
LEADING CASES

CONSTITUTIONAL LAW

Article I — Stare Decisis for Constitutional Default Rules — Dormant Commerce Clause — South Dakota v. Wayfair, Inc.

Judicial junk, the Court has long thought, is easier to scrap when the erroneous precedent cannot be fixed by Congress, as in constitutional cases.¹ On the flip side, whenever a bad precedent can be corrected by Congress, stare decisis applies with “special force.”² Last Term, in *South Dakota v. Wayfair, Inc.*,³ the Court tinkered with this thinking in overruling an outdated dormant commerce clause precedent. Dormant commerce clause decisions technically produce constitutional holdings, but Congress may override them at will.⁴ Under the usual logic of stare decisis, it should take special force to dislodge such precedents. But *Wayfair* applied the weakened stare decisis of constitutional cases, asserting that the Court must “address a false constitutional premise . . . whether or not Congress can or will act.”⁵

Emerging from *Wayfair* is an odd and ominous development in stare decisis doctrine. Odd, because it turns on a formal classification instead of on Congress’s practical ability to fix the problem. Ominous, because the Court’s logic leads far past the dormant commerce clause. *Wayfair* grants only feeble stare decisis to precedents that set a “constitutional default rule,”⁶ meaning constitutional decisions that allow for legislative adjustment or override. This new stare decisis analysis makes other precedents setting constitutional default rules more vulnerable — including, perhaps, mainstays of criminal procedure like *Miranda v. Arizona*⁷ and *Mapp v. Ohio*.⁸

¹ See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–10 (1932) (Brandeis, J., dissenting); Lee Epstein, William M. Landes & Adam Liptak, *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1116 (2015) (“[Justice Brandeis’s] dissenting opinion . . . now has the status of black letter law.”).

² See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989). The Court, following Justice Brandeis, usually articulates the rule as distinguishing between “constitutional” and “statutory” precedents. See, e.g., *id.* But the distinction is occasionally said to be between “constitutional” and “nonconstitutional cases.” See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (plurality opinion). Nomenclature aside, the Court has — until now — adhered to Justice Brandeis’s key insight that the important factor is whether or not the mistake may be legislatively corrected.

³ 138 S. Ct. 2080 (2018).

⁴ See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421–27 (1946).

⁵ *Wayfair*, 138 S. Ct. at 2096–97.

⁶ *Id.* at 2096 (“While . . . Congress has the authority to change the physical presence rule, Congress cannot change the constitutional default rule.”).

⁷ 384 U.S. 436 (1966).

⁸ 367 U.S. 643 (1961).

Since its 1967 decision in *National Bellas Hess, Inc. v. Department of Revenue*,⁹ the Court has held that, under the “dormant” or “negative” implication of the Commerce Clause,¹⁰ states may not compel remote sellers with no physical presence in the state to collect and remit sales taxes.¹¹ In *Quill Corp. v. North Dakota*,¹² the Court refused to overrule the “bright-line, physical-presence requirement” of *Bellas Hess*, leaning heavily on *stare decisis*.¹³ So the physical presence test remained the law of the land while the internet conquered the earth. Justice Kennedy had joined the *Quill* majority and Justice Scalia’s concurring opinion emphasizing *stare decisis*, but by 2015 he had second thoughts. Writing separately in *Direct Marketing Ass’n v. Brohl*,¹⁴ Justice Kennedy acknowledged that “[t]he Internet has caused far-reaching systemic and structural changes in the economy” and therefore “*Quill* now harms States to a degree far greater than could have been anticipated earlier.”¹⁵ He concluded with the wish that “[t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.”¹⁶

Seldom has a concurring opinion signed by a lone Justice prompted a state to officially declare an emergency. Yet in 2016, in response to Justice Kennedy’s overture, the South Dakota legislature passed a law, S.B. 106, “to provide for the collection of sales taxes from certain remote sellers . . . and to declare an emergency.”¹⁷ It required every remote seller to collect and remit sales tax if the seller’s business in South Dakota comprised either a “gross revenue” greater than \$100,000 or at least 200 “separate transactions” within one calendar year.¹⁸ Significantly, the law did not apply retroactively.¹⁹ The “emergency” declaration was necessary to give the law immediate effect, for the purpose of “permitting the most expeditious possible review of the constitutionality

⁹ 386 U.S. 753 (1967).

¹⁰ The dormant or negative commerce clause is a judicial derivation from the Commerce Clause “prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval,” which “strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce.” *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015).

¹¹ See *Bellas Hess*, 386 U.S. at 759–60.

¹² 504 U.S. 298 (1992).

¹³ *Id.* at 317–18. Three Justices joined a concurrence explaining that their decision rested solely “on the basis of *stare decisis*.” *Id.* at 320 (Scalia, J., concurring in part and concurring in the judgment).

¹⁴ 135 S. Ct. 1124 (2015).

¹⁵ *Id.* at 1135 (Kennedy, J., concurring).

¹⁶ *Id.*

¹⁷ 2016 S.D. Sess. Laws ch. 70 pmb. 217 (codified at S.D. CODIFIED LAWS § 10-64 (2017)).

¹⁸ *Id.* § 1.

¹⁹ *Id.* § 5.

of this law” by the U.S. Supreme Court.²⁰ As Justice Alito put it, the “South Dakota law [was] obviously a test case.”²¹

Expediently, a group of remote sellers challenged the law. After being sued by South Dakota for refusing to register for the newly required sales tax license, Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc. moved for summary judgment in South Dakota circuit court on the grounds that S.B. 106 was unconstitutional under *Quill* and *Bellas Hess* — a point South Dakota conceded, indicating that it was seeking review by the U.S. Supreme Court to overturn *Quill*.²² Accordingly, the South Dakota circuit court granted the motion for summary judgment and South Dakota appealed to the state’s highest court.²³ The South Dakota Supreme Court unanimously affirmed, recognizing that South Dakota’s “arguments on the merits” may be “persuasive” but “*Quill* remains the controlling precedent.”²⁴

The U.S. Supreme Court vacated and remanded.²⁵ Writing for the Court one last time, Justice Kennedy²⁶ pilloried *Quill*’s physical presence rule as “arbitrary, formalistic,” “anachronistic,” and “unfair and unjust” to both states and brick-and-mortar retailers.²⁷ After all, the rationale of *Quill* was that remote sellers lacked a sufficiently “substantial nexus” with the state to justify imposing a duty of tax collection.²⁸ This was wrong even in the mail-order catalog days of 1967 and 1992, but “the Internet revolution has made [*Quill*’s] earlier error all the more egregious and harmful.”²⁹ The rule deprived the states of billions of dollars, since they could not force remote sellers to collect the tax and consumers hardly ever paid it on their own.³⁰ *Quill* “serve[d] as a judicially created tax shelter” for remote retailers who do a great deal of business online.³¹

Satisfied that *Bellas Hess* and *Quill* were wrongly decided, the Court then jumped the hurdle of stare decisis. The *Quill* Court had feared upsetting reliance interests.³² *Wayfair* shrugged off this concern, noting

²⁰ *Id.* § 8(8).

²¹ Transcript of Oral Argument at 27, *Wayfair*, 138 S. Ct. 2080 (No. 17-494), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-494_7lho.pdf [<https://perma.cc/8HYH-VU8N>].

²² *State v. Wayfair Inc.*, 2017 SD 56, ¶¶ 9–11, 901 N.W.2d 754, 759–60.

²³ *Id.* ¶ 12, 901 N.W.2d at 760.

²⁴ *Id.* ¶ 18, 901 N.W.2d at 761. See generally Recent Case, *State v. Wayfair Inc.*, 2017 SD 56, 901 N.W.2d 754 (S.D. 2017), 131 HARV. L. REV. 2089 (2018).

²⁵ *Wayfair*, 138 S. Ct. at 2100.

²⁶ Justices Thomas, Ginsburg, Alito, and Gorsuch joined Justice Kennedy’s opinion.

²⁷ *Wayfair*, 138 S. Ct. at 2092, 2095.

²⁸ *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992) (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

²⁹ *Wayfair*, 138 S. Ct. at 2097; see also *id.* at 2092.

³⁰ *Id.* at 2088 (“[C]onsumer compliance rates are notoriously low.”).

³¹ *Id.* at 2094.

³² *Quill*, 504 U.S. at 317 (“*Bellas Hess* . . . has engendered substantial reliance and has become part of the basic framework of a sizable industry.”).

that “*stare decisis* accommodates only ‘legitimate reliance interest[s]’”; by contrast, reliance on the physical presence rule was largely due to consumers evading their use-tax obligations.³³ *Quill* had also appealed to Congress’s ultimate authority over interstate commerce as a reason to abide by a precedent, even if wrongly decided.³⁴ But *Wayfair* denied that Congress’s ability to change the law was a proper consideration:

While it can be conceded that Congress has the authority to change the physical presence rule, Congress cannot change the constitutional default rule. It is inconsistent with the Court’s proper role to ask Congress to address a false constitutional premise of this Court’s own creation. 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.³⁵

Having dispensed with the physical presence rule, the Court remanded the case to the South Dakota courts to determine in the first instance “whether some other principle in the Court’s Commerce Clause doctrine might invalidate the Act.”³⁶

Justices Thomas and Gorsuch each filed concurring opinions. Justice Thomas wistfully likened himself to Justice White — who voted for *Bellas Hess* but against *Quill* a quarter-century later — and confessed that he “should have joined [Justice White’s dissenting] opinion.”³⁷ Justice Thomas added that the “Court’s entire negative Commerce Clause jurisprudence” is wrong and should be abandoned.³⁸ Justice Gorsuch also wrote separately to express skepticism of the Court’s dormant commerce clause jurisprudence, raising “questions for another day” of whether the doctrine “can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV’s Privileges and Immunities Clause.”³⁹

Chief Justice Roberts dissented.⁴⁰ Surprisingly, the dissenting Justices “agree[d] that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court.”⁴¹ The dispute between the majority and the dissent turned entirely on the principles and application of *stare decisis*. Chief Justice Roberts argued that whether or how to reverse *Quill* should be left to Congress, which “has the flexibility to address these questions in

³³ *Wayfair*, 138 S. Ct. at 2098 (alteration in original) (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)).

³⁴ See *Quill*, 504 U.S. at 318–19; *id.* at 320 (Scalia, J., concurring in part and concurring in the judgment) (“Congress . . . can change the rule of *Bellas Hess* by simply saying so.”).

³⁵ *Wayfair*, 138 S. Ct. at 2096–97.

³⁶ *Id.* at 2099. But the Court listed “several features [of South Dakota law] that appear[ed] designed to prevent discrimination against or undue burdens upon interstate commerce.” *Id.*

³⁷ *Id.* at 2100 (Thomas, J., concurring).

³⁸ *Id.*

³⁹ *Id.* at 2100–01 (Gorsuch, J., concurring).

⁴⁰ Justices Breyer, Sotomayor, and Kagan joined the Chief Justice’s dissent.

⁴¹ *Wayfair*, 138 S. Ct. at 2101 (Roberts, C.J., dissenting).

a wide variety of ways” and “can focus directly on current policy concerns rather than past legal mistakes.”⁴² He also pointed to the “baffling” burdens of compliance with the idiosyncratic tax codes of “[o]ver 10,000 jurisdictions,” particularly for small businesses, and doubted that new “software” — the majority’s proposed solution to this mess⁴³ — would soon solve the problem.⁴⁴

Chief Justice Roberts emphasized that a “heightened form of *stare decisis*”⁴⁵ applies when “Congress . . . can, if it wishes, override this Court’s decisions with contrary legislation.”⁴⁶ In *Quill*, the Chief Justice noted, the Court had taken to heart that “Congress may be better qualified” and “has the ultimate power to resolve” the question⁴⁷ while Justice Scalia had “recogniz[ed] that *stare decisis* has ‘special force’ in the dormant Commerce Clause context due to Congress’s ‘final say over regulation of interstate commerce.’”⁴⁸ Moreover, “[i]f *stare decisis* applied with special force in *Quill*, it should be an even greater impediment” afterward since *Quill* effectively “tossed [the ball] into Congress’s court.”⁴⁹ Because the Court invited Congress to act and then “suddenly chang[ed] the ground rules, the Court may have waylaid Congress’s consideration of the issue.”⁵⁰

In *Wayfair*, the Court applied the flimsier form of *stare decisis* to a precedent that could have been overruled by Congress. It did so in the context of a dormant commerce clause case, but *Wayfair*’s logic extends

⁴² *Id.* at 2104.

⁴³ *Id.* at 2098 (majority opinion) (“Eventually, software that is available at a reasonable cost may make it easier for small businesses to cope with these problems.”).

⁴⁴ *Id.* at 2103–04 (Roberts, C.J., dissenting). In *Bellas Hess*, the Court reasoned that the dormant commerce clause protects interstate business from being “entangle[d] . . . in a virtual welter of complicated obligations to local jurisdictions.” *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753, 759–60 (1967). The dissent replied that the Court “vastly underestimate[d] the skill of contemporary man and his machines.” *Id.* at 766 (Fortas, J., dissenting). The dispute in *Wayfair* over whether software is up to the task effectively reprised the old debate from *Bellas Hess*, only this time couched as part of the *stare decisis* inquiry’s concern for reliance interests rather than as a matter of dormant commerce clause doctrine. While *Wayfair* acknowledged that “[c]omplex state tax systems could have the effect of discriminating against interstate commerce,” 138 S. Ct. at 2099, the Court remarked that “[t]he physical presence rule is a poor proxy” for an inquiry into any actual burdens imposed on interstate commerce, *id.* at 2093.

⁴⁵ *Wayfair*, 138 S. Ct. at 2102 (Roberts, C.J., dissenting).

⁴⁶ *Id.* at 2101 (first citing *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (tribal sovereign immunity); then citing *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (statutory interpretation); and then citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014) (judicially created doctrine implementing a judicially created cause of action)).

⁴⁷ *Id.* at 2102 (quoting *Quill Corp. v. North Dakota*, 504 U.S. 279, 318 (1992)).

⁴⁸ *Id.* (quoting *Quill*, 504 U.S. at 320 (Scalia, J., concurring in part and concurring in the judgment)).

⁴⁹ *Id.* (alteration in original) (quoting *Kimble*, 135 S. Ct. at 2409); *cf. Bay Mills*, 134 S. Ct. at 2039 n.12 (“When we inform Congress that it has primary responsibility over a sphere of law, and invite Congress to consider a specific issue within that sphere, we cannot deem irrelevant how Congress responds.”).

⁵⁰ *Wayfair*, 138 S. Ct. at 2102–03 (Roberts, C.J., dissenting).

to all constitutional default rules — that is, constitutional decisions that Congress remains free to change. Not only does *Wayfair* deviate from the Court’s decades-old stare decisis analysis, it also imperils other precedents that set constitutional default rules.

The Court’s reasoning in *Wayfair* departs from its prior stare decisis analysis. In 1932, Justice Brandeis posited that stare decisis must bend “in cases involving the Federal Constitution, where correction through legislative action is practically impossible.”⁵¹ The Court has long since adopted his argument,⁵² as well as its corollary — that stare decisis commands “special force in the area of statutory interpretation” where “Congress remains free to alter what [the Court has] done.”⁵³ Justice Brandeis’s logic demands that dormant commerce clause cases, where Congress is free to act, be granted the weightier stare decisis.⁵⁴ The Court applied this reasoning in *Quill*, as Chief Justice Roberts underscored.⁵⁵

Yet the *Wayfair* majority refused to consider Congress’s authority to legislate as a relevant factor for stare decisis.⁵⁶ The Court even insisted that to do so “is inconsistent with the Court’s proper role,” since *Quill* embodied “a false constitutional premise of th[e] Court’s own creation.”⁵⁷ This refusal breaks from the practical Brandeisian wisdom that has guided the Court’s treatment of precedent for the better part of a century. The point is not that stare decisis should have ultimately propped up *Bellas Hess* yet again, as *Wayfair*’s dissenting Justices maintained. After all, a realistic approach that is alert to each branch’s institutional capacities might have led to the conclusion that Congress was actually ill-equipped to overrule *Quill*. In this vein, the Court could have sensibly pointed out that Congress is unlikely to stick its neck out

⁵¹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting).

⁵² See, e.g., *Smith v. Allwright*, 321 U.S. 649, 665 (1944).

⁵³ *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989). For normative evaluations of heightened stare decisis for statutory precedents, see generally EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 211–23 (2008); and William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1364–1409 (1988).

⁵⁴ Scholars have noted the curious fact that Justice Brandeis included many dormant commerce clause cases as examples of overruled constitutional precedents. See, e.g., Earl M. Maltz, Commentary, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 468–469, 469 n.11. One explanation for this is that Justice Brandeis sought the authority of Chief Justice Taney’s dictum that the Court’s “opinion upon the construction of the Constitution is always open to discussion” — which referred to the dormant commerce clause. See *Burnet*, 285 U.S. at 408 n.3 (Brandeis, J., dissenting) (quoting *The Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting)). In Chief Justice Taney’s time, it was thought that Congress could not override the Court’s dormant commerce clause decisions, see *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 321 (1852), so the context of Chief Justice Taney’s dictum does not conflict with Justice Brandeis’s theory of stare decisis.

⁵⁵ *Wayfair*, 138 S. Ct. at 2102 (Roberts, C.J., dissenting).

⁵⁶ Even Justice Kennedy’s earlier opinion in *Direct Marketing* contemplated judicially overruling *Quill*, conspicuously neglecting a possible legislative solution. See *supra* p. 278.

⁵⁷ *Wayfair*, 138 S. Ct. at 2096 (emphasis added).

with a tax hike (or a look-alike) from which only the states would benefit.⁵⁸ Indeed, South Dakota advanced such practical arguments in its brief.⁵⁹ More generally, the Court might have discussed the limits of the states' influence in the federal system as a reason not to wait for congressional intervention, a topic it has debated on other occasions.⁶⁰ Or it could have argued that new facts on the ground — namely, the blast of e-commerce that hit like a comet after *Quill* — overpowered stare decisis of any force, special or plain.⁶¹ Because even statutory precedents may sometimes be overruled,⁶² the Court could have killed *Quill* without first planting its constitutional kiss of death.⁶³

The Court resisted such arguments. Instead, *Wayfair* reasoned that Congress's total ability to correct an erroneous decision counts for nothing when the Court gets the Constitution wrong. That such a theory sprouts from a case like *Wayfair*, which repudiated a "formalistic distinction,"⁶⁴ is ironic. *Wayfair*'s stare decisis analysis resorts to the formalism of making *constitutional* a "magic" word⁶⁵ rather than asking whether Congress can step in.

Moreover, the Court's new thinking on stare decisis threatens other constitutional default rules. *Wayfair* now stands for the proposition that a "constitutional default rule" — a term the Court apparently lifted from South Dakota's reply brief on the merits⁶⁶ — gets only weakened stare

⁵⁸ For two practical arguments to this effect, see Brian Galle, Essay, *Kill Quill, Keep the Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation*, 70 STAN. L. REV. ONLINE 158, 160–62 (2018), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/03/70-Stan.-L.-Rev.-Online-158-Galle.pdf> [<https://perma.cc/22YP-P4V5>]; Edward A. Zelinsky, *The Political Process Argument for Overruling Quill*, 82 BROOK. L. REV. 1177, 1191–92 (2017).

⁵⁹ See Petitioner's Brief at 54, *Wayfair*, 138 S. Ct. 2080 (No. 17-494) ("Congress has little incentive to act here because it would be (or *appear* to be) authorizing new or greater tax collections from its constituents, while receiving none of the revenue in return.").

⁶⁰ See Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 30–32; see also Galle, *supra* note 58, at 159 ("Congress is not a trustworthy guardian of state fiscal power, making continuing judicial involvement a more appealing prospect.").

⁶¹ Two recent studies of stare decisis highlighted the physical presence rule as exemplifying a precedent that may reasonably be overruled due to changed facts. See BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 364–65 (2016); RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 112–13 (2017). It should be noted that the authors of *The Law of Judicial Precedent* classify the physical presence rule as a *constitutional* precedent for stare decisis purposes, thus anticipating the Court's misstep in *Wayfair*. GARNER ET AL., *supra*, at 354–65.

⁶² See *Patterson v. McLean Credit Union*, 491 U.S. 164, 173–74 (1989) (discussing justifications for overruling statutory precedents). *Contra* Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

⁶³ Cf. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 704 (1999) ("Justice Brandeis' . . . memorable prose has since become a mandatory part of the burial rite for any constitutional precedent.").

⁶⁴ *Wayfair*, 138 S. Ct. at 2092.

⁶⁵ See Transcript of Oral Argument, *supra* note 21, at 12.

⁶⁶ Reply Brief at 22, *Wayfair*, 138 S. Ct. 2080 (No. 17-494) ("Congress is polarized, which makes it critical . . . to get the constitutional default rule right.").

decisis. To appreciate why this holding matters, it is worth exploring the concept and scope of constitutional default rules. Contract theory describes default rules as legal rules that the parties may “contract around.”⁶⁷ Although “constitutional default rule” could be read broadly to include a variety of actors and contracting mechanisms,⁶⁸ the Court’s use of the term for purposes of stare decisis may be narrowly defined as judicial precedents of constitutional law that “are ultimately subject to congressional control.”⁶⁹ The dormant commerce clause is a paradigmatic constitutional default rule because what the Court does today Congress may undo tomorrow. Justice Scalia declared this fact “[t]he clearest sign that the negative Commerce Clause is a judicial fraud,” for “[h]ow could congressional consent lift a constitutional prohibition?”⁷⁰ But that’s what a constitutional default rule is. The Court has allowed Congress to overturn its dormant commerce clause cases since 1891.⁷¹

Dormant commerce clause cases are not the only constitutional default rules. Professor Laurence Tribe’s treatise identifies two others.⁷² And in a groundbreaking article, Professor Henry Monaghan revealed “a substructure of substantive, procedural, and remedial rules” forming “a constitutional common law subject to amendment, modification, or even reversal by Congress.”⁷³ What follows is a list of six lines of cases beyond the dormant commerce clause that may be fairly described as constitutional default rules. The first two are drawn from Tribe’s treatise while the next four are found in Monaghan’s article:

(1) *State Taxation of Federal Instrumentalities*: States may not tax instrumentalities of the federal government⁷⁴ — unless Congress consents.⁷⁵ (2) *Article I, Section 10 Cases*: Article I, Section 10 provides

⁶⁷ See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989).

⁶⁸ See John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 826 (2006) (“When we speak of default rules in constitutional law, we typically are talking about specifications of ways the government can act (or modify its behavior) to get around a constitutional prohibition.”).

⁶⁹ Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1525 (2007) (describing judicially enforceable “constitutional default rules imposing obligations on the states in the name of union [that] are ultimately subject to congressional control”).

⁷⁰ *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting).

⁷¹ See *In re Rahrer*, 140 U.S. 545, 560–62 (1891).

⁷² 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-35 (3d ed. 2000).

⁷³ Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975); see also Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001) (further developing Monaghan’s theory in criminal procedure context).

⁷⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).

⁷⁵ See, e.g., *Helvering v. Gerhardt*, 304 U.S. 405, 411 n.1 (1938) (“Congress may curtail an immunity which might otherwise be implied or enlarge it beyond the point where, Congress being silent, the Court would set its limits.” (citations omitted)). One court has described such judicial decisions as setting a “constitutional default rule.” *United States v. Delaware*, 958 F.2d 555, 560 n.9

that certain prohibitions on the states may be waived by Congress.⁷⁶ The Court has taken note of this when considering whether to overrule, for instance, an Import-Export Clause precedent.⁷⁷ (3) *Bivens Cases*: In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁷⁸ the Court held that a violation of the Fourth Amendment gives rise to a right to sue for damages.⁷⁹ But the Court has also held that “[s]uch a cause of action may be defeated . . . when . . . Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.”⁸⁰ (4) *Miranda Cases*: The *Miranda* Court famously “encourage[d]” Congress and the states to explore alternative “procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.”⁸¹ (5) *The Police Lineup Case*: In *United States v. Wade*,⁸² the Court created an exclusionary rule for evidence obtained from a police lineup in violation of the Sixth Amendment right to counsel but acknowledged that it could be replaced by “[l]egislative or other regulations . . . which eliminate the risks of abuse.”⁸³ (6) *The Exclusionary Rule Cases*: *Mapp v. Ohio* made the Fourth Amendment “exclusionary rule” binding on the states,⁸⁴ yet Congress is thought to have the power to replace it.⁸⁵

(3d Cir. 1992) (“[W]e must decide the constitutional default rule for this type of tax, fully aware that Congress could decide at any time to reverse our decision statutorily.”).

⁷⁶ See U.S. CONST. art. I, § 10, cls. 2–3.

⁷⁷ See *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 668 (1945) (“In view of the fact that the Constitution gives Congress authority to consent to state taxation of imports and hence to lay down its own test for determining when the immunity ends, we see no convincing practical reason for abandoning the test which has been applied for more than a century . . .”), *overruled on other grounds* by *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984). In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), the Court left open the question whether “Congress may authorize, under the Import-Export Clause, an exaction that it could not directly impose under the Tax Clause.” *Id.* at 301 n.13. Metzger, however, argues that the Import-Export Clause is free of other clauses’ limits on congressional power. See Metzger, *supra* note 69, at 1500 & n.120.

⁷⁸ 403 U.S. 388 (1971).

⁷⁹ *Id.* at 397.

⁸⁰ *Carlson v. Green*, 446 U.S. 14, 18–19 (1980).

⁸¹ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). In *Dickerson v. United States*, 530 U.S. 428 (2000), the Court struck down a congressional attempt to effectively abolish *Miranda*, holding that “*Miranda* announced a constitutional rule that Congress may not supersede legislatively.” *Id.* at 444. But *Dickerson* also stood by *Miranda*’s “invitation for legislative action” to replace *Miranda* with an adequate substitute. *Id.* at 440; see also Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61 (discussing legislative alternatives to *Miranda*).

⁸² 388 U.S. 218 (1967).

⁸³ *Id.* at 239.

⁸⁴ 367 U.S. 643, 655 (1961).

⁸⁵ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 422–24 (1971) (Burger, C.J., dissenting) (inviting Congress to replace the Fourth Amendment exclusionary rule); Harold J. Krent, *How to Move Beyond the Exclusionary Rule: Structuring Judicial Response to Legislative Reform Efforts*, 26 PEPP. L. REV. 855, 864–71 (1999).

All of the above are arguably constitutional default rules set by the Court that remain, to one degree or another, open to congressional revision. The list could be longer or shorter, depending on which default rules the Court will view as constitutional⁸⁶ and on how it will answer open questions about congressional authority over certain constitutional provisions.⁸⁷ But the takeaway is clear: weaker stare decisis for constitutional default rules. Pre-*Wayfair*, one would have thought that stare decisis applies with special force to such precedents, given congressional power to set them straight. Not anymore. Why? Because it is improper to “ask Congress to address a false constitutional premise of th[e] Court’s own creation.”⁸⁸ The Latin for *Wayfair*’s doctrine is not stare decisis, which should reflect a realistic, working relationship between the legislative and judicial branches. It is mea culpa.

In its zeal to update the Constitution for “the Cyber Age,”⁸⁹ the Court deleted Congress from stare decisis doctrine in constitutional cases. The Court had better options. It could have left *Quill* on Congress’s doorstep, as the dissent argued. Or it could have justified overruling *Quill* notwithstanding the special force of stare decisis. Instead, the Court reasoned that it doesn’t matter whether Congress is willing and able to do the job: a constitutional mess calls for a judicial clean-up crew. For constitutional default rules — a category of decisions embracing the dormant commerce clause and sweeping far beyond — *Wayfair*’s new theory of stare decisis makes the Court’s precedents less sticky and Congress less relevant.

⁸⁶ A shorter list could be produced by whittling away at the constitutional status of the cases identified by Monaghan. While the Court has held that *Miranda* is a constitutional decision, *Dickerson*, 530 U.S. at 444, some of the other cases may be viewed as nonconstitutional. See, e.g., *Collins v. Virginia*, 138 S. Ct. 1663, 1675–80 (2018) (Thomas, J., concurring) (arguing that *Mapp* is “nonconstitutional,” *id.* at 1678 n.5); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 775–77 (7th ed. 2015) (discussing whether *Bivens* is constitutionally required). Conversely, a longer list might include any constitutional right that can be waived by a party. See, e.g., Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 918 (2006) (describing the Eleventh Amendment as “just a contractual default rule that the states are free to barter away”). Such a list might also include various constitutionally inspired judicial presumptions. See, e.g., Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2299 (2006) (describing the *Chevron* presumption of delegated interpretive power to administrative agencies as “a constitutionally inspired default rule”); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2097–98 (2002) (describing clear statement rules as “constitutional default rules” reversible by Congress). Many other decisions could likely be characterized as constitutional default rules; the list above is only an initial stab.

⁸⁷ See, e.g., *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 n.18 (1980) (plurality opinion) (leaving unresolved whether Congress may limit constitutional full faith and credit obligations); *White v. Mass. Council of Constr. Emp’rs, Inc.*, 460 U.S. 204, 215 n.1 (1983) (Blackmun, J., concurring in part and dissenting in part) (leaving unresolved “whether Congress may authorize . . . what otherwise would be a violation” of the Privileges and Immunities Clause); 1 TRIBE, *supra* note 72, § 6-35, at 1243–44 (arguing that Congress cannot override judicial constructions of the Privileges and Immunities Clause); Metzger, *supra* note 69, at 1486–89 (arguing the opposite).

⁸⁸ *Wayfair*, 138 S. Ct. at 2096.

⁸⁹ *Id.* at 2097.