principles set forth in seminal Supreme Court cases — including in the tax arena — may be vulnerable to abrupt reversal. Moreover, these quick changes in governing legal standards may not only affect a business's future legal obligations, but also present the risk of retroactive application, whether by state tax departments or by plaintiffs' lawyers in state false claims act lawsuits alleging, for example, that sales and use taxes ought to have been collected, but were not.[9] While the majority opinion in *Wayfair* dodged the question of the retroactive application of its sweeping new commerce clause standard, Chief Justice John G. Roberts Jr., writing for four dissenting justices, recognized that the "troubling question" of retroactivity remains to be addressed.[10]

Stare Decisis: A Primer

As noted, the Supreme Court has historically viewed *stare decisis* as one of its doctrinal pillars. Continuity over time, reflected in a respect for precedent, "is, by definition, indispensable."[11] *Stare decisis* "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation."[12]

Of course, *stare decisis* is not an absolute rule. In some instances, the Supreme Court has recognized that its prior decisions were so fundamentally wrong as to be overturned and relegated to the dustbin of history.[13] But those cases have been rare, and precedent being "wrongly decided" has never been enough to avoid applying *stare decisis*. Indeed, the doctrine only comes into play if the Supreme Court concludes that its prior decisions were in error. Otherwise, there would be no need to consider reversing them.[14] "To reverse course," the Court explained in *Kimble*, "we require as well what we have termed a 'special justification' — over and above the belief 'that the precedent was wrongly decided.'"[15]

So before *Wayfair* and *Janus*, what constituted "special justification" for overturning well-established precedent? Two primary factors can be discerned from the Supreme Court's past decisions applying *stare decisis*:

- whether Congress has the power legislatively to correct the Court's earlier decision (thus allowing the Court to defer to Congress to address the matter); and
- whether there has been substantial reliance by businesses, state legislatures, or both.

As to the first criterion, Congress's power to overturn an erroneous Supreme Court decision counsels in favor of *stare decisis*, and therefore

[4] *Kimble v. Marvel Entertainment LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991)). *Stare decisis* has vaulted into the general lexicon in connection with the nomination of D.C. Circuit Court of Appeals Judge Brett Kavanaugh to fill the seat of retiring Supreme Court Justice Anthony M. Kennedy, with concerns raised about whether he would vote to overrule long-standing decisions involving abortion.

[5] *South Dakota v. Wayfair Inc.*, 138 S. Ct. 2080 (2018).

[6] *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

[7] *National Bellas Hess Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967).

[8] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[9] We previously discussed the rising number of private party tax enforcement lawsuits, both under state false claims statutes (so-called tax whistleblower lawsuits) and class actions. *See* David W. Bertoni and David Swetnam-Burland, "Barbarians at the Gates: Private State Tax Enforcement," *State Tax Notes*, Nov. 21, 2016, p. 585.

[10] *Wayfair*, 138 S. Ct. at 2104 (Roberts, J., dissenting).

[11] *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2809 (1992) (citing Powell, *Stare Decisis and Judicial Restraint*, 1991 Journal of Supreme Court History 13, 16).

[12] *Kimble*,135 S. Ct. at 2409.

[13] *See, e.g., Brown v. Board of Education*, 347 U.S. 483, 487 (1954) (repudiating *Plessy v. Ferguson*, 163 U.S. 537 (1896), and its doctrine of "separate but equal" under which the Supreme Court previously upheld a Louisiana law requiring racially segregated railroad cars).

[14] *See Kimble*, 135 S. Ct. at 2409 (*stare decisis* reflects the judgment "that it is usually 'more important that the applicable rule of law be settled than it be settled right'" (citation omitted).

[15] *Id.* (citation omitted).

against overturning existing precedent. This is so not only because of the Court's recognition of Congress's direct accountability to voters as an elected branch of government, but also because Congress has access to resources, expertise, and legislative processes to enable a comprehensive analysis of the economic impact of any change in settled law, and to craft modifications that address a wide variety of issues, including retroactivity. So, for example, in *Michigan v. Bay Mills Indian Community*, long-standing precedent regarding the immunity from suit of Native American tribes was upheld "for a single, simple reason: because it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."[16] Likewise, in *Quill*, Scalia explained that *stare decisis* has "special force" in commerce clause cases because "Congress has the final say over regulation of interstate commerce, and it can change the [rules] by simply saying so."[17] Indeed, in *Quill* the Court invited Congress to act in the event that it desired to change the long-standing physical presence requirement.[18]

As to the second criterion, the Supreme Court has repeatedly made clear that if precedent has resulted in substantial commercial reliance, it presents the strongest case of all for *stare decisis*. In *Bay Mills*, for example, Michigan argued that dramatically changed economic realities — a vast increase in Native American business activity, particularly in connection with casino development — required the Court to overturn long-standing precedent granting to tribes immunity from suit for business activities conducted outside of tribal lands. On this basis, Michigan asked the Supreme Court to "level the playing field" by eliminating that immunity so as not to give the tribes an unfair competitive advantage over non-tribal businesses.[19] In refusing to reverse its earlier decision, the Court in *Bay Mills* viewed as dispositive reliance "by tribes across the country, as well as entities doing business with them" that "have for many years relied on [our precedent], negotiating their contracts and structuring their transactions against a backdrop of tribal immunity."[20] The Supreme Court explained that "as in other cases involving contract and property rights, concerns of *stare decisis* are thus 'at their acme.'"[21]

It should be noted that in support of *stare decisis*, the Court has also pointed to reliance by states that have enacted laws conforming with the Court's prior rulings. *Stare decisis* in such instances prevents the disruption of existing state legal frameworks. For example, in *Allied-Signal Inc. v. Director, Division of Taxation*,[22] the Supreme Court upheld the unitary business principle in part because "state legislatures have relied upon our precedents by enacting tax codes which allocate intangible nonbusiness income to the domiciliary State," requiring the Court "either to invalidate those statutes or authorize what would be certain double taxation."

The Court has looked to other factors beyond congressional authority and reliance — including, for example, whether the challenged precedent has proven "unworkable" or constitutes a "legal last-man-standing for which we sometimes depart from *stare decisis*."[23] However, these have been amorphous, subsidiary inquiries at best.[24]

Against this backcloth, we turn to *Wayfair* and *Janus v. AFSCME*.

[16] 134 S. Ct. at 2037. *See also Kimble v. Marvel Entertainment LLC*, 135 S. Ct. at 2414 (overturning a prior decision concerning the interpretation of the federal patent statute — acknowledged by the Court to be erroneous — that is "more appropriately left to Congress") (citation omitted).

[17] *Quill*, 504 U.S. at 320 (Scalia, J., concurring).

[18] *Quill*, 504 U.S. at 318 ("Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.").

[19] *Bay Mills*, 118 S. Ct. at 2036 (citation omitted).

[20] *Id.*

[21] *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L.Ed.2d 199 (1997). 134 S. Ct. at 2036.

[22] 504 U.S. 768 (1992) at 785-86.

[23] *Kimble*, 135 S. Ct. at 2411.

[24] One commentator, in an exhaustive survey, argues persuasively that *stare decisis* is, in the end, almost entirely about *reliance alone*. Randy J. Kozel, "Stare Decisis as Judicial Doctrine," 67 *Wash. & Lee L. Rev.* 411 (2010). He concludes that *stare decisis* is "best understood — or perhaps reimagined — as efforts to gauge the *reliance interests* that would be affected by the decision to overrule a given precedent." *Id.*, 67 *Wash. & Lee L. Rev.* 411, 414 (emphasis in original). He reasons that the various subsidiary factors that are sometimes mentioned — like workability — are simply "proxies for the implicated reliance effects." *Id* . at 415. *See also* Hillel Y. Levin, "A Reliance Approach to Precedent," 47 *Ga. L. Rev.* 1035, 1039 (2013) (making the case that "reliance should be the primary factor in deciding whether and when to adhere to precedent").

Wayfair

In *Wayfair*, the Supreme Court was, in fact, for the second time addressing the question whether the commerce clause bright-line physical presence requirement for sales and use tax collection should be upheld based on *stare decisis*. In *Quill*, North Dakota also urged the Court to overrule prior decisions establishing and later recognizing the rule, including *National Bellas Hess*.[25] The Supreme Court refused to do so, despite strenuous claims of changed economic circumstances and the unfair advantage enjoyed by direct marketers over local brick-and-mortar retailers as a result of the physical presence test.

In *Quill*, the majority of the Court found that "the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law."[26] In so doing, it observed, consistent with long-standing principles of *stare decisis*, that:

> This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.[27]

The Court also underscored the legitimacy (and significance) of reliance by direct marketers on the physical presence rule, observing that "it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*," and that "the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizable industry."[28]

Thus, in *Quill*, the commerce clause physical presence test easily met the two main criteria for *stare decisis* to apply. In fact, *Quill* presented an exceptionally strong case for upholding precedent. Indeed, the Supreme Court has recognized that where private parties have structured their business affairs in reliance on its decisions, a "superpowered form of *stare decisis*" results, requiring "a superspecial justification" to reverse established precedent.[29]

Twenty-six years after *Quill*, and over 50 years after *Bellas Hess*, the Supreme Court in *Wayfair* abruptly discarded both *Bellas Hess* and *Quill*. In reversing its long-standing precedent, what had been characterized in *Quill* as profound and reasonable reliance on decades of established precedent was simply dismissed by the majority opinion in *Wayfair* with the sweeping observation that the reliance was not "legitimate" because it helped consumers avoid their tax obligations. The majority employed the strained analogy of businesses relying upon the *Quill* standard to narcotics smugglers who, in reliance on prior cases, had adapted their business practices to evade police searches.[30] Thus, what was found to be entirely legitimate reliance in *Quill*, a case decided on a lopsided 8-1 vote in 1992, was summarily discarded in the narrow 5-4 decision in *Wayfair*. It should be noted that the *Wayfair* majority included arguably the Court's most liberal member (Justice Ruth Bader Ginsburg) and its most conservative (Justice Clarence Thomas). The reversal of *Quill*, including its abandonment of the core principles of *stare decisis*, was not ideologically one-sided.

Justice Roberts's dissenting opinion in *Wayfair* cogently framed the majority's extraordinary departure from both *Quill* and the fundamental tenets of *stare decisis*. Consistent with *Quill*, *Bay*

[25] 386 U.S. 753 (1967).

[26] *Quill*, 504 U.S. at 317.

[27] *Id.* at 318.

[28] *Id.* at 316, 317.

[29] *Id.*, *Kimble*, 135 S. Ct. at 2410, 2414 (also involving a situation in which "Congress has the prerogative to determine the exact right response — choosing the policy fix, among many conceivable ones, that will optimally serve the public interest").

[30] *Wayfair*, 138 S.Ct. at 2086 (citing *United States v. Ross*, 456 U.S. 798, 824 (1982)).

Mills, and *Kimble*, Roberts explained that the physical presence requirement should be upheld precisely because of the economic reliance the majority disparaged: specifically, that "e-commerce 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 these rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress."[31]

"The Court should not," Roberts wrote, "act on this important question of current economic policy, solely to expiate a mistake it made over 50 years ago."[32] This was in accord with what *Quill* had previously held in considering — and rejecting — North Dakota's request to discard the physical presence standard for the very same reasons advanced by South Dakota in 2018.

As Roberts explained, citing both *Bay Mills* and *Kimble*, "departing from the doctrine of *stare decisis* is an 'exceptional action' demanding 'special justification,'" with a bar that "is even higher in fields in which Congress 'exercises primary authority' and can, if it wishes, override this Court's decisions with contrary legislation."[33] He noted that the Supreme Court has applied this "heightened form of *stare decisis*" in dormant commerce clause cases like *Wayfair*, relying not only on *Quill*, but a consistent line of cases recognizing that Congress's "plenary power to regulate Commerce among the States" counsels against discarding long-established rules like the physical presence requirement.[34] "If *stare decisis* applied with special force in *Quill*," he explained, "it should be an even greater impediment to overruling precedent now."[35]

Janus

Six days after *Wayfair*, the Supreme Court issued its decision in *Janus*. In *Janus* the Court considered a First Amendment challenge to the practice of public unions collecting so-called agency fees from nonunion members. In *Abood v. Detroit Board of Education*,[36] the collection of agency fees had been upheld, provided that those fees were only used to represent all employees in labor negotiations and grievances, and in working on behalf of those employees in other employment functions, and not for political advocacy. In *Janus* the Supreme Court overturned *Abood*.

Unlike *Wayfair*, *Janus* involved a First Amendment question reserved to the courts, not Congress. But what *Janus* lacked in congressional recourse was more than made up for in considerable economic reliance (by individuals and unions) and legislative reliance (as numerous states had passed laws incorporating the *Abood* test). In her dissenting opinion, Justice Elena Kagan observed that in applying *stare decisis*, one factor — reliance — dominates and "demands keeping *Abood*." As she explained, *stare decisis* "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision."[37] "That is because," she observed, overruling *Abood* would, among other things, "dislodge settled rights and expectations."[38]

Justice Kagan explained that the majority opinion in *Janus* reflected a "radically wrong understanding of how *stare decisis* operates," pointing to the *Quill* case as illustrative of the Court's disconnect:

> Justice Scalia once confronted a similar argument for "disregard[ing] reliance interests" and showed how antithetical it was to rule-of-law principles. *Quill Corp. v. North Dakota*, 504 U.S. 298, 320, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (concurring opinion). . . . He concluded: "[R]eliance

[31] *Supra* note 29, 138 S. Ct. at 2101.

[32] *Id.*

[33] *Id.* (citations omitted).

[34] *Id.* at 2102.

[35] *Id.*

[36] 431 U.S. 209 (1977).

[37] *Id.* 138 S.Ct. at 2499 (citation omitted).

[38] *Id.* (citation omitted).

> upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance." *Ibid. Abood*'s holding was square. It was unabandoned before today. It was, in other words, the law — however much some were working overtime to make it not. Parties, both unions and governments, were thus justified in relying on it. And they did rely, to an extent rare among our decisions. To dismiss the overthrowing of their settled expectations as entailing no more than some "adjustments" and "unpleasant transition costs," *ante*, at 2485, is to trivialize *stare decisis*.[39]

Stare Decisis: What's Left?

Wayfair undoubtedly met and exceeded the traditional core requirements for applying *stare decisis* to respect prior precedent, all of which had previously been recognized and adhered to in *Quill*. Not only had an entire industry relied on over 50 years of established law, but the case involved a legal dispute that Congress was free to resolve through the legislative process — either by allowing the physical presence standard to remain in place (as it had done for decades), or to craft a carefully balanced legislative "fix" for any problems it concluded needed to be addressed. There is no other way of putting it: *Quill* and *Wayfair* are irreconcilable on the meaning, import, and implications of *stare decisis*. In overturning *Quill* and *Bellas Hess*, the Supreme Court in effect cast aside the very underpinnings of *stare decisis*.

Janus weakened *stare decisis* further still. In addition to substantial private party reliance — with "thousands of current contracts covering millions of workers" negotiated in reliance on the Supreme Court's prior decision in *Abood* — 20 states had enshrined *Abood*'s requirements in their labor law statutes, many with "multiple statutory provisions, with variations for different categories of public employees."[40]

Thus, between *Wayfair* and *Janus*, Kagan's observation that the Court has "subvert[ed] all known principles of *stare decisis*" seems unavoidably correct.[41] These two cases do collectively weaken — to the point of near irrelevancy — a doctrine that "contributes to the actual and perceived integrity of the judicial process . . . by ensuring that decisions are 'founded in the law rather than in the proclivities of individuals.'"[42] For businesses relying on Supreme Court precedent to organize their affairs, including for tax reasons or exposure to regulatory liability, *Wayfair* and *Janus* are a wake-up call. The Supreme Court made clear that it can, and will, readily depart from precedent when a majority favors a particular policy result or new interpretation of constitutional or statutory language.

A discussion of *stare decisis* would not be complete without a brief discussion of how overruling long-established precedent can result in unanticipated retroactive consequences.

The rejection of *stare decisis* in *Wayfair* raises significant concerns regarding not only future sales and use tax collection obligations, but also the potential for retroactive application of the new standard to prior tax periods. Although the majority in *Wayfair* glibly sidestepped the issue,[43] there is considerable risk that its new constitutional standard could be applied retroactively — either by state revenue departments or rapacious private attorneys filing false claims act lawsuits under a variety of state laws. In *Harper v. Virginia Department of Taxation*,[44] the Supreme Court all but conclusively confirmed that retroactivity applies not just to criminal cases,

[39] *Id.*, 138 S. Ct. at 2500–01 (2018).

[40] 138 S. Ct. at 2499-500 (Kagan, J., dissenting) (citations omitted) (noting that the Court in *Allied-Signal* declined to overturn precedent approving the unitary business principle precisely because state legislatures had substantially relied upon it in crafting their tax statutes).

[41] *Janus*, 138 S. Ct. at 2497.

[42] *Id.* (citations omitted).

[43] Kennedy, writing for the majority, flirts with the fact that "others have argued retroactive liability risks a double tax burden in violation of the Court's apportionment jurisprudence because it would make both the buyer and the seller legally liable for collecting and remitting the tax on a transaction intended to be taxed only once," but fails otherwise to address the issue, leaving it to Roberts, in his dissent, to worry about difficult questions related to the potential retroactive application of the majority's new commerce clause rule. *Wayfair*, 138 S. Ct. at 2099, 2104.

[44] 509 U.S. at 94 (1993).

but to civil cases as well — and to tax cases in particular.[45]

Whether the retroactive application of these Supreme Court rulings arises from the actions of an overly aggressive state revenue department seeking to use *Wayfair* as an excuse to assess companies for prior tax periods,[46] or results from private attorneys asserting retroactive liability in false claims act cases, the issue of retroactive application of *Wayfair* will no doubt need to be addressed by courts in multiple states (with the potential for inconsistent outcomes). Also, the impact on companies that have lost the opportunity to collect sales or use taxes from their customers — because of their potentially misplaced reliance on Supreme Court precedent — could be profound.[47]

The Future

Wayfair and *Janus* will encourage Supreme Court advocates to treat precedent as nothing more than a starting point and not a controlling principle. It will be less important to distinguish precedent than it will be to argue that precedent — no matter how clear, long-standing, and the subject of reliance — was decided incorrectly or produces a disfavored policy.

Moreover, there undoubtedly will be significant political implications associated with the Court's liberation from its own precedent. For example, whichever political party does not control Congress will likely turn to the Supreme Court to adopt its policy agenda, recognizing that the justices are now prepared to depart from precedent if they can be convinced that a better social or economic policy would result.

Less certain jurisprudence, in which a departure from precedent is always up for grabs, will be a destabilizing development in our legal system. This is especially portentous at a time when the political environment in America is already besieged with sudden and unpredictable changes in direction. Whether the issue is taxes, regulatory authority, affirmative action, abortion, free speech, or literally hundreds of other subjects, those who most cherish the traditions on which our legal system is grounded may come to mourn the strange death of *stare decisis*. ■

[45] *See also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring) ("Unlike a legislature, we do not promulgate new rules to be applied prospectively only."); and *American Trucking Associations Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (the Court's determination of constitutionality applies to similar statutes in other states "whether occurring before or after our decision"). *See* Pamela J. Stephens, "*The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*," 48 Syracuse L. Rev. 1515, 1559 (1998) ("Essentially then the Court has created a presumption of retroactivity. Left unclear are the circumstances under which such a presumption might be overturned.").

Congress, in contrast, can implement a legislative solution with prospective effect only. *Harper*, 509 U.S. at 107 (Scalia, J., concurring) ("That which distinguishes a judicial from a legislative act is, that the one is a determination of what existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.") (quoting Thomas M. Cooley, *Constitutional Limitations* at 91). Roberts noted this in his *Wayfair* dissent, explaining:

> Here, after investigation, Congress could reasonably decide that current trends might sufficiently expand tax revenues, obviating the need for an abrupt policy shift with potentially adverse consequences for e-commerce. Or Congress might decide that the benefits of allowing States to secure additional tax revenue outweigh any foreseeable harm to e-commerce. Or Congress might elect to accommodate these competing interests, by, for example, allowing States to tax Internet sales by remote retailers only if revenue from such sales exceeds some set amount per year. *See* Goodlatte Brief 12-14 (providing varied examples of how Congress could address sales tax collection). In any event, Congress can focus directly on current policy concerns rather than past legal mistakes. *Congress can also provide a nuanced answer to the troubling question whether any change will have retroactive effect*.

Wayfair, 138 S. Ct. at 2104 (emphasis added).

[46] *See, e.g.*, "State of 'Wayfair': Rhode Island Serious About Retroactivity," *Bloomberg News*, July 12, 2018.

[47] Serious concerns about *Wayfair* and its potential retroactivity come at a time when companies are already reeling from successful efforts by states to change retroactively their own tax statutes, all of which the U.S. Supreme Court has declined to review. *See* Andrew Chung, "Supreme Court Rejects Challenge to State Retroactive Tax Changes," Reuters, May 22, 2017. For example, in Michigan, the state courts upheld a 2014 statute repealing Michigan's membership in the Multistate Tax Compact, retroactively stripping taxpayers of the right to use the compact's three-factor apportionment formula back to 2008 — resulting in an estimated $1 billion in additional liability. *Gillette v. Department of Treasury*, 312 Mich. App. 394, 878 N.W.2d 891 (2015), *app. denied*, 499 Mich. 960 (2016), *cert. denied*, 137 S. Ct. 2157 (2017). *See also Dot Foods Inc. v. Department of Revenue*, 185 Wash. 2d 239, 372 P.3d 747 (2016), *cert. denied*, 137 S. Ct. 2156, 198 L. Ed. 2d 231 (2017) (upholding a statute narrowing retroactively an exemption from the state's business and occupation tax).