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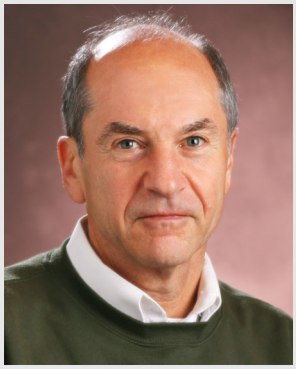

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In this article, Hellerstein and Appleby consider the question whether *Wayfair* applies retroactively in light of the Supreme Court's case law and a recent Oregon Tax Court opinion that addressed the question as applied to the state's tobacco products tax.

I. Introduction

Hypothetical questions are a law professor's stock in trade, and we would have thought that the title to this article could have been so characterized. After all, the statute at issue in *South Dakota v. Wayfair Inc.*,[1] which imposed sales and use tax collection obligations on out-of-state sellers whose annual sales of goods or services into the state exceeded $100,000 or 200 transactions, even if the sellers lacked an in-state physical presence required by preexisting constitutional doctrine, did not apply retroactively.[2] Similarly, other states' statutes embracing *Wayfair*'s nexus standard of "economic and virtual contacts"[3] for subjecting out-of-state sellers to sales and use tax collection obligations have all adopted effective dates after the date of the U.S. Supreme Court's decision in *Wayfair*.[4] Accordingly, however interesting the question whether *Wayfair* applies retroactively may be from a theoretical perspective, it would seem at first glance to be a question more appropriate for a law school examination than an article in *Tax Notes State*.

A recent decision of the Oregon Tax Court nevertheless suggests that it may be premature to dismiss the challenging questions raised by the retroactive application of *Wayfair* as entirely hypothetical. Accordingly, after providing an overview of the case law governing retroactive application of Supreme Court state tax decisions repudiating preexisting constitutional doctrine, we examine the Oregon Tax Court's opinion in *Global Hookah Distributors Inc. v. Department of Revenue*,[5] which addressed the question whether

[1] 138 S. Ct. 2080 (2018).

[2] Indeed, as the Court also noted, the statute "provides means for the Act to be appropriately stayed until the constitutionality of the law has been clearly established." *Id.* at 2089.

[3] *Id.* at 2099.

[4] Jerome Hellerstein, Walter Hellerstein, and Andrew Appleby, *State Taxation*, para.19.04[1][b], table 19-1 (2021).

[5] No. TC5272, 2021 WL 3732047 (Or. Tax Ct., Regular Div., Aug. 6, 2021).

Wayfair applied retroactively to the state's tobacco products tax (TPT).

II. General Principles Governing Retroactive Application of U.S. Supreme Court State Tax Decisions Repudiating Earlier Doctrine

The starting point for examination of the general principles governing retroactive application of the Supreme Court's decisions[6] is *Chevron Oil Co. v. Huson*.[7] In *Chevron*, the Court declared:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."[8]

In the half-century since *Chevron* was decided, the Court has generally taken a narrow approach to the circumstances under which prospective application of its decisions is appropriate, at least in the context of decisions repudiating earlier doctrine in the state tax context.

A. The *American Trucking Associations* Cases

American Trucking Associations Inc. v. Smith[9] (hereinafter *ATA II*) grew out of an earlier decision involving the same plaintiff, *American Trucking Associations Inc. v. Scheiner*[10] (hereinafter *ATA I*), that invalidated Pennsylvania's flat taxes on trucks. In *ATA I*, the Supreme Court held that Pennsylvania's flat highway use taxes discriminated against interstate commerce, and in so doing, the Court explicitly overruled its earlier precedents that had rejected commerce clause challenges to flat highway taxes. At the time of the Court's decision in *ATA I*, the Court had pending before it a similar case arising in Arkansas in which the taxpayers had challenged Arkansas's flat tax on trucks.

ATA I was decided on June 23, 1987. Three days later the Court vacated the judgment of the Arkansas Supreme Court that had sustained Arkansas's highway use tax and remanded the case for further consideration in light of *ATA I*.[11] Following the taxpayers' unsuccessful efforts to have the Arkansas courts enjoin further collection of the highway use tax or to order an escrow of the taxes pending reconsideration of the merits of the case, Justice Harry Blackmun ordered Arkansas to escrow such taxes on August 14, 1987, until a final decision on the merits of the case could be reached.[12] In March 1988 the Arkansas Supreme Court held that the challenged highway use tax was unconstitutional in light of *ATA I*.[13] Despite its decision on the merits, the Arkansas court refused to order refunds to the taxpayers for all taxes paid before Justice Blackmun's August 14, 1987, escrow order. The court based its holding on the U.S. Supreme Court's decision in *Chevron*, quoted above,[14] which held that in some circumstances, decisions may be given only prospective effect.

In *ATA II*, the Supreme Court held that its decision in *ATA I* should be applied prospectively. Four justices subscribed to the Court's plurality

[6] The following discussion draws freely from the more detailed examination of these principles and the case law construing them in *State Taxation*, *supra* note 4, para. 4.17.

[7] 404 U.S. 97 (1971).

[8] *Id.* at 106-107 (citations omitted).

[9] 496 U.S. 167 (1990).

[10] 483 U.S. 266 (1987).

[11] *American Trucking Associations Inc. v. Gray*, 483 U.S. 1014 (1987).

[12] *American Trucking Associations Inc. v. Gray*, 483 U.S. 1306 (1987).

[13] *American Trucking Associations Inc. v. Gray*, 746 S.W.2d 377 (Ark. 1988).

[14] *See* text accompanying note 8 *supra*.

opinion, which expressed the view that *ATA I* should not be given retroactive effect under *Chevron*. Four justices subscribed to the dissenting opinion, which expressed the view that *ATA I* should be applied retroactively and that *Chevron*'s prospectivity doctrine should apply only in the most limited circumstances. The actual decision in the case turned on Justice Antonin Scalia's concurrence in the judgment, which expressed sympathy for the dissenters' views about retroactivity in general but nevertheless joined the plurality for reasons relating to his distaste for the Court's commerce clause doctrine.[15]

The plurality concluded that *ATA I* met *Chevron*'s test for prospective application of the Court's decisions. They thought it "obvious"[16] that *ATA I* met the first prong of the *Chevron* test because the Court's decision in *ATA I* expressly overruled earlier Supreme Court precedents and thereby established a "new principle of law."[17] They likewise concluded that *ATA I* met the second prong of the *Chevron* test — whether retroactive application will further the purpose of the rule in question — because "it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce."[18] Because the Arkansas highway use tax was consistent with preexisting commerce clause doctrine, the plurality believed that the purpose of the commerce clause would not be served by applying the new rule to past conduct.

Finally, the plurality found that the balance of the equities weighed in favor of prospective application, concluding that in light of the financial burdens and administrative costs that would be imposed on the state by virtue of retroactive application of *ATA I*, "we think it unjust to impose this burden when the State relied on valid, existing precedent in enacting and implementing its tax."[19]

The four dissenting justices declared that *Chevron* merely stated a narrow "remedial principle for the exercise of equitable discretion by federal courts and not, as the plurality states, a choice of law principle applicable to all cases on direct review."[20] They relied heavily on the views of Justice John Harlan, which they quoted at length, that once the Supreme Court has decided a new rule in a particular case, the rule should apply to all cases in which the parties' rights have not been finally adjudicated.[21] Hence the dissenters concluded that the taxpayers were "plainly entitled to an adjudication that the Arkansas . . . tax violated the Constitution both before and after our decision in [*ATA I*]."[22]

While Justice Scalia expressed his sympathy for the position taken by the dissent "that prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be"[23] and that prospective judicial decision-making by the Supreme Court "is fundamentally beyond judicial power,"[24] he did not believe that this led inexorably to the conclusion that the pre-*ATA I* Arkansas highway use taxes were unconstitutional, a conclusion that was informed by his rejection of much of the Court's dormant commerce clause jurisprudence.[25]

B. *James Beam*, *Harper*, and 'Selective' Prospectivity

1. *James Beam*

In *James B. Beam Distilling Co. v. Georgia*,[26] the question was whether the Court's 1984 decision in *Bacchus Imports Ltd. v. Dias*[27] should apply retroactively. In *Bacchus,* the Court held that a Hawaii liquor tax that exempted locally produced beverages discriminated against out-of-state alcoholic beverages in violation of the commerce clause. In so holding, the Court rejected the view that the 21st Amendment, which repealed

[15] For a consideration of Justice Scalia's views of the commerce clause, see *State Taxation*, *supra* note 4, para. 4.12[2][a].

[16] *ATA II* at 179.

[17] *See* text accompanying note 8 *supra*.

[18] *ATA II* at 181.

[19] *Id.* at 183.

[20] *Id.* at 220 (Stevens, J., dissenting).

[21] *Id.* at 215 (Stevens, J., dissenting) (quoting *United States v. Estate of Donnelly*, 397 U.S. 286, 295-297 (1970) (Harlan, J., concurring)).

[22] *Id.* at 218 (Stevens, J., dissenting).

[23] *Id.* at 201 (Scalia, J., concurring).

[24] *Id.* at 204 (Scalia, J., concurring).

[25] *See supra* note 15.

[26] 501 U.S. 529 (1991).

[27] 468 U.S. 263 (1984).

prohibition, shielded states' discriminatory liquor taxes from commerce clause scrutiny.

In *James Beam*, the taxpayer sought a refund of $2.4 million in liquor excise taxes paid in 1982, 1983, and 1984 under a Georgia statute that imposed a higher tax on alcoholic beverages imported into the state than on those produced in Georgia. The Georgia court summarily concluded that the tax violated the commerce clause because "the purpose and effect of the statute was simple economic protectionism which is virtually per se invalid under the Commerce Clause of the U.S. Constitution."[28] Applying the *Chevron* doctrine, however, the Georgia court found that its decision established a "new rule"[29] derived from *Bacchus* and that the balance of the equities weighed in favor of the state because of the "severe financial burden"[30] that retroactive application would impose on the state. It therefore concluded that "prospective application of the decision is appropriate,"[31] and it refused to provide the taxpayers with refunds.

The Supreme Court reversed and held that *Bacchus* applied retroactively. Without reaching the question whether *Bacchus* should be applied prospectively under the *Chevron* doctrine, the Court held that because *Bacchus* itself had been applied retroactively to the taxpayer in that case, the rule of *Bacchus* likewise had to be applied retroactively to all other taxpayers whose claims were not barred by the statute of limitations, res judicata, or other procedural requirements. Justice David Souter declared in his opinion announcing the judgment of the Court that "it is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that . . . the applicability of rules of law are not to be switched on and off according to individual hardship."[32] Hence, "once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application."[33] The Court thus rejected a rule of "selective prospectivity," whereby the new rule announced in the case is applied to the litigants, but the old rule is applied to all others whose cause of action arose regarding facts predating the court's pronouncement.

The relatively narrow and straightforward holding of *James Beam* — "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata"[34] — could not mask the deep divisions in the Court over the role of the prospectivity doctrine. There were five separate opinions in the case, and none reflected the views of more than three justices. Justice Souter's opinion that announced the judgment of the Court rejecting a doctrine of "selective prospectivity" was joined only by Justice John Paul Stevens. Justice Byron White, writing only for himself, agreed with Justice Souter's analysis, except for the cloud he may have cast on *Chevron*. Justice White dissociated himself from Justice Souter's speculation about the "propriety of pure prospectivity" and made clear his view that "the propriety of prospective application of decision in this Court, in both constitutional and statutory cases, is settled by our prior decisions."[35] Justices Blackmun, Marshall, and Scalia, while agreeing with Justice Souter's conclusion, nevertheless did so on the ground that the Court's decisions must be applied retroactively in all cases.[36] Justice Sandra Day O'Connor, joined by Chief Justice William Rehnquist and Justice Anthony Kennedy, dissented from the Court's judgment. In their view, not only was prospective application of the Court's decisions appropriate as a matter of principle under the *Chevron* doctrine, it was also proper in *James Beam* itself.

[28] *James B. Beam Distilling Co. v. Georgia*, 382 S.E.2d 95, 96 (Ga. 1990), *rev'd*, 501 U.S. 529 (1991).

[29] *Id.*

[30] *Id.* at 97.

[31] *Id.*

[32] *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (opinion of Souter, J.).

[33] *Id.* at 543 (opinion of Souter, J.).

[34] *Id.* (opinion of Souter, J.).

[35] *Id.* at 546 (opinion of White, J.).

[36] In two separate opinions, one by Justice Blackmun and the other by Justice Scalia, the three justices expressed the view that prospectivity, whether "pure" or "selective," "breaches our obligation to discharge our constitutional function" and is "beyond our power." *Id.* at 548-549 (opinions of Blackmun, J., and Scalia, J.).

2. *Harper*

In *Harper v. Virginia Department of Taxation*,[37] the Supreme Court applied the rule announced in *James Beam* to hold that its decision in *Davis v. Michigan Department of Treasury*[38] must be applied retroactively. *Davis* held that Michigan violated principles of intergovernmental tax immunity by taxing the retirement benefits paid by the federal government while exempting retirement benefits paid by state and local governments. Although the Court's opinion in *Davis* did not clearly indicate whether the Court was applying the rule announced in the case retroactively,[39] the Court in *Harper* concluded that it had in fact applied the rule announced in *Davis* to the parties before the Court. On this understanding of *Davis*, the conclusion that *Davis* must be applied retroactively followed inexorably from the Court's opinion in *James Beam* — namely, if the Court applies its ruling to the parties before the Court, the rule should apply retroactively to "all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[40]

C. *Fulton*: An End to the Prospectivity Doctrine in State Tax Cases?

In *Fulton Corp. v. Faulkner*,[41] the Court struck down a North Carolina intangible property tax, as applied to corporate stock, on the ground that the tax discriminated against interstate commerce because it varied inversely with the North Carolina presence of the corporation whose stock was subject to tax. In so holding, the Court overruled *Darnell v. Indiana*,[42] which had sustained a similar statute over commerce clause objections. In the proceedings below, the North Carolina Court of Appeals, although finding the tax discriminatory, had held that its ruling should apply only prospectively, because to apply the rule retroactively would be "inequitable."[43] It observed that "both the United States Supreme Court and the North Carolina Supreme Court 'have recognized that in some cases it would be inequitable to apply newly announced rules retroactively if prior to the enunciation of the rules parties had reasonably relied on certain principles in ordering their affairs.'"[44] The North Carolina Supreme Court did not reach the question of prospectivity, since it sustained the tax.

In light of the fact that the U.S. Supreme Court in *Fulton* overruled *Darnell* for commerce clause purposes, *Fulton* would appear to have been a case in which there was at least some room for argument that prospective application of the decision is appropriate, if, in fact, there is anything left to the prospectivity doctrine in civil cases. The Court's treatment — or, more accurately, non-treatment — of the prospectivity issue in *Fulton*, however, raises additional questions (beyond those suggested in *James Beam* and *Harper*) about whether the Court's decisions may *ever* be applied prospectively, at least as a general principle as distinguished from a case-by-case analysis focusing on the particular facts associated with the litigants.[45]

Without even adverting to the possibility that the decision in *Fulton* might be applied prospectively (as the North Carolina Court of Appeals had held), and thus remanding to the state court to consider the prospectivity question along with others that might arise should the lower courts determine that prospective application was inappropriate, the Court remanded solely to consider questions of *remedy* under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*.[46] In so doing, the Court necessarily pretermitted any consideration of prospectivity because issues of remedy simply do

[37] 509 U.S. 86 (1993).

[38] 489 U.S. 803 (1989).

[39] The cause of the uncertainty was Michigan's concession in *Davis* that the taxpayer was entitled to a refund if the taxpayer prevailed on the merits. *Id.* at 817. In light of this concession on the retroactivity issue, there was no reason for the Court to rule on it. Thus, the Virginia Supreme Court in *Harper* concluded that the U.S. Supreme Court "made no . . . ruling" about the application of the rule announced in *Davis* "retroactively to the litigants in that case." *Harper v. Virginia Department of Taxation*, 410 S.E.2d 629, 631 (Va. 1992), *rev'd*, 509 U.S. 86 (1993).

[40] *Harper*, 509 U.S. at 97.

[41] 516 U.S. 325 (1996).

[42] 226 U.S. 390 (1912).

[43] *Fulton Corp. v. Justus*, 430 S.E.2d 494, 501 (N.C. App. 1993).

[44] *Id.*

[45] *See* the discussion in Part (II)(D) *infra*.

[46] 496 U.S. 18 (1990). *McKesson* and the remedial issues it raises are considered in detail in *State Taxation*, *supra* note 4, paras. 4.17[1] and 4.17[2].

not arise if the rule of law announced in the case is to be applied on a prospective basis only. In short, the Court, without saying so explicitly, may well have put the final nail in the coffin of the civil prospectivity doctrine (as a general principle) by refusing even to entertain the notion that the prospectivity issue was an appropriate matter to be addressed on remand. Indeed, in other cases (not involving state taxation), the Court has cast further doubt about the viability of the civil prospectivity doctrine articulated in *Chevron*.[47]

D. *Wayfair*

Despite the doubts that the foregoing discussion might create about the contemporary viability of *Chevron* and the prospectivity doctrine, as well as the fact that retroactive application of the statute at issue in *Wayfair* itself was not at issue because the statute by its terms applied only on a prospective basis,[48] the Court nevertheless did advert to retroactivity concerns in the course of its opinion. Thus, in describing the potential commerce clause burdens that could arise if *Quill*'s physical presence test were overruled, the Court observed:

> Other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines. For example, the United States argues that tax-collection requirements should be analyzed under the balancing framework of *Pike v. Bruce Church, Inc.*[49] Others have argued that 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. Complex state tax systems could have the effect of discriminating against interstate commerce. Concerns that complex state tax systems could be a burden on small business are answered in part by noting that, as discussed below, there are various plans already in place to simplify collection; and since in-state businesses pay the taxes as well, the risk of discrimination against out-of-state sellers is avoided. And, if some small businesses with only *de minimis* contacts seek relief from collection systems thought to be a burden, those entities may still do so under other theories. These issues are not before the Court in the instant case; but their potential to arise in some later case cannot justify retaining this artificial, anachronistic rule that deprives States of vast revenues from major businesses.[50]

In short, the Court's response to these concerns was not to suggest that its decision in *Wayfair* eliminating the physical presence requirement should be applied prospectively as a general rule under *Chevron*. Rather, the Court concluded that commerce clause undue burdens and fair apportionment jurisprudence might bar retroactive application in particular

[47] *See Ryder v. United States*, 515 U.S. 177, 184-185 (1995) ("But whatever the continuing validity of *Chevron Oil* after *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993) and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner that would bring that doctrine into play."); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 279 (1994) ("While it was accurate in 1974 to say that a new rule announced in a judicial decision was only presumptively applicable to pending cases, we have since established a firm rule of retroactivity. *See Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993); *Griffith v. Kentucky*, 479 U.S. 314 (1987)."). In *Reynoldsville Casket*, the Court held that the Ohio Supreme Court erred in not giving the Court's decision in *Bendix Autolite Corp. v. Midwesco Enters. Inc.*, 486 U.S. 888 (1995), retroactive effect. *Bendix* established that a statute tolling the statute of limitations in lawsuits against out-of-state defendants placed an unconstitutional burden on interstate commerce. In *Reynoldsville Casket*, the Court ruled that the plaintiff's lawsuit had to be dismissed, since it was timely only if the tolling statute (analogous to the tolling statute invalidated in *Bendix*) applied. The Court rejected the plaintiff's argument, based on the theory that the *Chevron* doctrine was a remedial doctrine rather than a choice-of-law doctrine and that the Court should allow the Ohio Supreme Court to fashion a remedy limiting *Bendix* in light of the plaintiff's reliance on the tolling statute, even if the "law" as articulated in *Bendix* applied retroactively. Justices Kennedy and O'Connor, concurring in the judgment, observed: "When a hard case presents the question of our authority to deny relief in a retroactivity case, that will be soon enough to resolve it; for the law in this area is, as it ought to be, shaped by the urgent necessities we confront when there is a strong case to be made for limiting relief despite the retroactive application of the law." *Reynoldsville Casket*, 514 U.S. at 762 (Kennedy, J., and O'Connor, J., concurring).

[48] *See* text accompanying note 2 *supra*.

[49] 397 U.S. 137 (1970).

[50] *Wayfair*, 138 S. Ct. at 2099.

circumstances based on examination of the specific facts at issue.[51]

III. *Global Hookah Distributors Inc. v. Department of Revenue*

In what appears to be the first reported decision actually confronting the retroactivity issue raised by *Wayfair*, the Oregon Tax Court concluded in *Global Hookah Distributors Inc. v. Department of Revenue*[52] that *Wayfair* applied retroactively. However, the conclusion was dictum because the court ultimately ruled that the TPT[53] at issue in the case was not a sales or use tax governed by *Quill*'s physical presence nexus requirement.[54]

In a thoughtful opinion that considered the case law described above, the Oregon court recognized the Supreme Court's general rule articulated in *Chevron* governing the retroactive application of its decisions in civil actions.[55] The court went on to observe, however, that "without expressly overruling *Chevron Oil Co. v. Huson*, the Court's more recent opinion in *Harper v. Virginia Dept. of Taxation* announced that 'this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision.'"[56] The court went on to quote *Harper*'s unequivocal statement:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law *and must be given full retroactive effect in all cases still open on direct review and as to all events*, regardless of whether such events predate or postdate our announcement of the rule.[57]

The taxpayer sought to distinguish *Harper* on the ground that, in contrast to *Harper*, in which the Court's decision applied to the parties before the Court for periods before its decision, there was no retroactive application of the *Wayfair* decision to facts before the decision because the statutory scheme in *Wayfair* foreclosed the retroactive application of its nexus requirements. While acknowledging the taxpayer's observation, the Oregon court found that the taxpayer's "contention that *Wayfair*'s procedural posture creates an opening to apply a *Chevron Oil* test in this case is based on a misreading of *Harper*."[58] The court declared:

> *Harper* does not hold that a new rule may be applied on a prospective-only basis if the Court does not determine, in the case in which the rule is announced, that the rule applies retroactively. Rather, both in the passages quoted above and elsewhere, *Harper* repeatedly declares a general rule that the Court's holdings apply with retroactive effect in other cases. Nothing in the Court's pronouncements limits this general rule to cases in which the Court has applied the new rule to the parties *retroactively*.[59]

Accordingly, based on the analysis in *Harper*, and identifying the competing concerns the Supreme Court had identified, including "the risk that retroactive application could create harsh results for litigants who have relied on a prior judicial rule; the problem of disparate treatment of litigants whose claims arise on one side or the other of the date a new rule is announced; and the role of the courts as interpreters, rather than creators, of the law,"[60] the court concluded that "the weight of that analysis, and the absence of any exception on all fours with this case, move

[51] *See also* Walter Hellerstein and Andrew Appleby, "Substantive and Enforcement Jurisdiction in a Post-*Wayfair* World," *State Tax Notes*, Oct. 22, 2018, p. 283. For a pre-*Wayfair* examination of these issues, see Adam Thimmesch et al., "*Wayfair* and the Retroactivity of Constitutional Holdings," *State Tax Notes*, May 7, 2018, p. 511.

[52] No. TC5272, 2021 WL 3732047 (Or. Tax Ct., Regular Div., Aug. 6, 2021).

[53] The TPT statute provides:

> A tax is hereby imposed upon the distribution of all tobacco products in this state. The tax imposed by this section is intended to be a direct tax on the consumer, for which payment upon distribution is required to achieve convenience and facility in the collection and administration of the tax. The tax shall be imposed on a distributor at the time the distributor distributes tobacco products.

Or. Rev. Stat. Ann. section 325.505(1) (Westlaw 2021).

[54] *Global Hookah*, 2021 WL 3732047, at *14 (Or. Tax Ct., Regular Div., Aug. 6, 2021) (quoting *State Taxation*, *supra* note 4, para. 19.02[2][c][vi], addressing the inapplicability of *Quill*'s physical presence requirement to levies other than sales and use taxes).

[55] *Id.* at *13; see text accompanying note 8 *supra*.

[56] *Id.* (quoting *Harper*, 509 U.S. at 90).

[57] *Id.* (quoting *Harper*, 509 U.S. at 97 (emphasis supplied by the Oregon court)).

[58] *Id.*

[59] *Id.* (emphasis in original, citation to *Harper*, and associated quotations, omitted).

[60] *Id.*

this court to conclude that *Wayfair* must apply retroactively to the facts in this case."[61]

As noted at the outset of this discussion, however, the court's statement was dictum because the court ultimately concluded that the TPT at issue in the case was not a sales or use tax governed by *Quill*'s physical presence nexus requirement.

IV. Conclusion

After this brief foray into the retroactivity issues potentially raised by *Wayfair*, we return to the question that we posed at the outset — namely, whether *Global Hookah* suggests that it "may be premature to dismiss the challenging questions raised by the retroactive application of *Wayfair* as entirely hypothetical." Although the Oregon court's reasoning suggests an affirmative answer to the question, its holding points in the other direction. Because *Quill*'s physical presence test of substantial nexus has long been limited (with the Court's implicit blessing[62]) to sales and use taxes,[63] and because the states have not applied their post-*Wayfair* "economic presence" sales and use tax collection requirements on a retroactive basis, cases involving the retroactive application of *Wayfair* may well appear more frequently on law school examinations than in case law reports. ■

[61] *Global Hookah Distributors Inc. v. Department of Revenue*, ___ Or. Tax ___, No. TC5272, 2021 WL 3732047, at *13 (Or. Tax Ct., Regular Div., Aug. 6, 2021).

[62] *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992) ("in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a . . . bright-line, physical-presence requirement").

[63] *See generally State Taxation*, *supra* note 4, ch. 6.