

# THE NEW SISTER-STATE SOVEREIGN IMMUNITY

Michael H. Hoffheimer\*

*Abstract:* The Article reviews the constitutional status of sister-state sovereign immunity. It argues that the parity requirement announced in *Franchise Tax Board v. Hyatt* (2016) is a temporary compromise that is supported by neither the purposes of the Full Faith and Credit Clause nor by cases cited by the Court. It further argues that parity is bad policy because parity overprotects states for acts they commit beyond their borders and under protects the interests of forum states in regulating conduct within their territorial jurisdiction.

But the Article breaks from most scholarship. It suggests that the Court went too far in *Nevada v. Hall* (1979) in finding that nothing in the Constitution compels states to respect sister-state claims to sovereign immunity. But it does not endorse those critics who find absolute state immunity in policies of federalism. Instead it proposes a limited constitutional basis for sister-state immunity that grounds this immunity in territorial restrictions on judicial power that operated during the founding era. Under the proposed approach, states would enjoy sovereign immunity in a sister-state court—but only for acts they or their agents commit in their own territory. The Article explains how this limited immunity accommodates the competing interests of the states, and why it is superior to alternative proposals to ground sister-state immunity in international law.

INTRODUCTION .....	1772
I. THE CONTESTED AUTHORITY: <i>NEVADA V. HALL</i> .....	1775
A. Facts .....	1775
B. The Road Not Taken: The Supreme Court of California’s Approach .....	1776
C. The Categorical Rejection of Constitutional Obligations to Respect Sister-State Immunities.....	1778
D. A Guilty Conscience: Footnote 24 .....	1781
E. The Dissenters .....	1782
F. Legacy .....	1783
II. SOMETHING NEW: <i>FRANCHISE TAX BOARD V. HYATT</i> ....	1785
A. Back Story .....	1785
1. Interim Appeal and <i>Hyatt I</i> .....	1787
2. Trial and Appeal in Nevada Courts .....	1788

---

\* Professor of Law and Jamie L. Whitten Chair of Law and Government, University of Mississippi School of Law. B.A., Johns Hopkins University; Ph.D., University of Chicago; J.D., University of Michigan. For expert library reference service, I thank Ellie Campbell. For detailed, helpful feedback on drafts, I thank Judge John M. Rogers and Professors Patrick J. Borchers, Charles H. Brower II, Judy M. Cornett, John F. Coyle, Joseph Glannon, Christopher R. Green, Jack W. Nowlin, Larry J. Pittman, Kermit Roosevelt, and Michael Solimine.

B.	The New Doctrine in <i>Hyatt II</i> .....	1791
1.	Failure to Overrule <i>Hall</i> .....	1791
2.	Limiting <i>Hall</i> by Requiring Parity .....	1792
3.	The Dissent .....	1794
III.	THE PROBLEM WITH PARITY .....	1796
A.	Sovereign Parity Is Not Supported by the Cases.....	1796
B.	The Scope of Sovereign Parity Remains Uncertain .....	1801
C.	Sovereign Parity Is Bad Medicine.....	1804
1.	Parity Under-Protects a State Engaging in Sovereign Functions Within Its Own Territory .....	1804
2.	Parity Overprotects Sister States when the Forum Has Genuine Interests in Applying Its Own Rule of Liability .....	1805
IV.	THE CASE FOR SISTER-STATE SOVEREIGN IMMUNITY .....	1806
A.	Territorial Limitations Embedded in the Structural Operation of State Judicial Systems in the Founding Era .....	1807
B.	International Law as a Source of Sister-State Immunity .....	1813
C.	Application of the Proposed Approach .....	1816
	CONCLUSION .....	1817

And what trouble will I get into with precedents in the Constitution or something else if I were to write the words that I suggested?

Justice Breyer<sup>1</sup>

## INTRODUCTION

The Eleventh Amendment purported to end private litigation against states in federal courts,<sup>2</sup> and courts and commentators long assumed that

---

1. Transcript of Oral Argument at 44, *Franchise Tax Bd. v. Hyatt*, \_\_ U.S. \_\_, 136 S. Ct. 1277 (2016) (No. 14-1175) [hereinafter *Hyatt II Transcript*] (colloquy with counsel during which Justice Breyer requested but did not receive legal authority for position ultimately adopted by Court).

2. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). The Eleventh Amendment has been expanded beyond its words. *See, e.g.*, *Monaco v. Mississippi*, 292 U.S. 313, 322–30 (1934) (holding state may not be sued by foreign nation in federal court); *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding Eleventh Amendment bars citizen from suing citizen’s own state in federal court despite presence of federal question). Courts have recognized numerous exceptions to the prohibition. *See generally* Martha Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977). Scholars have argued that the Court’s reliance on state sovereign immunity to explain its holdings is anachronistic, incoherent, or in conflict with other constitutional

a state could not be sued in other state courts without its consent.<sup>3</sup> But in 1979 a divided Supreme Court held in *Nevada v. Hall*<sup>4</sup> that the long tradition of sovereign immunity among states was not mandated by any provision of the federal Constitution: sister-state immunity was purely a matter of comity to be found in state law, and states were free to reject sister states' defenses of sovereign immunity.<sup>5</sup>

In June 2015, the Court granted certiorari in *Franchise Tax Board v. Hyatt* [hereinafter *Hyatt II*]<sup>6</sup> to consider whether to overrule *Hall*. Forty-five states urged the Court to do so.<sup>7</sup> Reduced to eight members with the death of Justice Scalia in February 2016, the Court divided equally on the core constitutional issue, leaving the precedent standing—for the time being.<sup>8</sup> But *Hyatt II* also announced a new rule of parity that decided the case on the facts before the Court. The Court held that full faith and credit has a special application in the area of interstate immunity and requires a state court to accord to other states at least as much sovereign immunity as it extends to the state in which it sits.<sup>9</sup>

---

commitments. See generally Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001); Field, *supra*; William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843 (2000); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1; Davis L. Shapiro, Comment, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984). But see Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485 (2001) (criticizing critics of Court's sovereign immunity jurisprudence).

3. *E.g.*, *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883) ("It may be accepted as a point of departure unquestioned, that neither a state nor the United States can be sued as a defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the supreme court of the United States by virtue of the original jurisdiction conferred on this court by the constitution."). The conservative scholarship responding to the *Hall* decision is especially valuable for collecting compelling evidence of the widespread acceptance of the assumption of sister-state immunity. *E.g.*, Philip L. Martin, *The New Interpretation of Sovereign Immunity for the States*, 16 CAL. W. L. REV. 39 (1980).

4. 440 U.S. 410 (1979).

5. *Id.* at 420–21.

6. *Cal. Franchise Tax Bd. v. Hyatt*, \_\_ U.S. \_\_, 135 S. Ct. 2940 (2015) (mem.) (granting certiorari for two questions). See *infra* text at note 115 (identifying issues on review).

7. *Hyatt II Transcript*, *supra* note 1, at 9 (clarifying number of states opposing *Hall*).

8. Justice Breyer's opinion for the Court observed only that the Court was equally divided, without indicating which members of the Court favored overruling *Hall*. See generally Justin Pidot, *Tie Votes in the Supreme Court*, 101 MINN. L. REV. 245, 297 (2017) (discussing tie vote in *Hyatt II* and other cases decided same term).

9. *Franchise Tax Bd. v. Hyatt*, \_\_ U.S. \_\_, 136 S. Ct. 1277, 1282–83 (2016) [hereinafter *Hyatt II*]. This part of the Court's decision was supported by five members of the Court with three Justices dissenting. See *infra* section III.B. The first state court to cite the opinion summarized its holding

This Article examines the current constitutional status of sister-state immunity.<sup>10</sup> It argues that *Hyatt II*'s parity requirement is a temporary expedient, inconsistent with full faith and credit principles and lacking a secure foundation in the case law. At the same time, it questions *Hall*'s rejection of all constitutional limits on sister-state immunity and identifies a constitutional source for immunity in territorial restrictions on state power that were understood as attributes of sovereignty during the founding era and that persisted into the twentieth century. It proposes that states should be immune under their own law but only for acts and consequences of their acts within their own territory. And it contends that this territorial approach strikes the right constitutional balance between the interests of sovereign actors in limiting their liability and the interests of other states in exercising regulatory control over events in their territories.

Part II shows how *Hall*'s broad rejection of constitutional limits on sister-state immunity was not required by the facts of that case and departed sharply from the reasoning offered by the state court. Part III discusses the Court's failure in *Hyatt II* to reach agreement on the constitutional status of sister-state sovereign immunity, examines the new rule of parity adopted by the majority, and considers objections raised by dissenting members of the Court.

Part IV critically evaluates the new parity requirement for sister-state sovereign immunity. It exposes the lack of foundation for the requirement in prior cases construing the Full Faith and Credit Clause, explores the uncertain scope of the requirement, and argues that parity insufficiently accommodates the competing interests of state sovereigns. While the new rule curtails potential interference with sister-state sovereignty, this Part argues that it does so by an unwarranted sacrifice of the forum state's legitimate regulatory policies.

Part V considers alternative approaches to sister-state immunity. First, it finds support for sister-state sovereign immunity in structural limitations on the reach of state process that were closely identified with attributes of sovereignty during the founding era. While such limitations

---

similarly. *Montaño v. Frezza*, 393 P.3d 700, 705 (N.M. 2017) (extending immunity to sister state as matter of comity but observing that "the Full Faith and Credit Clause . . . requires us to recognize the sovereign immunity of other states to the extent that sovereign immunity has been retained by this state under our law") (citing *Hyatt II*, 136 S. Ct. at 1282–83).

10. It does not separately address the preliminary, related issue of personal jurisdiction of one state court over another state as a party. The Court has often adopted language that conflates the issue of juridical jurisdiction and the issue of the substantive defenses. *Cf. Hyatt II*, 136 S. Ct. at 1279 ("In *Nevada v. Hall* . . . this court held that one State . . . can open the doors of its courts to a private citizen's lawsuit against another State . . . without the other State's consent.").

effectively shielded states from liability in sister-state courts for over a century, they provide no authority for limiting state liability arising from the sovereign's conduct outside its own territorial jurisdiction. Second, it considers a proposal by Judge John M. Rogers for grounding sister-state sovereign immunity in the evolving norms of international law.<sup>11</sup> Finally, it considers the practical effect of the proposed approach. Under the approach proposed in this Article, California would be free to impose liability in a case like *Hall* where agents of Nevada enter California and cause personal injuries in California. But Nevada would be compelled to respect California's sovereign immunity in a case like *Hyatt* for claims based on tortious conduct by California agents in California. In contrast, Nevada would be free to reject sovereign immunity and impose liability for claims based on California agents' intentional torts in Nevada.

This Article does not address whether sister-state immunity is politically desirable. It concludes only that the parity requirement has weak constitutional foundations and is unnecessary to preserve interstate harmony. States would remain free to accord greater deference to other states' immunities either by judicial comity<sup>12</sup> or by some form of mutual agreement. If a problem exists and requires a federal solution, Congress has authority to act.<sup>13</sup>

## I. THE CONTESTED AUTHORITY: *NEVADA V. HALL*

### A. *Facts*

In May 1968, an employee of the state of Nevada was driving a car owned by the state university, an instrumentality of Nevada, within the state of California.<sup>14</sup> While acting in the scope of his duties, the Nevada driver collided with another car, causing personal injuries, including severe disabling brain damage, to the passengers of the other car who were

---

11. John M. Rogers, *Applying the International Law of Sovereign Immunity to the States of the Union*, 1981 DUKE L.J. 449. Judge Rogers published the article while still a law professor prior to his call to the federal bench.

12. Some states have accorded full deference to sister-state defenses of sovereign immunity as a matter of comity. *E.g.*, *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283, 287 (Ill. 1983) (respecting sister state's sovereign immunity defense on grounds of comity). Others have imposed significant restrictions on actions against sister states that are not available in other cases. *See infra* note 102 (discussing California court's decision not to award punitive damages against sister state absent express legislative direction).

13. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . to regulate commerce . . . among the several States . . ."); U.S. CONST. art. IV, § 1 ("Congress may by general laws prescribe the manner in which such [state] acts, records and proceedings shall be proved, and the effect thereof.").

14. *Nevada v. Hall*, 440 U.S. 410, 411 (1979).

residents of California. The Nevada driver died in the collision.<sup>15</sup> The California residents commenced an action in California state court against the state of Nevada, the University of Nevada, and the administrator of the deceased driver.<sup>16</sup>

*B. The Road Not Taken: The Supreme Court of California's Approach*

While the case proceeded against the estate of the driver,<sup>17</sup> the State of Nevada moved to quash service on the ground that California state courts lacked jurisdiction over claims against sister states.<sup>18</sup> The trial court granted the motion, but the California Supreme Court reversed, holding that Nevada was subject to personal jurisdiction.

Justice Peters, writing for a unanimous court, provided a narrow ground for the decision: "sister states who engage in activities within California are subject to our laws with respect to those activities and are subject to suit in California courts with respect to those activities."<sup>19</sup> Without rejecting all claims to sovereign immunity, Justice Peters linked both amenability to suit (personal jurisdiction) and liability to the state's activities within another state:

When the sister state enters into activities in this state, it is not exercising sovereign power over the citizens of this state and is not entitled to the benefits of the sovereign immunity doctrine as to those activities unless his state has conferred immunity by law or as a matter of comity.<sup>20</sup>

The Supreme Court of California did not begin its analysis by assuming that its sister state, Nevada, was not entitled to immunity. On the contrary, it concluded that immunity was unavailable only because the volitional activity of the state of Nevada created a relationship with California that eliminated the defense. For this reason, it looked to federal cases where federal courts held that states waived sovereign immunity defenses by

---

15. *Id.*

16. *Id.*

17. The California Supreme Court observed that the case was "[a]pparently" proceeding to trial against the administrator of the estate of the driver. *Hall v. Univ. of Nev.*, 503 P.2d 1363, 1365 n.3 (Cal. 1972). It is not known why the driver's estate did not raise a defense of immunity, and the outcome of that litigation is not reported.

18. *Id.* at 1364.

19. *Id.* The opinion was one of the justice's last, published December 21, two weeks before his death. *Justice Raymond E. Peters of the California High Court*, N.Y. TIMES (Jan. 4, 1973), <http://www.nytimes.com/1973/01/04/archives/justice-raymond-e-peters-of-the-california-high-court.html> [<https://perma.cc/UU89-3ZYE>].

20. *Univ. of Nev.*, 503 P.2d at 1364.

engaging in interstate commercial activity that was expressly regulated by the Federal Employers' Liability Act.<sup>21</sup> The general rule in such cases was one of sovereign immunity, but "the state[,] by engaging in interstate commerce by rail and thereby subjecting itself to the federal legislation[,] must be deemed to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent."<sup>22</sup>

Justice Peters did not suggest that Nevada was subject to California laws because it had engaged in interstate commerce. He suggested rather that just as a state lost sovereign immunity and became subject to federal authority when it engaged in activity directly regulated by Congress, so the sister state lost sovereign immunity when its agents physically entered California and engaged in in-state activity that was directly regulated by state law.<sup>23</sup> Although the analogous federal authority was later overruled, Justice Peters's position remains sound under principles that govern sovereigns in international relations.<sup>24</sup>

Justice Peters found even more direct authority in state decisions holding that sister states owning property in other states were subject to the laws of the states where the property was located.<sup>25</sup> From these cases, the Court proposed a general territorial limit: "[a]lthough these cases involve enforcement of property duties rather than *in personam* jurisdiction and a transitory action, they reflect that state sovereignty ends at the state boundary."<sup>26</sup>

Justice Peters did not rest his rejection of sovereign immunity on comity. Only after determining that the sister state's activity lay outside the zone covered by sovereign immunity did Justice Peters consider comity-based arguments in favor of sovereign immunity. First, he

---

21. *Id.* (citing *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184, 190 (1964), *overruled by* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676–80 (1999) (expressly overruling *Parden* and rejecting its theory of constructive waiver of sovereign immunity)).

22. *Id.* (citing *Maurice v. California*, 110 P.2d 706 (Cal. Ct. App. 1941)).

23. *Id.*

24. Martiniak characterizes the California court's approach as a "less restrictive" version of the restrictive approach to foreign sovereign immunity "where the only 'restriction' is that the suit arise from acts occurring 'within' the forum state." Chris Martiniak, *Hall v. Nevada: State Court Jurisdiction Over Sister States v. American State Sovereign Immunity*, 63 CALIF. L. REV. 1144, 1160 (1975).

25. *Univ. of Nev.*, 503 P.2d at 1365 (citing and quoting *People v. Streeper*, 145 N.E.2d 635, 629–30 (Ill. 1957) (injunction against sister state stemming from property owned in state); *State v. Holcomb*, 116 P. 251, 254 (Kan. 1911) (taxation of sister state based on property owned in state)).

26. *Univ. of Nev.*, 503 P.2d at 1365 (emphasis added).

distinguished the only case on point.<sup>27</sup> Second, he rejected “possible embarrassment” as a ground for prohibiting claims against sister states when those claims advanced important policies.<sup>28</sup> He found such important policies in the nonresident motorist statute that required nonresidents to answer lawsuits in the state for conduct in the state.<sup>29</sup>

In addition to the public safety promoted by the nonresident motorist provision, Justice Peters identified two general policy interests that militated against a comity-based recognition of Nevada’s sovereign immunity. First, he identified an interest in providing California residents and taxpayers with a forum where they may seek redress. And second, he found an interest in assuming jurisdiction where most of the evidence is in California and where abdication of authority may result in litigation in other states.<sup>30</sup>

Two other considerations counseled against comity. It would be unfair to deny a California plaintiff a claim against a sister state that retained sovereign immunity under circumstances where recovery would be permitted against the state of California.<sup>31</sup> And the Court viewed the defense of sovereign immunity as “suspect” or disfavored “in a society such as ours, which places such great value on the dignity of the individual and views the government as an instrument to secure individual rights . . . .”<sup>32</sup>

### C. *The Categorical Rejection of Constitutional Obligations to Respect Sister-State Immunities*

On remand, the California trial court denied the state of Nevada’s motion to limit liability to \$25,000, the maximum authorized under

---

27. *Id.* (distinguishing *Paulus v. South Dakota*, 201 N.W. 867 (N.D. 1924), on the ground that in *Paulus* the North Dakota Court relied on the fact that the plaintiff was a resident of the state that he sought to sue in another state). Justice Blackmun would later criticize the California Supreme Court for failing to recognize that in subsequent litigation the plaintiff amended his complaint to allege that he was a resident of North Dakota, and the North Dakota Supreme Court persisted in holding that the claim was barred by sovereign immunity. See *Nevada v. Hall*, 440 U.S. 410, 430 (1979) (Blackmun, J., dissenting) (quoting *Paulus v. South Dakota*, 227 N.W. 52 (N.D. 1929)).

28. *Univ. of Nev.*, 503 P.2d at 1365 (quoting *Hess v. Pawloski*, 274 U.S. 352 (1927) (identifying the important state interest promoted by nonresident motorist statute)).

29. *Id.*

30. *Id.* at 1365–66 (“The presence of the evidence and witnesses in California could, of course, mean that plaintiffs if not permitted to proceed in California could find themselves seriously hampered in proving their case elsewhere.”).

31. *Id.* at 1366.

32. *Id.*

Nevada's partial waiver of sovereign immunity.<sup>33</sup> The jury found liability and returned a verdict for damages in the amount of \$1,150,000.<sup>34</sup> After the Court of Appeals affirmed,<sup>35</sup> and the state Supreme Court denied review, the U.S. Supreme Court granted certiorari. As Justice Stevens wrote, "[d]espite its importance, the question whether a State may claim immunity from suit in the courts of another State has never been addressed by this Court."<sup>36</sup>

Justice Stevens's opinion embraced an instrumental approach to judicial decision-making that informed the interest analysis approach to conflict of laws.<sup>37</sup> He assumed from the outset that forum state courts, as instruments of a sovereign power, have broad judicial authority, and he regarded most legal limits on such power as themselves originating in the law of the forum. These methodological assumptions led him to distinguish between a sovereign's immunity in its own court system, and sovereign immunity accorded to other states as parties in other sovereign's courts. This approach skewed towards finding that legal obligation to recognize a defense under another state's law was self-imposed as a matter of "comity."<sup>38</sup> Despite its long tradition, comity itself was left largely undefined—connoting a vague charitable commitment to some respect for other sovereigns or some shared goal of interstate harmony.

From this orientation, Justice Stevens made quick work of the claims for a constitutional obligation outside of state law to respect sister-state immunity. As a functional limit on the power of sovereign forums, he insisted that such an obligation be expressly rooted in some specific

---

33. *Nevada v. Hall*, 440 U.S. 410, 412. (1979).

34. *Id.*

35. *Id.* at 413–14.

36. *Id.* at 414.

37. Justice Stevens did not cite Currie's scholarship, but Currie's theory of conflict of laws was highly influential by the 1970s. Currie drew on a long tradition that viewed choice of law as a matter of forum-state deference; he justified a forum's occasional application of some other jurisdiction's rule of decision only when it advanced some forum interest—or when it conflicted with no forum interest. See BRAINHERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS 177–87* (1963).

38. Sovereign immunity within a single sovereign was a result of functional limits of the sovereign's own courts to hold the source of their authority accountable. In contrast, the claim of immunity raised in another state's courts "necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Hall*, 440 U.S. at 416.

Justice Stevens illustrated this in the Court's holding in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), where the Court recognized a sovereign immunity defense regarding a vessel attached in admiralty but did so by reasoning that the forum states voluntarily ceded exclusive territorial jurisdiction over visiting sovereigns as a matter of comity. *Hall*, 440 U.S. at 416–17.

provision of the Constitution, and he found no such obligation in the Eleventh Amendment,<sup>39</sup> the Full Faith and Credit Clause,<sup>40</sup> or in other implied limits.<sup>41</sup> For him claims based on any implied limits to preserve the autonomy of sister states were particularly unpersuasive because they in turn entailed restrictions on the power of the forum state—in conflict with his methodological assumption.<sup>42</sup>

This left only the long history of widely shared assumptions that states did in fact enjoy sovereign immunity in sister-state courts.<sup>43</sup> Justice Stevens fully acknowledged evidence of “the widespread acceptance of the view that a sovereign State is never amenable to suit without its consent,”<sup>44</sup> but nothing in the historical record convinced him that the source was derived from the Constitution rather than from the local laws of the states. For Justice Stevens, the pervasive acceptance of sovereign immunity as a matter of international and domestic law explained why it was not incorporated as a limit in the Constitution.<sup>45</sup> Like all states,

---

39. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.”). The Eleventh Amendment withdrew a contested grant of subject matter jurisdiction in Article III that *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), construed to authorize citizens of one state to sue another state in federal court.

40. The Court relied on authority that established that the Clause “does not require a State to apply another State’s law in violation of its own legitimate public policy.” *Hall*, 440 U.S. at 422 (citing *Pac. Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493 (1939)). The Court found strong California policies in providing full protection for persons injured on its highways. *Id.* at 424. It found that exercising jurisdiction over nonresident motorists effectuated this policy, and it observed that to further implement the policy, California waived its own sovereign immunity. *Id.*

41. Nevada argued that specific limits on state power in the Constitution demonstrated a commitment to restricting the power of states to disregard the sovereign immunity defenses of sister states. While agreeing that numerous provisions place limitations on state sovereignty, Justice Stevens refused to find an implied obligation to respect sister-state immunity. *Id.* at 425 (“[T]hese provisions do not imply that any one State’s immunity from suit in the courts of another State is anything other than a matter of comity.”).

42. As he insisted, the Tenth Amendment provided no answer. *Id.* (“[T]he the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers.”).

43. In his critique of the California Supreme Court decision, Martiniak anticipated arguments that the Constitution “implicitly assumes the notion of interstate sovereign immunity as a premise integral to the whole federal scheme.” Martiniak, *supra* note 24, at 1152 (comparing implied immunity to the implied right to the right to travel and discussing *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Ct. Com. Pl. Pa., Phila. Cty. 1781)); *see also id.* at 1154, 1164 (articulating arguments that the Constitution requires respect for sister-state sovereign immunity). Though he argued that the California court “failed to examine adequately the questions of federalism raised by *Hall*,” he did not conclude that sister-state immunity was constitutionally mandated. *Id.*

44. *Hall*, 440 U.S. at 420–21 n.20 (citing *Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934); *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)).

45. “Regardless of whether the Framers were correct in assuming, as presumably they did, that

California would no doubt have allowed the defense in the past, but in rejecting the defense, California altered its treatment of comity, and because nothing prohibited it from doing so, the Supreme Court affirmed.

*D. A Guilty Conscience: Footnote 24*

Justice Stevens relied on California's "substantial" local policies as providing a permissible ground for applying California law and disregarding Nevada's sovereign immunity.<sup>46</sup> But he added a footnote that indicated some awareness that the Court's broad ruling might cause mischief in other cases. In the note he observed that California's disregard of Nevada's sovereign immunity defense posed "no substantial threat to our constitutional system of cooperative federalism."<sup>47</sup> He emphasized that the factual circumstances supporting the claim made the appeal to sovereign immunity less convincing: "[s]uits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities."<sup>48</sup> And he suggested

---

prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another, the need for constitutional protection against that contingency was not discussed." *Id.* at 419.

The emphasis on comity led Justice Stevens to ignore other features of the legal system that prevent sister-state encroachment on sovereign immunity. States would probably not have feared a disregard of defenses in sister-state courts, because they probably could not have conceived of any way that they would be forced to litigate in such courts. The territorial assumptions about personal jurisdiction later articulated in *Pennoyer v. Neff*, 95 U.S. 714 (1877), reflected the reality that states (even if endowed with the legal attributes that made them subject to suit) would not be amenable to process in sister-state courts.

The history of procedure rather than the substantive law of defenses explains why all cases raising issues of sovereign immunity were proceedings in rem where one state owned property in a sister state. Although Justice Stevens did not discuss most of the cases, Justice Peters considered them. *Hall v. Univ. of Nev.*, 503 P.2d 1363, 1365 (Cal. 1972) (discussing cases). The sole case considered by the California Supreme Court as precedent was *Paulus v. South Dakota*, 227 N.W. 52 (N.D. 1929). *Id.* *Paulus* involved a claim for damages, which the North Dakota Supreme Court characterized as "not an action strictly in rem." *Paulus v. South Dakota*, 201 N.W. 867, 870 (N.D. 1924). In fact, the claim arose from an explosion at a mine owned and operated by a sister state in North Dakota, and the plaintiff commenced the action in rem by means of a writ of attachment. *Id.* at 867.

46. *Hall*, 440 U.S. at 424 n.24.

47. *Id.* Justice Stevens in other opinions had advocated an idiosyncratic approach to full faith and credit limits on choice of law under which a state was prevented from applying its own law only when doing so "threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State." *Allstate Ins. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J., concurring). In that case he found no threat to Wisconsin's sovereignty interests by Minnesota's failure to apply Wisconsin law in litigation between private parties. *Id.* at 324–25.

48. *Hall*, 440 U.S. at 424 n.24.

obliquely that different circumstances might support a different result in a future case.<sup>49</sup>

Justice Stevens suggested that the Constitution might require states to accord sovereign immunity to sister states either to avoid threats to cooperative federalism or to avoid interfering with their capacity to fulfill sovereign responsibilities. This suggestion has encouraged lawyers<sup>50</sup> and scholars<sup>51</sup> to identify cases that might qualify for constitutionally mandated respect for sovereign immunity. But there were reasons to think Justice Stevens did not envisage many exceptions. First, he nowhere suggested that the impact of the million-dollar judgment on Nevada's capacity to pay debts could constitute the sort of interference with sovereign responsibilities. Second, he nowhere else suggested that the nature of the claims would affect the claim of the defense to constitutional protection. This was probably not an oversight. The only precedent he identified had held that one state's commercial mining operation in a neighboring state was shielded by sovereign immunity. In that case from the 1920s, the Court confronted the changing nature of sovereign activities and concluded that "[w]hat is considered a private purpose today may be a public purpose and governmental function to-morrow."<sup>52</sup>

### E. *The Dissenters*

Three Justices in two separate dissents argued that states were bound by the Constitution to respect sister states' sovereign immunities defenses. The dissenters explained the absence of any express provision in the Constitution was due to the fact that the drafters universally assumed that states were immune in each other's courts.<sup>53</sup> They contended that the federal structure of the Constitution necessarily limited the power of states to disregard each other's sovereign immunity.<sup>54</sup> And they located the

---

49. *Id.* ("We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result.")

50. *E.g.*, Brief of the State of West Virginia as Amicus Curiae in Support of Petition for Rehearing of Nevada, Joined by [41 other states], *Hall*, 440 U.S. 410 (No. 77-1337) [hereinafter Brief of the State of West Virginia].

51. Rogers, *supra* note 11, provides the most probing and persuasive effort to give meaning to the limits suggested in footnote 24. His analysis is discussed further *infra* Part IV.

52. *Paulus v. South Dakota*, 201 N.W. 867, 870 (N.D. 1924).

53. *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) ("The only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention."); *see also id.* at 437 (Rehnquist and Burger, JJ., dissenting) ("[T]he States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions . . .").

54. *Id.* at 431 (Blackmun, J., dissenting) ("It is, for me, sufficiently fundamental to our federal

judicial authority to recognize such limits in cases that had recognized implied rights and powers under the Constitution's more general language.<sup>55</sup>

The dissenters also viewed the majority opinion as overbroad, observing that the Court's rule was less restrictive than the one adopted by the California court.<sup>56</sup> Noting that grounding immunity in state comity left no room to impose limits for future constitutional issues in the extreme cases addressed in footnote 24, the dissenting opinions predicted that *Hall* would lead to "interstate retaliation that will prove unsettling and upsetting for our federal system."<sup>57</sup>

### F. Legacy

The *Hall* decision should not have caught states by surprise,<sup>58</sup> but after the decision was announced, forty-one states filed an amicus brief in support of Nevada's petition for rehearing,<sup>59</sup> inaugurating efforts by a majority of state executive branches to overrule or limit the holding.<sup>60</sup> The

---

structure to have implicit constitutional dimension.").

55. *Id.* at 430 (citing cases recognizing freedom of association and right to travel).

56. *Id.* at 428.

57. *Id.* at 427 (Blackmun, Burger & Rehnquist, JJ., dissenting); *see also id.* at 443 (Rehnquist, J., dissenting) ("The federal system . . . is built on notions of state parity . . . . This decision cannot help but induce some 'Balkanization' in state relationships as States try to isolate assets from foreign judgments and generally reduce their contacts with other jurisdictions. That will work to the detriment of smaller States—like Nevada—who are more dependent on the facilities of a dominant neighbor—in this case, California.").

58. By the 1970s states were recognized as dividing over whether to respect sister-state sovereign immunity. *See* Sheldon R. Shapiro, Annotation, *Sovereign Immunity Doctrine as Precluding Suit Against Sister State for Tort Committed Within Forum State*, 81 A.L.R.3d 1239, 1240 (1977) ("In the very few reported decisions in which the issue has been discussed, the courts have reached conflicting results as to whether the doctrine of sovereign immunity precludes a suit against a sister state for a tort allegedly committed within the forum state.").

59. Brief of the State of West Virginia, *supra* note 50. The Court's docket records no prior appearance by amici. A PDF of the docket is on file with the author. There is no indication that amici obtained consent of all counsel, as was required by contemporary practice in the absence of a motion, nor does the docket indicate that the Court acted on the motion. *See* SUP. CT. R. 42 (prior to 1980 renumbering). *See generally* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE (6th ed. 1986) (discussing lack of express authority in rules for amicus brief supporting rehearing, but citing cases where such briefs were received and nothing that amicus brief requires either consent of all parties or motion).

60. *See Hyatt II Transcript*, *supra* note 1 (referring to state amici appearances in *Hyatt*). The amici followed the lead of Nevada in arguing that the Court's opinion provided insufficient guidance regarding the kind of state activity subject to immunity. *Id.* at 2–10. Nevada's petition for rehearing raised the additional argument that the Court's decision failed to provide sufficient guidance on the full-faith and credit due to judgments against states. Petition for Rehearing at 2–3, *Nevada v. Hall*, 441 U.S. 917 (1979) (No. 77-1337).

Nevada legislature expressed its displeasure by enacting a resolution supporting a constitutional amendment mandating that states accord sovereign immunity to sister states.<sup>61</sup>

The reach of the opinion was not always clear to lower courts,<sup>62</sup> and initial academic reception was critical.<sup>63</sup> Nevertheless, neither a Constitutional amendment nor act of Congress limited the impact of the Court's decision. Nor did states enter into mutual compacts on the subject.<sup>64</sup>

From the late 1990s, a series of five-four decisions expanded the scope of the Eleventh Amendment, with majority decisions recognizing broad historical and structural sources for state sovereign immunity.<sup>65</sup> Another

---

61. See H.R.J. Res. 29, 60th Assemb., Reg. Sess. (Nev. 1979), [https://www.leg.state.nv.us/Statutes/60th/Stats1979R01.html#Flz100\\_zAJRz29](https://www.leg.state.nv.us/Statutes/60th/Stats1979R01.html#Flz100_zAJRz29) [<https://perma.cc/9G4N-CBU4>] (showing the initial effort for the constitutional amendment by petitioning Congress to begin amendment process to adopt the following language: “[e]ach state of the United States shall be immune from any suits in law or equity commenced or prosecuted in the courts of another state by citizens of any other state or by citizens or subjects of any foreign state”); LEA BRILMAYER ET AL., *CONFLICT OF LAWS CASES AND MATERIALS* 357 (7th ed. 2015).

62. E.g., *Underwood v. Univ. of Ky.*, 390 So. 3d 433, 436 (Fla. Dist. Ct. App. 1980) (Pearson, J., concurring) (arguing *Hall*'s holding is “expressly limited to effectuating California’s interest in providing protection to those who are injured on its highways”).

63. See Hill, *supra* note 2, at 582 (Court in *Hall* was beguiled by comity and “inattentive to the implications of our constitutional arrangements”); Richard H. Pierson, *Constitutional Law—State Sovereign Immunity—Nevada v. Hall*, 56 WASH. L. REV. 289, 297 (1981) (“Justice Stevens’ conclusion . . . ignores the history and purpose of article III.”); Rebecca Block, Note, *State Borders Are New Boundaries for Sovereign Immunity—Nevada v. Hall*, 29 DEPAUL L. REV. 191, 210 (1979) (arguing that Court meant to offer restricted exception of sovereign immunity applicable under the facts but failed to provide sufficient guidance); David Olenick, Note, *Sovereign Immunity in Sister-State Courts: Full Faith and Credit and Federal Common Law Solutions*, 80 COLUM. L. REV. 1493, 1494 (1980) (*Hall* “threatens to upset the interstate relationships appropriate to the federal system”); Note, *State Tort Liability in Another State’s Courts*, 93 HARV. L. REV. 189, 197–98 (1979) (Court in *Hall* “did not analyze the implications of its full faith and credit holding” and “gives little precise guidance to the lower courts”).

Criticism has also been directed at the California court’s earlier decision. See Note, *Sovereign Immunity—May a State Assert in Personam Jurisdiction over a Sister State Without Its Consent?* Hall v. University of Nevada, 53 B.U. L. REV. 736, 744–45 (1973) (objecting that California court disregarded a “core concept of the federal model” based on “paucity of analysis”). But see J. Bruce Cross, Note, Hall v. University of Nevada: *Sovereign Immunity and the Transitory Action*, 27 ARK. L. REV. 546 (1973) (describing California decision and observing some uncertainties about its scope without suggesting it was constitutionally problematic); Leslie D. Rasmussen, Note, *Sovereign Immunity—Sovereignty of a State Does Not Extend into the Territory of Another State so as to Create Immunity from Suit Arising out of the Sister State’s Activities Within the Boundaries of the Forum State—Hall v. University of Nevada*, 6 LOY. L.A. L. REV. 585–86 (1973) (observing as settled law that “decisions of the United States Supreme Court and the courts of other states have held that this sovereignty ends at the state’s boundaries”).

64. *Hyatt II Transcript*, *supra* note 2, at 8–10 (discussing why no states have entered compact on subject of sovereign immunity).

65. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 627 (1999)

five-four decision relied on the inherent immunity of states under the Constitutional scheme to conclude that Congress lacks authority to subject nonconsenting states to private suits even in their own state courts.<sup>66</sup> But the opinions took care to distinguish those situations, involving conflicts of federal and state power, from the situation in *Hall*.<sup>67</sup>

## II. SOMETHING NEW: *FRANCHISE TAX BOARD V. HYATT*

### A. *Back Story*

Gilbert P. Hyatt, a California citizen and inventor who held the patent on a computer chip,<sup>68</sup> moved to Nevada in the early 1990s. Hyatt claims he established legal residence in Nevada by October 1991—before he received substantial income in patent licensing fees. The state of California claims he established residence in Nevada in April 1992 and was thus responsible for paying California tax on the income.<sup>69</sup>

---

(holding that an express grant of subject matter jurisdiction to federal courts in patent infringement claims against states violated the Eleventh Amendment); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999) (rejecting constructive waiver of sovereign immunity: “the Eleventh Amendment . . . repudiated the central premise of *Chisholm* that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 44 (1996) (holding Congress lacks authority under Article I to authorize private lawsuit against non-consenting state).

66. *Alden v. Maine*, 527 U.S. 710, 712 (1999); *see also id.* at 713 (Justice Kennedy’s opinion for the Court provided the most ambitious argument that “States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution . . . except as altered by the plan of the Convention or certain constitutional Amendments”); *id.* at 728 (concluding that early authorities agreed that “sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself”); *id.* at 753; *id.* at 760, 762–95 (Souter, J., dissenting) (Justice Souter’s dissenting opinion for four Justices challenged the majority’s constitutional history).

67. *Id.* at 739 (noting that *Hall* distinguished issue of state immunity in sister state from immunity in federal court, adding that Court’s reluctance in *Hall* to find implied limitation on power of state forum did not suggest reluctance to find implied constitutional limit on power of federal government inasmuch as states had residual attributes of sovereigns while federal government had only those powers expressly granted under the Constitution).

68. *See Franchise Tax Bd. v. Hyatt*, 335 P.3d 125, 131 (Nev. 2014), *rev’d*, *Hyatt II*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1277, 1278–80 (2016) (containing the most complete record of the facts and procedural history). Although Hyatt held a patent on which he was receiving substantial licensing revenues in 1991, he stopped receiving patent license income from Japan during the audit, and he apparently lost the patent as the result of a legal challenge to its validity. *Hyatt*, 335 P.3d at 133, 152.

69. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 490–91 (2003) [hereinafter *Hyatt I*]. The tax liability with interest and penalties would total more than ten million dollars. *See Hyatt II*, 136 S. Ct. at 1284 (Roberts, C.J., dissenting).

In 1998, while Hyatt's tax liability was pending before administrative agencies in California,<sup>70</sup> Hyatt commenced a civil action in Nevada state court against the California Franchise Tax Board, the California state agency responsible for investigating and assessing the tax. The Nevada lawsuit alleged various negligent and intentional torts in connection with California's investigation and sought compensatory damages and punitive damages.<sup>71</sup>

Hyatt also sought a declaratory judgment regarding the key issue in his California tax dispute: his legal residence in 1991 and 1992. The trial court granted the tax board partial summary judgment on this issue, leaving that issue to be resolved in California administrative proceedings.<sup>72</sup> Hyatt never appealed that court ruling.

Justice Breyer would later summarize Hyatt's tort claims: "Hyatt sought damages for what he considered the board's abusive audit and investigation practices, including rifling through his private mail, combing through his garbage, and examining private activities at this place of worship."<sup>73</sup> The Chief Justice described the claims more fully:

In the course of the audit, employees of the [California agency] traveled to Nevada and allegedly peered through Hyatt's windows, rummaged around in his garbage, contacted his estranged family members, and shared his personal information not only with newspapers but also with his business contacts and even his place of worship. Hyatt claims that one employee in particular had it in for him, referring to him in anti-Semitic terms and taking "trophy-like pictures" in front of his home after the audit.<sup>74</sup>

When the trial court rejected the defense of sovereign immunity,<sup>75</sup> the California Franchise Tax Board sought a writ of mandamus or prohibition

---

70. *Hyatt*, 335 P.3d at 132 (observing that action was pending in California courts). The California audit initially determined that Hyatt was a California resident at the time he received the taxable income. His challenge to the audit's findings led to an eleven-year administrative proceeding, which eventually upheld the California audit, but he was still challenging the agency in California in 2016. *See Hyatt II*, 136 S. Ct. at 1284 (Roberts, C.J., dissenting) (observing Hyatt challenging action in California courts). *But see* Brief for the Petitioner at 5, *Hyatt II*, 136 S. Ct. 1277 (2016) (stating that Nevada opinion erred in stating that Hyatt's challenge was pending in California courts).

71. *Hyatt I*, 538 U.S. at 491.

72. *Hyatt*, 335 P.3d at 132.

73. *Hyatt II*, 136 S. Ct. at 1280.

74. *Id.* at 1284 (Roberts, C.J., dissenting).

75. *See Hyatt I*, 538 U.S. at 492 (quoting CAL. GOV'T CODE ANN. § 860.2 (West 2002)). The tax board contended specifically that California immunity law should apply to the extent that it established immunity for public entities and employees for injuries caused by commencing judicial or administrative proceedings related to collecting tax or for interpreting or applying laws related to

in the Nevada Supreme Court, seeking either to require dismissal or to limit the scope of the suit to claims arising from its conduct in Nevada.<sup>76</sup>

### 1. *Interim Appeal and Hyatt I*

The Nevada Supreme Court granted the California agency partial relief. The Court held that principles of comity required the trial court to dismiss the negligence claim but held that the intentional tort claims could proceed to trial.<sup>77</sup> In 2003, *Franchise Tax Bd. v. Hyatt*<sup>78</sup> [hereinafter *Hyatt I*], the Supreme Court affirmed. Writing for a unanimous Court, Justice O'Connor explained that the Constitution did not require Nevada to give full faith and credit to California's statute providing the state agency with immunity from suit.<sup>79</sup> In contrast to the "exacting" full faith and credit due to sister-state judgments,<sup>80</sup> she emphasized that the Full Faith and Credit Clause does not require one state to implement the statute law of another state regarding a subject that it is itself competent to legislate.<sup>81</sup> She observed that Nevada was obviously competent to legislate regarding injurious conduct within its territory.<sup>82</sup> Under settled legal principles, the choice of Nevada law was constitutionally permissible so long as the state had "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>83</sup>

Justice O'Connor explained why the Court refused to adopt a special rule that would require recognizing sister-state immunity when necessary to avoid interference with a state's "capacity to fulfill its own sovereign responsibilities."<sup>84</sup> First, the proposed rule would have committed the Court to evaluating the respective legislative needs of the states, but the Court's historic experience with a balancing approach to full faith and credit obligations had proved unsatisfactory.<sup>85</sup> Second, she observed that

---

tax. *Id.*

76. *Id.*

77. *Id.*

78. *Hyatt I*, 538 U.S. 488 (2003).

79. *Id.*

80. *Id.* at 494 (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998)).

81. *Id.* (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (quoting *Pac. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939))).

82. *Id.* at 494.

83. *Id.* at 494–95 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

84. *Id.* at 495.

85. *Id.* at 486.

the Court had rejected any special need to protect core sovereignty functions when it rejected constitutionally based claims for sister-state immunity.<sup>86</sup>

In sum, Justice O'Connor rejected the proposed rule because it would require the Court to choose between the sovereign interest of California and Nevada, where "the question of which sovereign interest should be deemed more weighty is not one that can be easily answered."<sup>87</sup> And she observed that the sovereign function exception would be neither limited nor easily administered by comparing the tax-collecting activity in *Hyatt* to the transportation services in *Hall*.<sup>88</sup>

The Court did not find all state sovereignty interests beyond the scope of the Full Faith and Credit Clause; it observed that the Clause prevented policies of judicial hostility to the legislation of sister states. "But we are not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State."<sup>89</sup> And the Court found that the Nevada Supreme Court had "sensitively applied principles of comity with a healthy regard for California's sovereign status . . ."<sup>90</sup>

## 2. *Trial and Appeal in Nevada Courts*

Following *Hyatt I*, the case returned to the trial court. Three issues had been resolved as a matter of law in favor of the tax board. First, in keeping with the early pretrial determination that the issue of *Hyatt's* legal residence should be determined in California, the case was structured to avoid having the issue of the accuracy of the audit presented to the jury.<sup>91</sup> Second, the Nevada Supreme Court had determined that the tax board enjoyed immunity for claims of negligence. Third, the trial court granted summary judgment to the tax board on the matter of economic damages.<sup>92</sup>

---

86. *Id.* at 497 (Justice O'Connor emphasized that the state of California did not ask the Court to overrule *Hall*).

87. *Id.* at 498.

88. *Id.* at 498–99 ("To be sure, the power to promulgate and enforce income tax laws is an essential attribute of sovereignty. . . . But the university employee's education mission in *Hall* might also be so described.").

89. *Id.* at 499.

90. *Id.*

91. *Franchise Tax Bd. v. Hyatt*, 335 P.3d 125, 133 (Nev. 2014) ("[T]he parties were required to litigate the action under the restraint that any determinations as to the audits' accuracy were not part of *Hyatt's* tort action and the jury would not make any findings as to when *Hyatt* moved to Nevada or whether the audits' conclusions were correct.").

92. *Id.* *Hyatt* produced an expert who opined that the tax board's communication with persons in Japan caused the termination of his patent income from Japan. The trial court concluded that the evidence was speculative and granted summary judgment. *Id.* The Nevada Supreme Court affirmed.

The surviving intentional torts—invasion of privacy, breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress—were tried before a jury for “approximately four months.”<sup>93</sup> The jury found for the plaintiff on all claims and returned special verdicts awarding damages in the amount of \$52 million for invasion of privacy, \$85 million for emotional distress, and \$1,085,281.56 for fraud.<sup>94</sup> The jury also awarded \$250 million in punitive damages, and a special master fixed costs at \$2.5 million.<sup>95</sup>

On direct appeal, the Nevada Supreme Court held that three of the five intentional tort claims failed as a matter of law.<sup>96</sup> But the Court found that there was sufficient evidence to support the fraud claim based on the tax board’s representations that it would treat Hyatt courteously and fairly and treat his communications confidentially.<sup>97</sup> And the Court adopted a “sliding scale” approach to intentional infliction of emotion distress under which evidence of physical harm or other objectively verifiable injury would not be required for more egregious forms of conduct.<sup>98</sup> Applying this sliding scale to the facts, the Court determined that “this case is at the more extreme end of the scale,”<sup>99</sup> and, consequently, concluded that Hyatt’s claim was supported by sufficient evidence.<sup>100</sup>

The state Supreme Court also disallowed most of the damages. It rejected all punitive damages on the ground that punitive damages are available against a sovereign only when expressly authorized by statute,<sup>101</sup>

---

*Id.* at 157.

93. *Id.* at 130, 133–34.

94. *Id.* at 134 (designating the fraud award as “special damages” without further explanation of their source).

95. *Id.* The trial judge approved the master’s recommendation. These were reversed on appeal as part of the reversal regarding damages. In addition, the court held that the trial judge erred in refusing to permit the tax board to object before entry of the award. *Id.* at 155.

96. *Id.* at 130. The invasion of privacy claims failed because the private facts that were allegedly disclosed were available from public records or known to the third persons to which they were communicated, and because Hyatt failed to adduce legal authority to support his claimed expectation of privacy in his trash or in packages delivered outside his door. *Id.* at 140, 140 n.8. The breach of confidential relationship claim failed because there was no confidential relationship. *Id.* at 143. The abuse of process claim failed because the defendant did not employ legal process. *Id.* at 144.

97. *Id.* at 145 (evidence supporting the fraud claim included that the main auditor was biased against Hyatt, made negative comments about his religion, and was “intent on imposing an assessment . . . and that [the tax board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken”).

98. *Id.* at 147–48.

99. *Id.* at 148.

100. *Id.* at 149.

101. *Id.* at 154 (finding that the general statute authorizing punitive damages was not sufficient to overcome the presumption against punitive damages and stating, “[t]he broad allowance for punitive

extending to California the same sovereign immunity enjoyed by Nevada as a matter of comity.<sup>102</sup>

In contrast, the Court upheld the special damages awards against the tax board on the fraud claim.<sup>103</sup> The reported decisions do not explain the components of the special damages,<sup>104</sup> but the tax board did not contend that the verdict was unsupported by evidence. Rather, it argued that compensatory damages must be capped at \$50,000 as a matter of comity because the tax board was totally immune under California law and the state of Nevada waived immunity in such claims only to a maximum of \$50,000.<sup>105</sup>

The Nevada Court acknowledged that a majority of state courts recognized a sister state's immunity to the extent that they accorded immunity to their own sovereign.<sup>106</sup> But the Court chose to follow authority that refused to extend immunity to sister states when doing so conflicted with forum policies.<sup>107</sup> It found that subordinating Nevada's policy of compensation for Nevada citizens to goals of comity would violate public policy.<sup>108</sup> Because comity was the only challenge to the special damages, the Court affirmed the amount of the award.<sup>109</sup>

Finally, the Court upheld liability for fraud and intentional infliction of extreme emotional distress but reversed on other claims.<sup>110</sup> It upheld the award of \$1 million damages for fraud but reversed the award of \$85 million damages for intentional infliction of extreme emotional distress and reversed the award of costs.<sup>111</sup> And it ordered a new trial due to evidentiary errors and errors in jury instructions that permitted the jury to

---

damages under [the statute] does not authorize punitive damages against a government entity").

102. *Id.* ("Further, under comity principles, we afford FTB the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity . . .").

103. *Id.*

104. *See id.* at 145 (Hyatt introduced evidence that the delay in audit cost him \$8,000 per day in accrued interest and fines).

105. *Id.* at 146.

106. *Id.* (citing *Sam v. Estate of Sam*, 134 P.3d 761 (N.M. 2006); *Hansen v. Scott*, 687 N.W.2d 247, 250 (N.D. 2004); *Solomon v. Sup. Ct. of Fla.*, 816 A.2d 788, 790 (D.C. 2002); *McDonnell v. Illinois*, 748 A.2d 1105 (N.J. 2000); *Schoeberlein v Purdue Univ.*, 544 N.E.2d 283, 285 (Ill. 1989)). It is not clear from the opinion the Nevada court viewed the majority rule as constitutionally compelled, though it noted the *Sam* court's reliance on *Hall* and *Hyatt I. Id.* at 146.

107. *Id.* at 146–47 (citing and following *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362, 363–64 (Ala. 1992)).

108. *Id.* at 147.

109. *Id.*

110. *Id.* at 149.

111. *Id.* at 147, 153–54.

consider the accuracy of the audit,<sup>112</sup> prevented the tax board from rebutting evidence of spoliation,<sup>113</sup> and prevented the tax board from showing the loss of Hyatt's patent and a federal tax audit.<sup>114</sup>

## B. *The New Doctrine in Hyatt II*

The Supreme Court granted a writ of certiorari to review two issues: 1) whether to overrule *Hall*, and 2) “[w]hether Nevada may refuse to extend to sister States hailed into Nevada courts the same immunities Nevada enjoys in those courts.”<sup>115</sup>

### 1. *Failure to Overrule Hall*

The state of California focused its efforts on the first issue, devoting more space to it in the petition for certiorari and in its brief,<sup>116</sup> opening with the issue during argument, returning to it when Justice Breyer sought to turn discussion to the second issue, and addressing it exclusively in closing.<sup>117</sup> Forty-six states supported California's argument that the Court should overrule *Hall*.<sup>118</sup>

---

112. *Id.* at 149–51.

113. *Id.* at 152.

114. *Id.* The trial court had excluded evidence that the patent had been determined invalid and that Hyatt had been subjected to a federal tax audit on the ground that it was more prejudicial than probative. *Id.* The court reversed, finding that it was more probative than prejudicial. *Id.* The court does not explain why it affirmed the judgment of liability obtained in the absence of this evidence, given that it seems that a properly informed jury might not have found that the emotional distress was caused by the tax board's wrongdoing rather than the other events they did not consider. *Id.* at 148, 157. Under Nevada law, the extreme and outrageous conduct must cause the emotional distress. *Id.* at 147.

115. Petition for Writ of Certiorari, *Hyatt II*, \_\_ U.S. \_\_, 136 S. Ct. 1277 (2016) (No. 14-1175). The Court granted the petition as to the second and third questions presented but did not agree to review the first question, “[w]hether the federal discretionary-function immunity rule, 28 U.S.C. § 2680(a), is categorically inapplicable to intentional torts and bad-faith conduct.” *Id.*; see also *Franchise Tax Bd. v. Hyatt*, \_\_ U.S. \_\_, 135 S. Ct. 2940 (2015) (granting petition for writ but limiting to questions two and three).

116. The petition for certiorari allocated nine pages to the first issue and six pages to the second; the brief allocated thirty-two pages to the first issue, eight pages to the second. Petition for Writ of Certiorari, *supra* note 115, at 21–35; Brief of Petitioner at 17–57, *Hyatt II*, 136 S. Ct. 1277 (No. 14-1175).

117. Transcript of Oral Argument at 3–18, 21–26, 53–58, *Hyatt II*, 136 S. Ct. 1277 (No. 14-1175) [hereinafter Transcript of Oral Argument].

118. The total number of states supporting reversal of *Hall* was announced during argument. *Id.* at 10. The multi-state tax commission and forty-three states had filed amicus curiae briefs supporting the tax board before the Nevada Supreme Court. *Franchise Tax Bd. v. Hyatt*, 335 P.3d 125, 134 n.4 (Nev. 2014). In briefs, these states addressed only the issue of overruling *Hall*. See Brief of the State of West Virginia, *supra* note 50.

The Court's attention was also evidently focused on the issue of whether to overrule *Hall*, as Justice Breyer was the only member of the Court who requested counsel to address the second issue during argument.<sup>119</sup>

Because the Court was equally divided, it was unable to overrule *Hall*.<sup>120</sup> Yet the fact that the Court was equally divided indicated that a growing number of members of the Court were willing to find that the Constitution required states to respect sister states' claims to sovereign immunity, and it is tempting to speculate that, had Justice Scalia lived, he would have cast the necessary vote to overrule *Hall*.<sup>121</sup> And the public announcement of division on the issue after such intense debate constituted an invitation to the states to bring the issue back to the Court in the future.

## 2. *Limiting Hall by Requiring Parity*

Rarely has a member of the Court announced so clearly an interest in a radical new rule of constitutional jurisprudence as when Justice Breyer stated during oral argument:

Now, I would like just two minutes on what's bothering me. And what is bothering me is I really don't see how Nevada can say, we're going to give immunity to our own State but we won't accept California's similar immunity. Now, that doesn't seem intuitively right, but if I look at the Constitution, I see it says this. It says: "Full faith and credit shall be given in each State to the public acts of other States."

. . . .

So I say, how does Nevada get away with that? Answer: Because they have a strong public policy in not doing it; namely, the policy of they don't give anybody, including their own officials, that kind of immunity.

If that's the answer, that answer runs out of steam at the very point that they try to give officials more immunity than California is giving.

---

119. Transcript of Oral Argument, *supra* note 117, at 18, 40.

120. *See* *Pidot*, *supra* note 8.

121. During argument, Justice Scalia expressed his opinion that the Court's cases applying the Eleventh Amendment rested on the assumption that states could not be sued without their consent in either federal or state court. *See* Transcript of Oral Argument, *supra* note 117, at 34–35. Even if this represented his final view after deliberation, however, it would not necessarily mean he was prepared to overrule precedent.

Now, you see how I've lined up that legal reasoning with what seems intuitive. But I have no idea, to tell you the truth, about whether there is precedent for that; about what that might, in fact, get us into trouble on; or et cetera.

So I would—you must have thought through this. If I look in the briefs, the answer to this question of equal treatment—I can't find much.<sup>122</sup>

Justice Breyer, writing for the majority, devoted the bulk of his opinion to providing constitutional grounding for the intuition he articulated during argument that state courts must accord other states at least as much sovereign immunity as they accord to their own states.

Without help from counsel,<sup>123</sup> Justice Breyer found the desired Full Faith and Credit Clause precedent in three cases that, he characterized, demonstrated a well-established requirement that a forum court's disregard of a foreign state's law not be based on a "policy of hostility" to the foreign law.<sup>124</sup> Although the "policy of hostility" language derived from Justice O'Connor's caveat in *Hyatt I*,<sup>125</sup> the case she quoted provided no useful authority.<sup>126</sup> He relied instead on two other decisions.<sup>127</sup> From

122. Transcript of Oral Argument, *supra* note 117, at 40–41.

123. Not one of the twelve briefs submitted by parties and amici (including nine prominent professors specializing in federal jurisdiction) cited either *Broderick* or *Hughes*. Only the parties' briefs discussed *Carroll v. Lanza*, despite the Court's previous attention to that authority in *Hyatt I*, 538 U.S. 448, 499 (2003) ("[T]he Court is not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955))).

124. *Hyatt I*, 538 U.S. at 499.

125. *Id.* (quoting *Carroll*, 349 U.S. at 412–13); *see also* *Hyatt II*, \_\_ U.S. \_\_, 136 S. Ct. 1277, 1281 (2016) ("We followed this same approach when we considered the litigation now before us for the first time."). Justice Alito shared Justice Breyer's interest in the problem of hostility, posing a question during argument about whether the Constitution provided any limits on a state disregarding another state's law due to hostility. Transcript of Oral Argument, *supra* note 117, at 49–50.

126. The language occurred in the context of a case where the forum applied forum law to a personal injury caused in its state. Finding no full faith and credit problem, the Court distinguished *Hughes* and *Broderick* and observed the state "is not adopting any policy of hostility." *Carroll*, 349 U.S. at 413.

Two other early published discussions of the decision noted the Court's treatment of *Carroll* and case law precedent. One concluded that "*Carroll* stands for exactly the opposite proposition for which *Hyatt II* cited it." Patrick J. Borchers, *Is the Supreme Court Really Going to Regulate Choice of Law Involving States?*, 50 CREIGHTON L. REV. 7, 13 (2016). Another observed, "[w]hile *Hyatt II* extended precedent in novel ways, it did so in fealty to a tradition of pragmatic experimentation expressed in that same case." Casenote, *The Supreme Court 2015 Term: Franchise Tax Board v. Hyatt*, 130 HARV. L. REV. 317, 322 (2016).

127. *Hyatt II*, 136 S. Ct. at 1281 (citing and discussing *Hughes v. Fetter*, 341 U.S. 609, 611–12 (1951) (holding that Wisconsin statute that prevented litigation of Illinois cause of action violated full faith and credit when Wisconsin permitted litigation of comparable Wisconsin claims); *Broderick v. Rosner*, 294 U.S. 629, 642–43 (1935) (holding full faith and credit prevented New Jersey from

these he reasoned that Nevada's failure to extend to a sister state the same measure of immunity that Nevada enjoyed embodied "a special rule of law applicable only in lawsuits against its sister States," a rule "inconsistent with the general principles of Nevada immunity law," and "a special and discriminatory rule."<sup>128</sup> Finding that Nevada offered no "sufficient policy considerations" for the rule that discriminated against California law,<sup>129</sup> he concluded that the failure to accord California the immunity extended to Nevada's own sovereign as a defendant "lacks the 'healthy regard for California's sovereign status' that was the hallmark of [the Court's] earlier decision, and it reflects a constitutionally impermissible 'policy of hostility to the public Acts of a sister State.'"<sup>130</sup> The Court vacated the judgment below "insofar as the Nevada Supreme Court has declined to apply California law in favor of a special rule of Nevada law that is hostile to its sister States . . . ."<sup>131</sup>

### 3. *The Dissent*

Three Justices did not agree with the Court's opinion on the Full Faith and Credit issue. Justice Alito concurred in the judgment without explaining why he did not join the opinion.<sup>132</sup> The Chief Justice and Justice Thomas dissented and expressed their disagreement with the parity requirement.<sup>133</sup>

The dissenting opinion identified an obstacle to requiring full faith and credit for sister-state defenses of sovereign immunity. The dissent pointed out that the Court has consistently construed the Full Faith and Credit Clause to assure a state's broad freedom to disregard foreign laws—as distinct from rights reduced to foreign judgments—with respect to "subject matter concerning which it is competent to legislate."<sup>134</sup> The Court had specifically recognized in *Hyatt I* that a state is competent to apply its law without violating the Full Faith and Credit Clause so long as

---

refusing to enforce New York claims by applying burdensome requirements to foreign claims that it did not apply to comparable New Jersey claims)).

128. *Hyatt II*, 136 S. Ct. at 1282.

129. *Id.*

130. *Id.* at 1282–83 (quoting *Hyatt I*, 538 U.S. 448, 499 (2003)).

131. *Hyatt II*, 136 S. Ct. at 1283. After remand the Nevada Supreme Court held punitive damages were not available and limited compensatory damages to \$50,000. *Franchise Tax Bd. v. Hyatt*, 401 P.3d 1110, 1117–18 (Nev. 2017).

132. *Hyatt II*, 136 S. Ct. at 1283.

133. *Id.* at 1283–88.

134. *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939), *quoted in Hyatt II*, 136 S. Ct. at 1286 (Roberts, C.J., dissenting)).

there is a significant contact in the state creating state interests served by the application of its law.<sup>135</sup> The dissenters regarded the injury of a Nevada citizen in Nevada as satisfying the requirements for applying Nevada law.<sup>136</sup> The Chief Justice wrote, “[t]his Court has generally held that when a State chooses ‘to apply its own rule of law to give affirmative relief for an action arising within its borders,’ the Full Faith and Credit Clause is satisfied.”<sup>137</sup>

The dissenters also questioned the majority’s determination that Nevada had adopted a policy of hostility towards California as a sovereign, finding, on the contrary, that Nevada offered sufficient policy justifications for applying Nevada’s law of full compensation to foreign sovereigns.<sup>138</sup> The dissenters emphasized that *Hyatt I* had never required comity but had only referred with approval to the Nevada Supreme Court’s adoption of restraint as a matter of comity as evidence of Nevada’s healthy regard for the sister state’s sovereign status.<sup>139</sup>

Finally, the dissenters maintained that the Full Faith and Credit Clause either applied or it did not.<sup>140</sup> They thus read the Clause as effectively mandating a choice of law between either Nevada’s rejection of sovereign immunity or California’s total immunity.<sup>141</sup> Accordingly, they disagreed with the remedy mandated by the majority, which prohibited Nevada from treating California like a private party under Nevada law but fell short of requiring Nevada to recognize the full immunity available to the state under California law.<sup>142</sup> They characterized this as “a new hybrid rule, under which the Board enjoys partial immunity.”<sup>143</sup>

---

135. See *supra* text accompanying note 83.

136. “This Court has long recognized that ‘[f]ew matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power’ than ‘the bodily safety and economic protection’ of people injured within its borders.” *Hyatt II*, 136 S. Ct. at 1286–87 (Roberts, C.J., dissenting) (quoting *Pac. Emp’rs Ins. Co.*, 306 U.S. at 503).

137. *Id.* at 1286 (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)).

138. *Id.* at 1287.

139. *Id.* The Chief Justice observed that similar indications of such healthy disregard were evident in the Nevada Supreme Court decision under review in *Hyatt II*, where the Nevada court had eliminated the \$250 million punitive damages award. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1288. The Chief Justice insisted that “[w]here the Clause applies, it expressly requires a State to give full faith and credit to another State’s laws.” *Id.* (emphasis in original). The Court has, however, required states to give full faith and credit to part of another state’s law in a case. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (holding that full faith and credit and due process require court to apply a state’s substantive law to claim but do not require application of same state’s statute of limitations).

### III. THE PROBLEM WITH PARITY

*Hyatt II* requires states to extend to sister states at least as much sovereign immunity as they accord to their own sovereigns. This parity policy is grounded on the assumption that doing otherwise must stem from a constitutionally prohibited hostility to sister-state law. In the context of the Court's equal division on the constitutional validity of *Hall*, parity presents a pragmatic compromise and has the intuitive appeal of equal treatment. By effectively shielding states from excessive liability in the courts of other states, the decision may postpone the need to revisit the controversial issue of the validity of *Hall*.

Nevertheless, the rule of parity is constitutionally problematic. This part of the Article questions the reasoning offered by the Court in support of the new doctrine. It explores the lack of authority for parity in case law; it exposes the uncertain scope of the parity requirement; and it contends that the new rule is undesirable both because it provides insufficient immunity to states for sovereign acts performed in their own territory and because it overprotects states for injuries they cause in other states.

#### A. *Sovereign Parity Is Not Supported by the Cases*

Justice Breyer found authority for constitutional parity in two older cases where states applied forum law and refused to recognize claims based on sister-state statutes. In both cases, the Court emphasized that forum law would have permitted the claims if they had arisen in the forum state. In both cases, the Court held that full faith and credit required the forums to recognize the forum claims.<sup>144</sup>

Neither decision formulated anything like a rule of parity, and both emphasized the need to limit the decisions to their unusual facts. In *Broderick v. Rosner*,<sup>145</sup> the superintendent of the banks of New York sought to collect assessments in New Jersey court against New Jersey residents.<sup>146</sup> The New Jersey courts held the action was properly dismissed under a New Jersey statute requiring the joinder of the bank and all stockholders for claims arising from the laws of foreign states and foreign countries.<sup>147</sup> The Supreme Court reversed. Writing for the Court,

---

144. *Hyatt II*, 136 S. Ct. at 1281 (citing *Hughes v. Fetter*, 349 U.S. 609 (1951); *Broderick v. Rosner*, 294 U.S. 629 (1935)).

145. 294 U.S. 629 (1935).

146. *Id.* at 642–43. A New York statute imposed several liabilities on stockholders for the debts of the bank up to the par value of their shares or their investment in the bank. *Id.*

147. *Id.*

Justice Brandeis observed that forum requirement that the action proceed as a bill in equity was acceptable, but he explained that requiring joinder of all shareholders as necessary parties “imposes a condition which, as here applied, is legally impossible of fulfillment.”<sup>148</sup>

To be sure, the forum statute discriminated on its face against foreign claims, and, except for the statute, the action could have been permitted under New York law.<sup>149</sup> But the Court did not hold that full faith and credit prevented application of forum law just based on discrimination or hostility. Rather the Court found a complete absence of forum authority to legislate in an area peculiarly governed by sister-state law. Justice Brandeis accepted that valid procedural interests might justify dismissal of a claim brought under foreign law.<sup>150</sup> But he emphasized that the effect of applying forum law was to deny a remedy<sup>151</sup> and he noted that the assessed liability was an “incident” of a corporation and thus “peculiarly within the regulatory power of New York, as the State of incorporation.”<sup>152</sup> The Court’s decision was not beyond doubt. By dissenting without opinion, Justice Cardozo signaled that there were grounds for questioning the decision.<sup>153</sup>

Moreover, *Broderick* predated the Court’s modern approach to full faith and credit for statutes in *Pacific Employers*<sup>154</sup> and stemmed from the era when the Court was grappling with the inadequacies of its full faith and credit doctrine.<sup>155</sup> The opinion was never previously read as authority

---

148. *Id.* at 639.

149. *Id.* at 640. The case thus fell under the familiar doctrine that where states are concededly required to extend full faith and credit to the law of a sister state, they may not evade the liability by depriving their court of jurisdiction. *Id.* at 642 (citing *Kenney v. Supreme Lodge of the World*, 252 U.S. 411, 415 (1920)).

150. *Id.* at 643 (citing *Anglo-Am. Provision Co. v. Davis Provision Co.*, 191 U.S. 373 (1903) (Holmes, J.)) (observing that a court may dismiss forum claim under doctrine of forum non conveniens in some cases). The cited authority held that a state may deny its courts jurisdiction to enforce an action on a foreign judgment by a foreign corporation against a foreign corporation. *See Kenney*, 252 U.S. at 411.

151. *Broderick*, 294 U.S. at 643 (holding that the state “may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause”).

152. *Id.*

153. *Id.* (Cardozo, J., dissenting).

154. *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493 (1939).

155. *Pacific Employers* held that more than one state’s law may constitutionally apply to the same occurrence or transaction. Prior to that decision, the Court adopted a balancing test and imposed full-faith and credit obligations as a choice-of-law, requiring the application of sister-state laws even in situations where forum states had legitimate reasons for applying their own law. *See generally* PETER HAY ET AL., *CONFLICT OF LAWS* § 3.24, at 188–89 (5th ed. 2010); KERMIT ROOSEVELT, *CONFLICT OF LAWS* 120–21 (2010); RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS*

for a general full faith and credit requirement to give equal treatment to other states' positive laws. Members of the Court cited it twice in the past sixty years, on neither occasion as evidence of a full faith and credit policy against hostility.<sup>156</sup>

Justice Breyer was on firmer ground in reading *Hughes v. Fetter*<sup>157</sup> as authority for the rule of parity. That decision has been regarded as prohibiting on full faith and credit grounds one state's rejection of another state's law when the forum state has policy objections to the other state's law other than the fact that it is foreign.<sup>158</sup>

*Hughes* was decided in 1951 during the era when the Court's full faith and credit jurisprudence differentiated sharply between foreign rights and judgments, and when the Court permitted a state to apply its own laws so long as it had a legitimate reason for doing so.<sup>159</sup> Under this approach, full faith and credit would never compel a state to renounce its common law and enforce claims under a sister-state statute so long as the forum had a legitimate reason for applying its common law rule. The novel question in *Hughes* was whether one state, in enacting a statutory recovery for

---

§ 9.3A, at 694–95 (6th ed. 2010) (discussing *Pacific Employers* as turning point in Court's repudiation of balancing approach to full faith and credit cases).

Justice Breyer acknowledged the significance of the Court's abandonment of the balancing approach when he emphasized that the decision in *Hyatt II* was not a return to the old balancing approach: "[l]ong ago this Court's effort to apply that kind of analysis led to results that seemed to differ depending [on the kind of case before the Court. . . . We have since abandoned that approach. . . ." *Hyatt II*, \_\_ U.S. \_\_, 136 S. Ct. 1277, 1283 (2016).

156. See *Howlett v. Rose*, 496 U.S. 356, 381 (1990) (citing *Broderick* for authority that state cannot avoid full faith and credit obligation by depriving its courts of jurisdiction); *Shaffer v. Heitner*, 433 U.S. 186, 228 n.8 (1977) (Brennan, J., dissenting) (citing *Broderick* for authority that states may dismiss on grounds of forum non conveniens). One state court referred to the opinion as an example of an approach that the Supreme Court had repudiated. *Clark v. Rockwell*, 435 S.E.2d 664, 667 (W. Va. 1993) ("There are some earlier United States Supreme Court cases in which it appears that public policy considerations might be relevant if the public policy differential between the two states is substantial. . . . However, later cases appear to hold that the forum state's public policy cannot override the enforcement of a valid judgment rendered in a sister state." (citing *Broderick*, 294 U.S. 629 (1935))).

157. *Hughes v. Fetter*, 341 U.S. 609, 611–12 (1951) (holding that Wisconsin statute that prevented litigation of Illinois cause of action violated full faith and credit when Wisconsin permitted litigation of comparable Wisconsin claims).

158. See, e.g., MICHAEL H. HOFFHEIMER, CONFLICT OF LAWS EXAMPLES & EXPLANATIONS 402 (3d ed. 2016) (discussing constitutional limits on disregarding sister-state law).

159. See generally PETER HAY ET AL., CONFLICT OF LAWS § 3.24, at 188–90 (5th ed. 2010) (discussing emergence of rule by mid-twentieth century that forum did not violate full faith and credit when it disregarded sister-state law and applied forum law when doing so served forum state interest). See *Treinius v. Sunshine Mining Co.*, 308 U.S. 66 (1939) (holding state must give full faith and credit to sister state judgment even if rendering state failed to give full faith and credit to other state); *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (holding forum must give full faith and credit to sister-state judgment even where rendering court's judgment violated forum policy).

wrongful death, could limit its recovery to claims arising in Illinois and prevent its courts from hearing claims arising under the statutes of other states.

The claims arose from a fatal car accident in Illinois involving a driver and passenger who were residents of Wisconsin. The decedent's estate brought a wrongful death action in Wisconsin under the Illinois statute,<sup>160</sup> and the Wisconsin court dismissed under the local statute that authorized wrongful death actions only for deaths that occurred in Wisconsin.<sup>161</sup>

The outcome depended, in part, on how the case was characterized. If the chronology were emphasized, then Wisconsin would not be refusing to enforce foreign rights unreasonably; it would merely be enacting a new statutory remedy and strictly limiting its application. If the effect of the legislation were emphasized, then Wisconsin would not be recognizing a claim based on Illinois law for the sole reason that the claim was based on Illinois law.

The Court was sharply divided in holding that full faith and credit required Wisconsin to recognize the claim arising under Illinois's wrongful death statute. Writing for five members of the Court, Justice Black explained that the outcome required balancing the "strong unifying principle embodied in the Full Faith and Credit Clause" and the forum state's policy against entertaining the cause of action.<sup>162</sup> For him the balancing evaluation was easy because Wisconsin's enactment for a local wrongful death recovery showed the forum "has no real feeling of antagonism against wrongful death suits in general."<sup>163</sup> While forum procedural interests might sometimes limit recovery to local claims and support dismissal on grounds of *forum non conveniens*, Justice Black emphasized that the strong connections with the forum eliminated such policy arguments against maintaining the action.<sup>164</sup>

Four Justices dissented, arguing plausibly that Supreme Court decisions to date had established no clear full faith and credit obligation to displace any local law and enforce foreign claims.<sup>165</sup> Moreover, they insisted that Wisconsin's limit was neither novel nor unreasonable, and they identified valid and legitimate reasons for limiting recovery to deaths

---

160. The Wisconsin court may have been the only court with personal jurisdiction at that time. *Hughes*, 341 U.S. at 613.

161. *Id.* at 610.

162. *Id.* at 612.

163. *Id.*

164. *Id.* at 613.

165. *Id.* at 618 (Frankfurter, J., dissenting).

occurring in state and for refusing to recognize claims for deaths in sister states.<sup>166</sup>

The balancing evaluation adopted by the majority in *Hughes* was an artifact of the Court's earlier approach to full faith and credit and unnecessary to the Court's outcome. Justice Black relied on the complete absence of forum policy in finding that the balance decisively favored enforcement of the claim arising under sister-state law.<sup>167</sup> The absence of any local policy meant that the local rule was irrational. Nevertheless, the Court did not strike the local law on grounds of hostility to foreign law.<sup>168</sup>

Neither *Broderick* nor *Hughes* established anything like a general full faith and credit prohibition against judicial hostility to sister-state laws. Nor did those opinions announce a general requirement of parity in treating foreign laws. The decisions rejected forum procedural bars against causes of action (not defenses) arising under sister-state statutes. The reasoning offered by the majority in both decisions was rooted in a balancing approach that predates current full faith and credit jurisprudence, and neither opinion addressed the unique issues presented by defenses of sovereigns for the values of cooperative federalism.

While neither decision expressly required parity in treating foreign laws, each found a full faith and credit violation when there was no identifiable forum policy supporting the unequal treatment of rights arising under sister-state law.<sup>169</sup> Even if the decisions were understood to mandate a practical rule of parity, they would not apply to the obligation to respect sister-state immunity in *Hyatt II* for two reasons.

First, Nevada was not disregarding general rights arising under sister-state law; it was disregarding a special defense unique to the sovereign

---

166. *Id.* (arguing that a forum state may want to limit causes of action territorially so that witnesses will be available and courts familiar with the statute; arguing conversely that forum may reasonably not want to enforce claims arising under sister state law where witnesses would not be available and where the forum may be unfamiliar with the details of foreign law). The position of the dissent was strengthened by fact that other states, including Illinois, imposed similar territorial restrictions in wrongful death litigation.

167. *Id.*

168. On the contrary, the basis of the decision was narrow and, judging by contemporary commentators, its effect was not especially clear. See Lee H. Henkel, Jr., *Full Faith and Credit to Public Acts: The Significance of Hughes v. Fetter*, 2 DUKE B.J. 40, 52 (1951) ("Just what the legal profession is to expect in the future is uncertain.").

169. The holding in both cases comports with the general requirement in later cases that for a state's law to apply, both due process and full faith and credit Clauses require the state to have "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981); *id.* at 332 (Powell, J., dissenting) (agreeing with rule). This was followed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 819 (1985). But, the Court subsequently clarified that significant contacts are not required for traditional procedural rules. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725-27 (1988).

defendant. Justice Breyer worked to characterize the facts of *Hyatt II* so as to bring the case under the general parity requirement. Thus, he described the Nevada decision not to apply caps available in claims against the state of Nevada to the claim against the state of California as “a special rule of law applicable only in lawsuits against its sister States, such as California.”<sup>170</sup> But this was not the case. The lack of caps was in fact the general rule applicable to all defendants (other than the state of Nevada). It was not a rule directed exclusively or even primarily against sister states as defendants.<sup>171</sup> In short, the Court’s parity analysis assumes that sister-state sovereigns are lawfully entitled to comparable legal treatment in the context of sovereign immunity. But this is exactly the question to be decided.

Second, Nevada had identifiable, legitimate reasons for refusing to extend the defense to sister sovereigns.<sup>172</sup> Ironically, Nevada sought to provide the very compensatory relief whose denial was a full faith and credit violation in *Broderick* and *Hughes*.

#### B. *The Scope of Sovereign Parity Remains Uncertain*

The precise command of *Hyatt II* is uncertain when a forum state seeks to impose greater liability against a sister state than would be available against the sister state in the sister state’s own courts. In *Hyatt*, the state of California had a complete defense under California law. Under those circumstances, the Court held that California got the benefit of Nevada’s caps on damages available in litigation against the state of Nevada. But what if California had no defense at all under California law? Would Nevada courts be free to impose unlimited liability? Or would they be obligated to extend the same limits to California available to Nevada?

Similar problems would arise where a sister state’s immunity law permits certain kinds of claims or certain remedies that are not available in the forum’s courts against the forum state. And comparable problems could arise with respect to which state’s law must govern the scope of the defense where one state’s law provides a defense to individuals based on

---

170. *Hyatt II*, \_\_ U.S. \_\_, 136 S. Ct 1277, 1282, 1283 (2016).

171. The differential treatment of sister-state immunity would fail the more exacting requirements of the Equal Protection Clause, where the Court has found no equal protection violation in the application of rules of liability to a nonresident defendant when the rules apply to all other defendants. *See, e.g., Young v. Masci*, 289 U.S. 253 (1933) (considering rule of liability applicable to all similarly situated defendants at a time when sovereigns were immune to liability).

172. *See supra* notes 102, 125 and accompanying text (discussing Nevada interests served by disregarding California defense).

their conduct under the circumstances but another does not—or where the states differ in extending immunity to agencies and political subdivisions.

To be sure, *Hall* held that California courts were free to disregard Nevada's claim of complete immunity, but that case considered only the argument that Nevada was absolutely immune in sister states.<sup>173</sup> Finding no constitutional authority for absolute immunity, the Court left standing the judgment against Nevada. *Hall* did not address the different issue that rises in the wake of *Hyatt II*: whether a failure to extend sister states the limits on liability available to the forum's sovereign will constitute an unconstitutionally prohibited policy of hostility.

On the one hand, the parity requirement responds to a concern with a policy of hostility, and hostility seems established by the application of a less favorable rule of law. On the other hand, the authority for the parity requirement is the Full Faith and Credit Clause, and it is difficult to see how an obligation to give full faith and credit to a sister state's claimed immunity could support a constitutional obligation to give the sister state greater immunity than it enjoys under the law that is due full faith and credit.

Justice Breyer's opinion in *Hyatt II* does not answer the question. He frames the issue broadly and offers a broad answer: "[w]hether the Constitution permits Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances. We conclude that it does not."<sup>174</sup> This passage might suggest that California could not award damages against Nevada that are greater than it could award against California. Nevertheless, the opinion's broad language occurs in the context of prohibiting "special rule of law that evinces a 'policy of hostility' toward California."<sup>175</sup> In finding the special hostile rule, Justice Breyer emphasizes that the Nevada rule ignored *both* Nevada's rule of immunity and California's "immunity-related statutes."<sup>176</sup> And

---

173. See *supra* section II.C.

174. *Hyatt II*, 136 S. Ct. at 1281. The syllabus—evidence not of the law of the case but of one competent reading of the holding—provides: "[t]he Constitution does not permit Nevada to apply a rule of Nevada law that awards damages against California that are *greater than it could award against Nevada in similar circumstances*." *Id.* at 1278 (emphasis added).

175. *Id.* at 1281 (quoting *Hyatt I*, 538 U.S. 488, 499 (2003)).

176. *Id.* In finding the full faith and credit violation, Justice Breyer ultimately relied on Nevada's failure to accord California the benefits of the Nevada statute: "Nevada has not applied the principles of Nevada law ordinarily applicable to suits against Nevada's own agencies. Rather it has applied a special rule of law applicable only in lawsuits against its sister States, such as California." *Id.* But he immediately added, "[w]ith respect to damages awards greater than \$50,000, the ordinary principles of Nevada law do not 'conflic[t]' with California law, for both laws would grant immunity." *Id.* at

California, in awarding higher damages against Nevada, would not be employing a “special rule”; it would be applying Nevada law.

In discussing the full faith and credit due to statutes as public acts,<sup>177</sup> Justice Breyer suggests that the source of the constitutional violation lay in Nevada’s disregard of a statute. In fact, the California statutes merely codified the residual sovereign immunity that was not waived under California law. Because California waived no immunity under the circumstances, Justice Breyer did not consider whether, in a case of a limited waiver, such a waiver would affect limits of recovery only in the state’s own courts, and not prevent the state from raising the defense in litigation in sister states.

If the Court’s goal is to require that forum sovereigns get as much legal benefit as the home-state sovereign, then Nevada should have a viable defense under California sovereign immunity law in California courts. Such an aggressive application of *Hyatt II* would obviate the need to overrule *Hall*, because sister states would never have more liability than they retain under their home state law. *Hall*’s chief lingering effect would be that states would not be completely immune, and sister-state tribunals could assess liability consistent with the rule of parity.

Nevertheless, an application of the parity doctrine that requires state courts to give sister states greater immunity than the sister states have at home has no legal authority—other than the general prohibition of hostility to sister-state laws announced in *Hyatt II*. It would not be consistent with the decisions relied on by *Hyatt II*.<sup>178</sup> And requiring greater immunity for sister states rests on the idea that the state can create a cause of action in its own courts but limit claims against itself in sister states, an argument the Court has rejected in other contexts.<sup>179</sup>

---

1282.

177. *Id.*

178. The expansive application of *Hyatt II* would require the forum state to give the sister state the benefit of the lower liability of either forum or home state immunity. This would prevent the application of the sister-state law if it were higher than forum law. *Hughes and Broderick* prohibited the forum States from applying forum law based on a hostility to sister-state law, with the result that the forums applied sister-state law.

179. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (holding full faith and credit does not prevent state from applying its own longer statute of limitations to claim created under sister-state law even though claim would be time barred under the law that created it); *Tenn. Coal, Iron, & R.R. Co. v. George*, 233 U.S. 354, 380 (1914) (holding Georgia was not required to respect the venue limits in an Alabama statute creating a cause of action and reasoning that states cannot control the enforcement by other states of rights they create); *M’Elmole v. Cohen*, 38 U.S. (13 Pet.) 312, 327, 328 (1839) (same).

Margaret G. Stewart carefully distinguished two ways of characterizing a state’s waiver of sovereign immunity. If the waiver is understood as a legislative effort directly to restrict the personal

### C. *Sovereign Parity Is Bad Medicine*

The Court's approach in *Hyatt II* is open to criticism not just because the holding rests on questionable legal authority and because the scope of the new policy remains uncertain. The parity requirement is objectionable because it reaches bad results in practice, failing to shield a sister state for sovereign acts that occur solely within its borders while also failing to protect a forum state's regulatory authority over out-of-state actors that cause injuries within the forum state. The parity limits and thus threatens the sovereign autonomy of states that Justice Breyer hoped to restore.

#### 1. *Parity Under-Protects a State Engaging in Sovereign Functions Within Its Own Territory*

Parity provides an insufficient measure of protection when a state is sued in another state for damages resulting for sovereign functions performed within its own territory. Consider the case where a California state police officer shoots a suspect or injures a person while transporting him to the hospital in California. Though the police officer and the state may have complete defenses of sovereign immunity in California, the injured person might sue the state of California in a sister state that permits comparable claims against the forum state.<sup>180</sup>

As a general matter, one state can apply its own law to claims arising outside the state so long as there is a significant contact creating state interests.<sup>181</sup> But there are two reasons why sovereign immunity should be accorded greater respect where official state conduct occurs within the state's territory. First, the Constitution has long recognized sovereign attributes of states under principles of international law that give exclusive regulatory control to the states over consequences of conduct within the

---

jurisdiction of other courts, it is ineffective. But if the waiver is regarded as a condition on litigation occurring only in the sovereign's own courts, the result is less clear. Recognizing that such venue conditions are generally prohibited under *Tennessee Coal, Iron, & Railroad Co. v. George*, she observes that "reliance ought not to be placed automatically upon case law generated by claims arising between individuals." Margaret G. Stewart, *The State as an Unwilling Defendant: Reflections on Nevada v. Hall*, 59 NEB. L. REV. 246, 267 (1980).

180. Due process and full faith and credit require that there be some significant contact or significant aggregation of contacts with the forum state creating state interests. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981). A significant contact supporting the application of forum law may be established where the injured person was a resident of the forum state at the time of the injury. See generally HOFFHEIMER, *supra* note 158, at 408 (discussing similar hypothetical). The contact would not be significant if residence were established after the injury. *Allstate Ins. Co. v. Hague*, 449 U.S. at 322 (citing *John Hancock Mut. Ins. Co. v. Yates*, 299 U.S. 178 (1936)).

181. See *supra* notes 81, 83, and 180.

territory.<sup>182</sup> Although the principle of territoriality has been substantially eroded for over a century, it applies with special force to state action within the state's own territory.<sup>183</sup>

Second, a state, by shielding its agents and itself from liability, encourages state actors to engage in behavior in reliance on the immunity that promotes state interests. Unlike a common conflict of laws case involving a dispute between private parties where California recognizes no cause of action but Nevada does, the retention of sovereign immunity reflects politically charged decisions about what kind of activity to engage in as a state and about how to raise and allocate tax resources. In theory, the less immunity a sovereign retains, the more incentive it has to avoid cost-generating activity and the more taxes it must raise to pay for the resulting liability. Moreover, sovereign immunity does not just affect the determination of liability after the fact. Immunity affects the conduct of state actors within the state. For better or worse, the scope of sovereign immunity may influence whether a state university hires an orthopedic surgeon for its university's football team. For better or worse, knowing they are absolutely immune, state agents may respond to an emergency by shooting or driving with less care. This is exactly the sort of conduct a state as a sovereign should be able to regulate free from outside interference.<sup>184</sup> Moreover, the details of immunity law also result from a political process. For example, one state may recognize tort claims against state police in part to deter police misconduct; another state may bar such claims but more actively prosecute misfeasance and establish administrative review boards.

## 2. *Parity Overprotects Sister States when the Forum Has Genuine Interests in Applying Its Own Rule of Liability*

Parity leaves insufficient room for a state to apply its own law imposing liability against sister states even when it has powerful local policies served by its rule of liability. This problem is illustrated by a hypothetical case where a California state police officer shoots someone in Nevada. Assume that California retains sovereign immunity under the

---

182. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

183. *Cf. Saudi Arabia v. Nelson*, 507 U.S. 349, 359–60 (1993) (noting that restrictive theory of sovereign immunity provides defense in case involving torts allegedly committed by sovereign's agents in sovereign's territory); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (applying act of state doctrine preventing legal challenge to sovereign decisions affecting internal affairs of foreign sovereign state).

184. The due process and other limits on state action imposed by the Federal Constitution are not outside state law but are rather incorporated and become part of it. U.S. CONST. art. VI, cl. 2 (Supremacy Clause making federal law "the supreme Law of the Land" binding in federal courts).

circumstances. Assume further that Nevada allows full compensatory damages against a private defendant but caps liability at \$50,000 for claims against the state of Nevada. Under *Hyatt II*, parity requires that Nevada cap damages at \$50,000.

Nevada has strong sovereign interests in controlling the effects of conduct in its territory. But its interests in controlling conduct become more attenuated when the conduct occurs outside the state or causes results outside the state. In contrast, California has strong interests in applying its general rule of liability to the sister state. This rule both provides compensation and affects conduct within the state of Nevada.

Nevada has no local regulatory policy served by extending its sovereign immunity to California. Nevada's immunity serves purely Nevada interests. Moreover, the particular form of Nevada's immunity results from the political adjustment of local interests. Thus, the state may limit compensatory damages to \$50,000 but provide alternative administrative procedures to deter misconduct.

Requiring Nevada to apply its \$50,000 cap to California requires Nevada to relinquish local compensatory and regulatory policies reflected in its law that holds California subject to all actual damages. Requiring the cap also gives the state of California a windfall—the full measure of protection available to the local sovereign—without the corresponding political compromises, such as administrative oversight or higher taxes that Nevada has accepted as a cost.

#### IV. THE CASE FOR SISTER-STATE SOVEREIGN IMMUNITY

This Part reconsiders the Court's continuing rejection (by four-four vote) of constitutional foundations for sister-state sovereign immunity unrelated to policies of hostility. It proposes a firm constitutional foundation for sister-state immunity. It also proposes that the constitutional source for the immunity derives from the structural limits on state juridical jurisdiction that existed in the founding era and continued into the twentieth century.

The proposed approach would fully protect a state engaged in sovereign activity within its own state territories, deferring to the state with respect to what activities and agencies are covered by the defense, so long as the state causes no foreseeable injuries in other states.<sup>185</sup> At the

---

185. This proposal makes no claim to novelty. It is very close to the Justice Peters position in his 1972 opinion. *See Hill, supra* note 2, at 583 (critical of *Hall* but suggesting it was rightly decided because Nevada had entered California and affected that state's interests); *supra* section II.B.

While presented as a narrow exception to constitutional immunity, it does not follow that few cases

same time, the proposed approach would not enlarge immunity beyond its historical limits and would not force forum states to respect sister-state immunities when the sister states engage in activities beyond their territorial limits.

This Part will advance historical support for a constitutional foundation for a territorially based approach to sister-state sovereign immunity that stops at the state's borders. It will argue that the limited exception respects traditional limits on state power over sister states while accommodating a state's legitimate regulatory control over events within their states. It will examine the most common alternative proposed for an exception—one that focuses on the sovereign character of the sister state's conduct. And it will consider the promising alternative approach proposed by Judge Rogers for rooting sister-state immunity in international law. Finally, it will show how the proposed approach would apply to three types of cases.

A. *Territorial Limitations Embedded in the Structural Operation of State Judicial Systems in the Founding Era*

Both sides in the controversy over sister-state sovereign immunity accept the proposition that the framers assumed that states could not be sued in sister-state courts. Debate focused instead on whether this immunity stemmed from (or should now be located) in the law of the forum states or whether it was imposed by the federal Constitution.<sup>186</sup> All seem to agree that, because the immunity defense was so deeply and widely accepted, no state felt the need to articulate the immunity in a provision of federal law, thus leaving open the question of the effect of the federal practice of leaving unarticulated powers to the states.<sup>187</sup>

---

will satisfy the exception. Many cases litigated in sister-state courts involve some conduct or effect occurring outside the territory of the defendant state. The presence of such a feature may be necessary to qualify for personal jurisdiction. *Cf.* *Nevada v. Hall*, 440 U.S. 410, 412 (1979) (long arm service based on operation of motor vehicle in state).

186. Gary J. Simson, *The Role of History in Constitutional Interpretation: A Case Study*, 70 CORNELL L. REV. 253 (1985) (arguing *Hall* was inattentive to history, asserting that founder era jurists viewed states as immune in sister states, but failing to identify concrete legal sources that the Court neglected that could provide a constitutional basis for the immunity).

187. U.S. CONST. amend. X. The reservation of rights by the people has not been raised in discussions of state immunity. *Cf.* U.S. CONST. amend. IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”). *See generally* Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 345 (1981) (observing the Ninth Amendment lies in such disrepute that no majority applies it to anything).

There is considerable evidence that some framer era jurists viewed sovereign immunity with deep skepticism and welcomed challenges to it. This is clearest in Justice Wilson's opinion in *Chisholm v. Georgia*, 2 U.S. 419, 459 (1793) (Wilson, J.). Wilson rejected the structural argument that the king

Despite the assumption that the framers embraced sister-state sovereign immunity on theoretical or ideological grounds, there were two more immediate pragmatic reasons why framers did not envisage states becoming embroiled in litigation in sister-state courts—and why they did not imagine the need for federal limits on such litigation.<sup>188</sup>

First and most important was the absence of any procedural mechanism for subjecting one state to the personal jurisdiction of another state's courts. The problem was not that courts lacked the ability to fashion a writ sufficient in form to bind a state as a defendant.<sup>189</sup> Rather the problem was

---

enjoyed sovereign immunity because no court was superior to the king. *Chisholm*, 2 U.S. at 458 (questioning theory that law issued from superior authority and proposing that the Constitution embraced “another principle, very different in its nature and operations . . . [namely, that] laws derived from the pure [s]ource of equality and justice [and] must be founded on the CONSENT of tho[s]e who[s]e obedience they require”). Wilson also questioned Blackstone's history. *Id.* at 460. From a general consideration of sovereign immunity, Justice Wilson found that Georgia was subject to federal jurisdiction. Though the Eleventh Amendment altered the result of *Chisholm*, it did not reject its reasoning: “the states were concerned with finance—not legal theory.” George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 485 (1953). See generally HAROLD J. LASKI, RESPONSIBILITY OF THE STATE IN ENGLAND, THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS 127 (1921) (arguing that Holmes's structural argument for sovereign immunity was later development and “[n]o such certainty, indeed existed in the early days of the Republic; and Chief Justice Jay and Mr. Justice Wilson regarded the immunity of the state from suit as the typical doctrine of autocratic government”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426 (1987) (arguing state immunity with respect to federal claims is incompatible with the constitutional tradition of rooting sovereignty in the people); Randy E. Barnett, *The People or the State? Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1733–34 (2007) (same). See also Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924) (contending immunity of king was originally personal). Justice Peters was thus writing in a longstanding tradition with roots in the founding era when he observed that the defense of sovereign immunity was “suspect.” *Hall v. Univ. of Nev.*, 503 P.2d 1363, 1366 (Cal. 1972).

188. Rebecca Block offers a different explanation for the lack of concern with suits against states in state courts. She argues that states did not foresee a need for an express guarantee for immunity in sister state courts “because they did not foresee the technological advances which resulted in a mobile society with concomitantly complex interstate commerce.” Block, *supra* note 61, at 191. This is less persuasive because states engaged in commercial activity from an early date and recognized their potential liability for such activity. Indeed, the claim in *Chisholm v. Georgia* stemmed from a contract for sale of goods between a South Carolina citizen and the state of Georgia. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1561 (2002) (discussing facts of case).

189. Nelson contends that the absence of technically sufficient process prevented states from being joined in civil actions in federal or state court without their consent. Nelson, *supra* note 188, at 1559. Nelson relies heavily on the English common-law requirement that a defendant enter an appearance as a prerequisite for entry of judgment. *Id.* There are two objections to his theory. First, American jurists were certainly familiar with the old common-law requirements, but neither federal nor state courts embraced them. *Id.* The process issued in *Chisholm v. Georgia* conclusively demonstrates the divergence of U.S. practice from the common law. In *Chisholm*, 2 U.S. 419 (1793), the Supreme Court, sitting as a trial court, granted the order requested: “[i]t is Ordered, that the Plaintiff in this cause do file his declaration on or before the first day of March next. Ordered that certified copies of the said declaration be served on the Governor and Attorney General of the State of Georgia, on or

that effective judicial process over nonresidents was strictly limited to the territorial jurisdiction of the court that issued it.<sup>190</sup> Even if states had the attributes of legal persons that made them subject to suit, no process existed—or would have been conceivable in that age—for subjecting the state to jurisdiction in personam.<sup>191</sup> At best, state ownership interests

---

before the first day of June next. Ordered that, unless the said State shall either in due form appear, or show cause to the contrary in this Court, by the first day of next Term, judgment by default shall be entered against the said State.” *Id.* at 479. Whether classified as an original praecipe form original writ or as a summons, the order plainly compelled obedience. And a majority assumed the Court was authorized to issue such an order, if not by its inherent authority as a supreme court, then under the All Writs Act, Judiciary Act of 1789 § 14, 28 U.S.C. § 1651.

Second, Justices regarded the more onerous common law service procedures as inapplicable in U.S. practice. Justice Story referred specifically to the common-law requirement of an appearance, but he recognized that American courts did not impose a similar requirement. *See* *Picquet v. Swan*, 19 F. Cas. 609, 612–23 (C.C.D. Mass. 1828) (No. 11,134).

190. Prior to the Eleventh Amendment, federal courts had the power to issue an order to the state of Georgia because Georgia lies within their territorial jurisdiction, and an officer of the court could serve process on the governor and attorney general within the United States. The possibility of such jurisdiction for federal courts and the corresponding lack of process for sister-state courts explains why the issue of state immunity arose exclusively in federal litigation and why the Eleventh Amendment did not address sister-state immunity in state court.

For a discussion of the personal jurisdiction limits on actions against sister states, see Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 S. CT. REV. 249, 282–85. Woolhandler concludes that the absence of private lawsuits against sister states was not due “solely” to restraints on personal jurisdiction. *Id.* at 285. But her evidence supporting the supposed dissociation of jurisdiction and immunity is either case law postdating *International Shoe*, or cases commenced as actions quasi in rem, where the proceedings were commenced by attachment, but the liability was for damages for an injury. The latter authority does not distinguish the defense on the merits from the absence of territorial jurisdiction. *See id.* at 284 n.124 (discussing *Tappan v. W. & Atl. R.R.*, 71 Tenn. 106, 113 (1879) (dismissing private civil action on notes completely unrelated to bonds issued by Georgia when action was commenced by attaching real property owned by Georgia in Tennessee with court opining: “[n]o State can be sued in its own courts, except by its consent, and certainly can not be impleaded in a foreign State, against its consent. These are axiomatic principles of jurisprudence, about which there can be no doubt or debate”)).

191. Smith observes that theories of sovereignty were coextensive with *Pennoyer*’s vision of personal jurisdiction. Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 84 (2003). But he does not attribute any further constitutional significance to this limitation. When the Court later grounded jurisdictional limits on the Due Process Clause, it relied on earlier authority that linked jurisdiction with sovereignty. Justice Field wrote, “no State can exercise direct *jurisdiction and authority* over persons or property without its territory.” *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (emphasis added). This principle was a corollary of the proposition that “[e]very State possesses exclusive *jurisdiction and sovereignty* over persons and property within its territory.” *Id.* For both propositions, Justice Field cited and paraphrased Justice Story’s treatise where the maxim lists the territorial restriction on sovereignty first: “every nation possesses an exclusive *sovereignty and jurisdiction* within its own territory.” JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, AND JUDGMENTS ch. 2 § 18, at 19 (Boston, Hillard, Gray, & Co. 1834) (emphasis added). For the chronology of the territorial theory, see *infra* note 194.

might be attached in actions in rem in the same way that foreign sovereign rights were first brought to federal courts in libels in admiralty.<sup>192</sup> By the first third of the nineteenth century, de facto territorial limits on judicial power were recognized as limitations of their sovereignty, rooted either in the law of nations (international law), general law,<sup>193</sup> or natural law.<sup>194</sup>

In 1850, *D’Arcy v. Ketchum*<sup>195</sup> relied on the understanding of the Full Faith and Credit Clause in 1790 to hold that full faith and credit did not require states to enforce a sister-state judgment entered against a nonresident who was not served within its territory.<sup>196</sup> The Court’s opinion was grounded not on unique federal policies served by the Clause but on the inherent limitations of sovereign power. The opinion thus referred to settled international practice under which “[such a] proceeding is deemed an illegitimate assumption of power, and resisted as mere abuse.”<sup>197</sup>

---

192. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). The action was commenced by a libel of a vessel where the United States clearly obtained effective jurisdiction in rem over property within its territorial jurisdiction. Accordingly, the Court adopted sovereign immunity as a matter of comity under international law.

193. For a sustained argument that territorial limits on personal jurisdiction were—and are—rooted in the general or unwritten law, see Stephen E. Sachs, *Pennoyer Was Right: Jurisdiction and General Law*, 95 TEX. L. REV. (forthcoming 2017).

194. Treatises by Jabez Henry (1823) and William Story (1834) popularized and paraphrased the territorial maxims found in writings of Dutch legal scholar Ulrich Huber (1635–1694)—though Story appears to be the first to actually cite Huber. Story discussed territorial limits in his chapter entitled “General Maxims of International Jurisprudence,” but he might have regarded their origin as natural law rather than the law of nations (international law) because they were a function of the de facto power of states. See generally STORY, *supra* note 191, at 19 n.1 (citing Ulrich Huber, *De Conflictu Legum*, in 1 PRAELECTIONES JURIS CIVILIS tit. 3, § 2.); JABEZ HENRY, *On Personal and Real Statutes* pt. 1, ch. 1, at 1–2, in THE JUDGMENT OF THE COURT OF DEMERARA IN THE CASE OF ODWIN V. FORBES ON THE PLEA OF THE ENGLISH CERTIFICATE OF BANKRUPTCY IN BAR, IN A FOREIGN JURISDICTION, TO THE SUIT OF A FOREIGN CREDITOR, AS CONFIRMED IN APPEAL, WITH THE AUTHORITIES, AND FOREIGN AND ENGLISH CASES (London, S. Sweet 1823).

Story published his treatise in the 1830s. But the territorial theory of sovereignty was grounded on preexisting geographical limits on judicial jurisdiction for which there was judicial authority. See STORY, *supra* note 191, at § 539, at 450–51 (“[N]o sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort, beyond this limit, is a mere nullity, and incapable of binding such persons or property in any other tribunals.” (citing *Picquet v. Swan*, 19 F. Cas. 609 (No. 11,134) (C.C.D. Mass. May 1828) (Story, Cir. J.))). Story’s treatise quoted verbatim (without quotation marks) from the Justice’s own opinion in the cited case—adding only a single word (“own”) not found in the opinion. Both his treatise and opinion cited Lord Ellenborough’s discussion in *Buchanan v. Rucker*, 9 East 192 (KB 1808) (propounding view that service by publication in Tobago would not yield valid judgment against nonresident not present in Tobago at time of publication).

195. 52 U.S. (11 How.) 165 (1850).

196. *Id.* at 174.

197. *Id.* Territorial limits on sovereign power and *D’Arcy* in particular provided key authority for the Court’s later decision imposing due process limits on personal jurisdiction. *Pennoyer v. Neff*, 95

Second, sovereign liability was narrowly construed and did not extend to the misconduct of state agents and agencies. “The king can do no wrong” was understood not solely as secondary support for the doctrine of sovereign immunity, as Justice Stevens maintained,<sup>198</sup> but also as a means of restricting the doctrine to the person of the king, excluding his counselors.<sup>199</sup> The doctrine permitted liability on agents on the theory that wrongful conduct was beyond the scope of their agency.<sup>200</sup>

Not only was it conceivable that a state might impose liability on a sovereign’s agents, as late as 1889, one state sought to impose such liability on a federal marshal who killed a man who assaulted a sitting Justice of the Supreme Court.<sup>201</sup> And much of the judicial attention to the scope of sovereign immunity addressed the issue of when suits against officers were really suits against states.<sup>202</sup> Litigation against states for acts

---

U.S. 714, 729–30 (1877) (citing and discussing case). The Court’s subsequent retreat from *Pennoy*’s territorialism may in turn explain the universal neglect of pre-*Pennoy* cases acknowledging territorial restrictions on sovereign authority under the Full Faith and Credit Clause and international law.

198. *Nevada v. Hall*, 440 U.S. 410, 415 (1979).

199. The future abolitionist senator Charles Sumner recorded the contemporary understanding in an annotation to the maxim (“The king can do no wrong.”) in his personal copy of JOHN LOUIS DE LOLME, *THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT* 64 (new ed., London, J. Hatchard & Son, 1834): “[t]his maxim really means that if any wrong results from the king’s measures[,] the blame is not to rest on his shoulders but those of his ministers who warn and advise him in all matters. This is what the maxims means; no more and no less.” I think it probable that Sumner studied this text the year after it appeared, the year he graduated from Harvard Law School. A copy of the book with a manuscript annotation is in the possession of the author.

Sumner provides a narrower explanation than Blackstone, who wrote that the maxim means “only . . . that in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people: and, secondly, that the prerogative of the crown extends not to do any injury . . .” 3 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*254–55 (T. Cooley 3d ed. 1884).

The point is not whether eighteenth and nineteenth century understandings were historically accurate. See 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF THE COMMON LAW* 515–17 (S.F.C. Milsom ed., 2d ed. 1968) (original ed. 1898) (discussing credible evidence of early common law traditions that king was subject to common law); Herbert Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349, 352 (1925) (providing examples of conflicting understandings of the maxim). The point is that, consistent with these understandings, English courts permitted suit against government officials and employees who committed wrongs on the theory that the king, unable to commit a wrong, did not authorize their conduct. See generally Pugh, *supra* note 187, 479–80.

200. Amar advances a variation of this argument in proposing limits to state immunity in federal court for violations of federal law. Cf. Amar, *supra* note 187, at 1426 (“[W]henever a government entity transgresses the limits of its delegation [of authority by the people] by acting ultra vires, it ceases to act in the name of the sovereign, and surrenders any derivative ‘sovereign’ immunity it might otherwise possess.”).

201. *Cunningham v. Neagle*, 135 U.S. 1, 3 (1890).

202. See, e.g., Borchard, *supra* note 187, at 13–22 (discussing issues in cases).

caused by their employees in other states became possible in the late twentieth century only after forum states became habituated both to long-arm jurisdiction and to the vicarious liability of states for the acts of their employees.<sup>203</sup>

Sister-state liability was so firmly barred by structural limits on the process of state tribunals that lawsuits in sister-state courts based on personal jurisdiction lay well beyond the imagination—and fears—of founder-era jurists. Reflecting those structural limits, after the Eleventh Amendment, lawsuits against states as sovereigns would arise with respect to the sovereign's conduct within its own territorial borders. And state courts would accord the forum sovereign whatever form of the defense existed under local law. In contrast, where property could be attached beyond its borders, sovereign immunity was extended as a matter of comity under international law.<sup>204</sup>

Justice Stevens in *Hall* failed to identify the procedural source of structural limits on sister-state liability during the founding era and likewise failed to consider the significance of the fact that the continuing commitment to such procedural limits effectively shielded states from liability in other state courts. The historic limits on the reach of judicial process become constitutionally relevant for two reasons. First, they were quickly generalized into widely accepted limitations on sovereign power.<sup>205</sup> Second, the procedural limits endured into the twentieth century. While the duration of the practice alone does not confer constitutional authority, it is relevant.<sup>206</sup>

Moreover, there are reasons to believe that the duration of the practices reveals more deeply held civic understandings about the respective authority of states. The position of forty-five state attorneys general that *Hall* should be overruled provides convincing evidence that a constitutional mandate to respect sister-state immunity is popular with state executives.<sup>207</sup> While state courts today reach out-of-state defendants,

---

203. *Hall* was the first to reach the Court. It involved long-arm jurisdiction under California's nonresident motorist statute. 440 U.S. at 412. Earlier cases were commenced by proceedings in rem. See *supra* notes 27, 45 (discussing *Paulus*).

204. See *supra* note 192 (discussing *Schooner Exchange*).

205. See *supra* note 191, 194 (discussing *Story*).

206. *Burnham v. Superior Court*, 495 U.S. 604, 633 (1990) (Brennan, J.) (“Tradition, though alone not dispositive, is of course *relevant* to the question whether the rule of transient jurisdiction is consistent with due process.” (emphasis in original)).

207. See generally Michael Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 389–405 (2012) (arguing Court should give significance to collective attorney general briefs only under limited circumstances). Solimine points out that the state attorneys general in most states are elected and operate independently of the governors. *Id.* at

including states themselves that cause injuries in their territories or to persons under their protection, civic expectations still may associate a sovereign's authority with its territorial limits.

In short, the Court was wrong in *Hall* to suppose that sister-state immunity was grounded exclusively in comity. In doing so, it missed the opportunity to recognize an exception for immunity targeted narrowly at those cases that emerged after traditional limits on state judicial power were relaxed and forum states began to exercise jurisdiction in personam over sister states based on injuries they caused through their agents in the forum's territory.

### B. *International Law as a Source of Sister-State Immunity*

In one of the most persuasive critiques of *Hall's* rejection of constitutional sources for sister-state immunity, Judge John M. Rogers makes a persuasive case that such immunity is grounded in legal rules beyond the comity of the forum tribunal. He proposes that the federal system, including the states, embrace a shared commitment to principles of international law and that the Supreme Court has appellate authority to impose on states the obligation to respect sister-state immunity that derives from principles of international law.<sup>208</sup>

There are hurdles, however, to applying international principles to sister-state immunity. First, the Supreme Court has avoided applying concepts from international law to questions of state sovereignty.<sup>209</sup>

---

384–85. Even assuming the attorney generals speak with the authority of the state executives, it is debatable whether state executives in the posture of defending lawsuits seeking money damages impartially represent the full interest of the state. Those same states may have expressed an interest in holding other states liable through state legislation and judicial decisions.

208. Rogers, *supra* note 11, at 466–67, 469–70. Judge Rogers does not argue that immunity is required under international law.

The elegance of his argument consists in the fact that the procedural opportunity for Supreme Court review gives the Court authority by common law to adopt principles from international law and make them binding on states. *See also* Hill, *supra* note 2, at 583; Martiniak, *supra* note 24, at 1166 (suggesting federal courts should apply same federal common law that the Supreme Court would apply in litigation between two interested states). A similar proposal to ground limits on sister-state immunity in the Court's power to develop common law rule governing interstate relations is advanced in an early critique of *Hyatt II*. *See* Jonathan M. Guttoff, *Franchise Tax Board of California v. Hyatt: A Split Court, Full Faith and Credit, and Federal Common Law*, 22 *ROGER WILLIAMS U. L. REV.* 248, 259–60 (2017).

Under international law, the states of the union lack the essential attributes to be treated as foreign sovereigns. Nor do states qualify as foreign states for purposes of the FSIA. Smith, *supra* note 177, at 92. This is not an obstacle to Judge Rogers's argument, because he urges the adoption of international law limits as a matter of federal common law.

209. Smith observes, “[i]t is clear from the Court's decision in *Hall* . . . that it did not view the states as sovereigns within the meaning of the law of nations.” *Id.* at 87. He points out that the Supreme

Second, it is not obvious why the governing law must be uniform.<sup>210</sup> States are currently applying their own separate visions of the appropriate deference due to sister-state immunity and reaching different conclusions.<sup>211</sup>

Third, it is not clear what sources should guide courts when international law has departed from norms during the founding era that regulated relations between sovereigns.<sup>212</sup> As Judge Rogers emphasizes, the scope of international sovereign immunity has evolved: as sovereign states expanded the range of their activity in the twentieth century, the international law on sovereign immunity retreated from an absolute defense to a restrictive defense that allowed for exceptions. Under this approach, immunity was available when foreign states engaged in public activities (*acta jure imperii*) but not when they engaged in commercial activities (*acta jure gestionis*).<sup>213</sup> The federal Foreign Sovereign Immunities Act (FSIA) codifies the restrictive theory of immunity: foreign states are immune to jurisdiction of state and federal courts unless the Act provides an exception.<sup>214</sup> Exceptions include acts causing personal

---

Court has been careful to locate the source of sovereign immunity in English common law rather than international law, *id.* at 74, 74 n.313 (quoting *Alden v. Maine*, 527 U.S. 706, 715–16 (1999)), and has cited *Hall* itself for that proposition. *See id.* at 88 n.362 (considering and rejecting possible reading of *Hall* as locating state immunity in law of nations).

210. Even accepting Judge Rogers's argument that the Supreme Court has the authority to review state decisions and to apply international law principles, it is not self-evident that the Court should do so or should promulgate a uniform law. Rather the Court could leave to each state the sovereign task of construing the applicable (international) law—a process arguably identical to what it has done in leaving the issue to state courts as a matter of comity. Smith contends this was the plan of the Constitution: “the Constitution envisions a similar equality of right among the several states [as between foreign powers that are not subject to supervisory review by a superior court].” *Id.* at 88.

211. *Compare, e.g., Hall v. Univ. of Nev.*, 503 P.2d 1363, 1366 (Cal. 1972) (discussed, *supra* notes 31–33) (refusing to extend comity to sister state defense), *with Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283, 287–88 (Ill. 1989) (honoring sister-state's reservation of sovereign immunity), *and Simmons v. Montana*, 670 P.2d 1372 (Mont. 1983) (recognizing sister-state defenses on grounds of comity even though the Constitution does not require comity).

212. Judge Rogers makes a strong case for the Court's authority to adopt evolving standards, but the Court has not shown any interest in doing so. If it did, it would become debatable whether the 1976 federal codification of international law standards in the FSIA provides the appropriate source. If states are bound by principles of international law under the Constitution, it could be argued that limits of their liability should be determined at the time of their establishment as sovereigns—and no later than the time when they formed an indissoluble union with sister states. *Cf. Alden v. Maine*, 527 U.S. 706 (1999) (fixing sovereign immunity as attribute of state sovereignty in the founding era) (discussed *supra* note 66).

213. Rogers, *supra* note 11, at 472–73.

214. 28 U.S.C. § 1604 (2012). The idea that the FSIA codifies international law, *e.g., Rogers, supra* note 11, at 472–73, is true only as a generalization. The statutory history indicates that Congress meant to provide immunities that were available to the United States in foreign courts, but Congress also borrowed procedures and defenses from the Federal Torts Claim Act, and it provided policy

injury, death, or property damages in the United States<sup>215</sup> and claims stemming from some commercial activity in or affecting the U.S.<sup>216</sup>

The Act does not require anything like formal parity or reciprocity. It does not exempt foreign countries because their courts fail to extend immunity to the United States. Nor does it automatically entitle foreign countries to all the defenses that would be available to either the United States or to states as defendants. On the contrary, it provides that when sovereign immunity is eliminated due to an exception, the foreign state becomes liable “in the same manner and to the same extent as a *private individual* under like circumstances.”<sup>217</sup>

There can be practical difficulties with fitting private claims against sister states into the FSIA. The Act would be easy to apply to the car accident in *Hall*. Thus, Judge Rogers, while maintaining *Hall* was wrong to reject a constitutional basis for sister-state immunity, concluded that the case was rightly decided because causing a personal injury in California fell under an exception to immunity under the Foreign Sovereign Immunities Act.<sup>218</sup> In contrast, applying the Act to the claims in *Hyatt* becomes more difficult. Most of the intentional torts would be barred,<sup>219</sup>

---

exceptions (such as exceptions for state sponsors of terrorism) that had no authority and may even be contrary to international law. Email from Charles H. Brower II, Professor of Law, Wayne State Univ. Law School, to Michael H. Hoffheimer, Professor of Law, The Univ. of Miss. School of Law (Dec. 10, 2016) (on file with author).

215. 28 U.S.C. § 1605(5)(a)(5).

216. *Id.* Commercial activity may provide an exception to immunity in three situations: where the claim is based on the foreign country’s commercial activity in the U.S.; where the claim is based on the foreign country’s act in the U.S. in connection with commercial activity outside the U.S.; and where the claim is based on an act by the foreign country outside the U.S. that causes a direct effect in the U.S. *Id. See generally* Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).

217. 28 U.S.C. § 1606 (emphasis added).

The FSIA controls the scope of sovereign immunity extended to foreign states by U.S. courts, including state courts. In litigation involving sister states, however, state courts have not followed the restrictive approach to sovereign immunity.

Moreover, in cases under its legislative jurisdiction, the federal system waives immunity only for claims arising in the U.S., retaining immunity for claims arising in foreign states. The FSIA expresses Congress’s understanding of the limits of sovereign immunity in U.S. courts only with respect to foreign nation states. Congress has not attempted to legislate the limits of state sovereign immunity. In partially waiving sovereign immunity with respect to claims against the federal government, Congress provides that such claims must arise within the territorial limits of the U.S. *See* 28 U.S.C. § 1346(b) (Federal Torts Claim Act partially waiving immunity); *id.* § 2680(k) (providing Federal Tort Claims Act “shall not apply to . . . any claim arising in a foreign country”). *See* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that place where claim arises is place of injury).

218. Rogers, *supra* note 11, at 472–73.

219. There is a potential issue as to whether *Hyatt* suffered any personal injury as required for the FSIA. The applicable state law did not require proof of such injury, but the plaintiff did produce sufficient objectively verifiable evidence of extreme emotional distress to satisfy state law. Franchise

but the Act does not address personal injury resulting from intentional infliction of extreme emotional distress; nor does it provide the legal standard to determine whether an employee's acts are within the scope of agency and thus attributable to the state.<sup>220</sup>

The immunity provided by international law, designed to alleviate potential conflicts between sovereigns, may be less appropriate in a case where sister states have identifiable governmental interests and where other provisions of the Constitution reduce the risk of state-to-state conflict. In *Hyatt*, for example, the state of California retains complete immunity for intentional torts like intentional infliction of extreme emotional distress and interference with privacy. Such immunity removes disincentives that may discourage California state agencies from aggressively investigating tax liability. Conversely, to permit sister states to disregard such immunity could encourage the establishment of "tax asylums" for wealthy scofflaws who flee to them after flouting local laws.

In contrast, Nevada, by recognizing claims for intentional torts, seeks to protect individuals from injurious conduct. In refusing to extend immunity to sister states for such claims, Nevada regards their legitimate administration of government functions to require no such extensive protection. Applying the FSIA to bar the claim would privilege California's interests and deprive Nevada of its own sovereign authority to regulate conduct and the effects of conduct within the state of Nevada.

### C. *Application of the Proposed Approach*

Under the proposed territorial approach, *Hall* was rightly decided. Where an agent authorized by the state of Nevada caused a personal injury in California, California may disregard the Nevada defense of sovereign immunity. Moreover, no parity should be required. It would be reasonable for California to subject a sister state to higher levels of liability when the sister state is free from alternative regulatory restraints available against California.

In contrast, *Hyatt* was wrongly decided—but only to the extent that claims arose from the California agents' activity in Nevada. To the extent that the plaintiff's theory stemmed from fraudulent statements

---

Tax Bd. v. Hyatt, 335 P.3d 125, 149 (Nev. 2014) (discussing evidence of injuries, including severe migraines and stomach problems). Even if he suffered a personal injury, that exception to federal sovereign immunity does not apply to "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . ." 28 U.S.C. § 1605(a)(5)(B).

220. The Act provides that the exceptions to personal-injury liability arise only when caused by the foreign state or by "any official or employee of that foreign state while acting within the scope of his office or employment . . ." 28 U.S.C. § 1605(5).

communicated in California or were based on biased prosecutorial policies implemented in California, Nevada should be required to accept the state of California's sovereign immunity defense. To the extent that claims arose from invasions of privacy based on agents' acts in Nevada, however, the state of Nevada should be free to apply Nevada law and impose liability against California. Again, parity should not prevent a higher level of liability.

Finally, there is the hypothetical case where state A sends an agent to state B to negotiate financing of state bonds, and the agent causes personal injuries to a resident of state B while in state B.<sup>221</sup> In such a case, state B should be free to apply its laws and disregard state A's sovereign immunity without regard to limits on sovereign immunity enjoyed by state B—or the limits enjoyed by state A in its own courts. In contrast, full faith and credit would require state B to recognize state A's defense for a personal injury caused by its agents in state to a resident of state B.

The proposed approach preserves the territorial limit of sovereign immunity as an attribute of state sovereignty. But it also allocates to forum states maximum regulatory control over conduct and consequences of conduct within their jurisdiction. The proposed approach does not, of course, guide states in the exercise of such regulatory control, and states can—and probably should—grant sister states more sovereign immunity than the Constitution requires.

## CONCLUSION

In *Hyatt II*, an evenly divided Court fails to overrule a 1979 precedent that had left state courts free to disregard sister-state defenses of sovereign immunity. But a majority in *Hyatt II* finds a new parity requirement in the Full Faith and Credit Clause: state courts must now give a sister state at least as much sovereign immunity as they give their own sovereign.

---

221. Forty-one states proposed the following hypothetical as an “example of the injustice” if states need not give full faith and credit to sister states' sovereign immunity. Brief of the State of West Virginia, *supra* note 50, at 4–6.

South Dakota is in the process of obtaining financing through the issuance of bonds and, as a result of New York's position as a financial center, is required to send an employee to New York. While in New York, said employee is involved in an automobile accident with a New York resident. The New York resident files an action against South Dakota in New York's State Court and obtains jurisdiction pursuant to New York's nonresident motorist act. Judgment in favor of the Plaintiff is returned at the precise time that the proceeds from South Dakota's bond issue are deposited in New York banks. The Plaintiff attaches those funds in New York.

The hypothetical was designed to illustrate unfairness due to the greater opportunities available to New York residents to satisfy judgments and also to demonstrate how attaching South Dakota's assets would have “a dramatic effect on her ability to meet her own sovereign responsibilities.” *Id.* at 5 n.1.

This Article argues that parity is a temporary solution that is uncertain in its scope, inconsistent with full faith and credit principles, and unsupported by case law. Moreover, parity reaches the wrong result in too many situations. It overprotects a state that causes injuries in other states while it interferes with the sovereign authority of those states to regulate conduct and effects of conduct within their territory.

The Court's failure to reach agreement on the core constitutional issue and the problems with parity presage a return of the question of sister-state sovereign immunity to the Court.<sup>222</sup> This Article shows how the Court can recognize an alternative constitutional foundation for sister-state sovereign immunity that does not depend on parity. It explains how procedures from the founding era through the twentieth century provided fixed territorial limits to the juridical jurisdiction of state courts. These limits effectively prevented a state court from disregarding a sister state's defense of sovereign immunity.

At the same time, this Article contends that the Court is right to resist the expansion of immunity beyond the structural limits imposed in the past. Accordingly, it proposes that the Constitution should command respect for a state's defense of sovereign immunity as measured by that state's own law but only for conduct in its own territory. States should remain free to disregard a sister state's claimed immunity when the sister state acts beyond its territory and causes injuries in the forum state. The proposed approach preserves traditional, structural limits grounded on notions of sovereignty and it strikes the right balance between the needs of the interstate system and the competing claims to sovereignty of the defendant state and the forum state.

---

222. See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 23 (2017) ("The split decision in *Franchise Tax Board* leaves the issue to come up again—perhaps soon."); Pidot, *supra* note 8, at 297 (2016) (discussing doctrine developed in *Hyatt II* and other cases decided by tie vote and observing that "there is reason to believe that [the decisions] are unlikely to create prolonged spits of authority").