TAKING INTERSTATE RIGHTS SERIOUSLY

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When the U.S. Supreme Court in the 2019 case of Franchise Tax Board v. Hyatt held that the Constitution bars private suits against a state in another state's courts, it endorsed a surprisingly shallow conception of state sovereign power. But the doctrinal alternative from the now-overruled Nevada v. Hall is no better. Where Hyatt gives too much constitutional protection to would-be defendant states, Hall gives too little. And both approaches mistakenly conceive of interstate sovereign immunity as an on/off switch that the Constitution locks in one position.

Finding neither Hyatt III nor Hall satisfactory, I offer a third view. The Full Faith and Credit Clause was meant to ensure that states extend to each other dignity and respect for their sovereign duties. In the case of private suits against a defendant state in another state's court, these sovereign duties conflict, and it is impossible for a forum state to preserve the sovereign duties of another state without impairing its own. To ensure full faith and credit, the Constitution, I argue, requires that states extend sovereign immunity to their sister states only when doing so maximizes the total sovereign power available to both states. In my view, this approach to interstate sovereign immunity is more consistent with the crucial value precipitated by the Constitution and enshrined in our federal system: states respect each other.

INTRODUCTION

When the U.S. Supreme Court in *Franchise Tax Board v. Hyatt* overruled decades of precedent to hold that the Constitution bars private suits against a state in another state's courts,[1] it endorsed a surprisingly limited conception of state sovereign power. The only power that mattered, it seemed, was immunity. According to the Court, the Constitution required that states grant each other immunity from suits brought by private litigants.[2] No constitutional text speaks to this rule. Rather, the Court derived it from the Constitution's "structure," which undoubtably altered the relationships among the states.

Across the Court's jurisprudence on interstate sovereign immunity, two approaches emerged. The Court's first major case on the subject, *Nevada v. Hall*, treated interstate sovereign immunity as a common-law defense that enjoys constitutional protection only to the extent the Constitution requires a

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[1] Franchise Tax Bd. of Cal. v. Hyatt (*Hyatt III*), 139 S. Ct. 1485, 1490 (2019).

[2] *Id.* at 1498.

state to extend another state its statutory immunity.[3] This view predominated for forty years until *Hyatt III* reversed course and secured interstate sovereign immunity as a constitutional mandate.

I argue that both views misunderstand the history and structure of the Constitution. *Hyatt III* reads the Constitution's restrictions on federal judicial power to restrict state judicial power. In the other corner, *Hall* elevates state law above federal law, enabling state law to pierce state immunity that most federal law cannot. Where *Hyatt III* gives too much constitutional protection to would-be defendant states, *Hall* gives too little. And both approaches mistakenly conceive of interstate sovereign immunity as an on/off switch that the Constitution locks in one position. I argue that this reflects a shallow and harmful understanding of our constitutional structure and state sovereign power.

Finding that neither *Hyatt III* nor *Hall* provides a satisfactory approach, I offer a third view—one that carves a stronger role for full faith and credit in interstate sovereignty. The Full Faith and Credit Clause was meant to ensure that states extend to each other dignity and respect for their sovereign duties. In the case of private suits against a defendant state in another state's court, these sovereign duties conflict, and it is impossible for a forum state to preserve the sovereign duties of another state without impairing its own. To ensure full faith and credit, the Constitution, I argue, requires that states extend sovereign immunity to their sister states only when doing so maximizes the total sovereign power available to both states. In my view, this approach to interstate sovereign immunity is more consistent with the crucial value precipitated by the Constitution and enshrined in our federal system: states respect each other.

I. HOW WE GOT HERE: THE DOCTRINE OF INTERSTATE SOVEREIGN IMMUNITY

Interstate sovereign immunity originates from the structural premises that "[s]tates entered the federal system with their sovereignty intact"[4] and that "the nature of [this] sovereignty" meant that a state was not "amenable to the suit of an individual without its consent."[5] In this Part, I trace the development of the Court's doctrine governing interstate sovereign immunity, from its beginnings with a family seeking compensation for a horrific car accident to its

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[3] 440 U.S. 410, 426–27 (1979).

[4] Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991).

[5] Hans v. Louisiana, 134 U.S. 1, 13 (1890) (emphasis omitted).

most recent iteration in the finale of a 28-year-long legal battle between an inventor of submarine technology and the California Franchise Tax Board. Throughout these cases, we see the surface of much deeper problems that have plagued the Court in its attempts to reconcile the common law with our constitutional history and structure.

A. NEVADA V. HALL

The U.S. Supreme Court first addressed interstate sovereign immunity in *Nevada v. Hall*, a case arising from an automobile crash in California.[6] California residents Patricia Hall and her son John Michael Hall suffered serious injuries after a car driven by an employee of the University of Nevada crossed a dividing strip on a California highway and struck their vehicle.[7] The crash killed the employee, but the Halls filed tort claims in California Superior Court against the state of Nevada, alleging that the state was vicariously liable for the employee's negligent driving.[8]

After a protracted dispute on whether the California Vehicle Code authorized service of process on Nevada, the California Supreme Court held that California law did not grant immunity to Nevada from suits in California courts and remanded for trial.[9] In a pre-trial motion to limit damages, Nevada argued that the Full Faith and Credit Clause of the federal Constitution[10] required the California court to enforce a Nevada statute that limited tort damages against the state to $25,000.[11] The California court disagreed, and the jury awarded damages of $1,150,000 to the Halls.[12]

The U.S. Supreme Court affirmed, rejecting the existence of "a federal rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted."[13] Instead, the Court found that nothing "in Art[icle] III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide[s] any basis, explicit or implicit, for this Court to impose limits" on a state's authority to assert its judicial power over

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6 440 U.S. 410, 411 (1979).

7 Brief of Respondents, Nevada v. Hall, 440 U.S. 410 (1979) (No. 77-1337), 1978 WL 206995, at *3–4.

8 440 U.S. at 411–12.

9 Hall v. Univ. of Nev., 503 P.2d 1363, 1366 (1972), *cert. denied*, 414 U.S. 820 (1973).

10 U.S. CONST. art IV, § 1.

11 440 U.S. at 412.

12 *Id.* at 413.

13 *Id.* at 418.

another state.[14] The relevant constitutional language "concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts."[15] It did not answer whether the Constitution limited *state* judicial power.[16] If the Constitution did nothing to abrogate state judicial authority over another state, the "prevailing notions of comity" provided the only limits on this authority.[17] By rejecting Nevada's immunity claim, the California Supreme Court made clear that California law "no longer extend[ed] immunity to Nevada as a matter of comity."[18]

Determining that the Halls could sue the state of Nevada in California court, the Court moved to the question of whether the Full Faith and Credit Clause required the California court to use Nevada's damages limit. The Court determined that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."[19] Nevada's damage limit violated California's policy of awarding "full compensation in its courts for injuries on its highways resulting from the negligence of others," so the Full Faith and Credit Clause did not compel California to use the Nevada statute.[20]

Hall treats interstate sovereign immunity no differently than any other choice-of-law issue under the Full Faith and Credit Clause. As we will see, this conception of sovereignty, which fades from the Court's interstate sovereign immunity doctrine, fails to appreciate the extent to which the Full Faith and Credit Clause altered interstate relationships.

B. HYATT I

In 1991, Gilbert P. Hyatt filed a part-year resident income tax return in California.[21] This mundane act triggered a 28-year battle between Hyatt and California tax authorities that gave rise to three Supreme Court cases. Hyatt's

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14 *Id.* at 421.

15 *Id.* at 420–21.

16 *Id.* at 421.

17 *Id.* at 419.

18 *Id.* at 418.

19 *Id.* at 422 (citing Pac. Employers. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939)). This argument likely holds under current Full Faith and Credit Doctrine. *See* Allstate Ins. Co. v. Hague, 449 U.S 302, 308 (1981) (holding that Full Faith and Credit requires only for a state to have significant contacts that create interests such that the use of its law is neither arbitrary nor fundamentally unfair).

20 Nevada v. Hall, 440 U.S. 410, 426 (1979).

21 Franchise Tax Bd. of Cal. v. Hyatt (*Hyatt I*), 538 U.S. 488, 490 (2003).

return represented that he moved from California to Nevada—presumably to avoid California's high tax rate—and, as of October 1, 1991, was no longer a California resident.[22] The California Franchise Tax Board was not convinced. In 1993, the Board audited Hyatt and concluded that, contrary to his 1991 return, Hyatt had remained a California resident until April 3, 1992, owed the state millions in income taxes, and was liable for civil-fraud penalties.[23]

As a wealthy inventor with a penchant for litigation,[24] Hyatt vigorously fought the audit's findings. He appealed within the Board's administrative process and filed a lawsuit against the Board in Nevada state court, alleging that the Board's auditors committed various torts against him in Nevada.[25] California law immunized the Board from all liability arising from conduct during its investigations.[26] Nevada law, on the other hand, did not immunize state agencies for intentional torts.[27]

The U.S. Supreme Court granted certiorari to answer whether the Full Faith and Credit Clause required Nevada state courts to use California's statute that gave the Board complete immunity for actions related to its investigations.[28] In a unanimous opinion, the Court affirmed the Nevada Supreme Court's judgment in which Nevada's statute governed the issue of state immunity.[29] The Nevada court had determined that "'Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees' should be accorded greater weight 'than California's policy favoring complete immunity for its taxation agency.'"[30] The *Hyatt I* Court found that Nevada's interest was sufficiently significant to satisfy full faith and credit by ensuring that the choice of Nevada statutory immunity was "neither arbitrary nor fundamentally unfair."[31]

Like *Hall*, *Hyatt I* treats issues of interstate sovereign immunity as issues of full faith and credit. The Court declined "to adopt a 'new rule' mandating that a state court extend full faith and credit to a sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would

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22 *Id.*

23 *Id.* at 491.

24 Hyatt recently sued the U.S. Patent and Trademark Office to challenge its rejection of several applications for submarine patents. *See* Hyatt v. Hirshfeld, 998 F.3d 1347, 1352–53 (Fed. Cir. 2021).

25 538 U.S. at 491.

26 *Id.* at 492–93.

27 *Id.* at 492.

28 *Id.* at 494.

29 *Id.*

30 *Id.* at 493–94 (quoting App. to Pet. for Cert., *Hyatt I*, 538 U.S. 488, at 12–13).

31 *Id.* at 494–95 (quoting Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 818 (1985)).

'interfer[e] with a State's capacity to fulfill its own sovereign responsibilities.'"[32] Because balancing the importance of these sovereign responsibilities would be difficult, the Full Faith and Credit Clause, the Court held, does not require state courts to use the law of the state with more important sovereign interests.[33]

Unlike *Hall*, though, *Hyatt I* addressed only the choice-of-law question: Which state's immunity statute governed? It did not consider whether a state has the power to haul another state into its courts. This distinction between statutory and "pure" state sovereign immunity offers a glimpse into the different approaches to interstate sovereign immunity that I discuss in Part II. If interstate sovereign immunity is not a constitutional mandate, the issue becomes a choice between the conflicting laws of different states, resolved constitutionally by the Court's Full Faith and Credit and Due Process doctrines. *Hyatt I* takes this approach.

C. HYATT II

On remand from *Hyatt I*, the case went to trial in Nevada state court, where a jury found for Hyatt and awarded him a staggering $500 million in compensatory and punitive damages.[34] California law provided complete immunity in such cases to California state agencies.[35] But Nevada law limits damages against the state to $50,000.[36] The Nevada Supreme Court admitted that the law would impose the limit in a similar suit against Nevada officials but declined to impose the limit against the California agency because "California's efforts to control the actions of its own agencies were inadequate as applied to Nevada's own citizens."[37] Instead, the court threw out the $250 million punitive damages and the $1 million fraud judgment.[38]

After affirming by 4-4 vote Nevada's exercise of jurisdiction over California's agency, the U.S. Supreme Court held that the Constitution does not permit Nevada "to award damages against California under Nevada law that are greater than it could award against Nevada agencies in similar circumstances."[39] Justice Stephen Breyer's majority opinion noted that, unlike *Hyatt I*, there was no direct conflict between the policies of Nevada and

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[32] *Id.* at 495 (quoting Brief for Petitioner at 13, *Hyatt I*, 538 U.S. 488 (2003)).

[33] *Id.* at 495, 498.

[34] Franchise Tax Bd. of Cal. v. Hyatt (*Hyatt II*), 578 U.S. 171, 175 (2016).

[35] *Id.* at 177.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 183 (Roberts, C.J., dissenting).

[39] *Id.* at 176 (emphasis omitted).

California because California would also grant immunity.[40] The Nevada court's "special rule" allowing damages greater than $50,000 was opposed to both California law and "inconsistent with the general principles of Nevada immunity law."[41] This special rule represented a "policy of hostility" to California.[42] By failing to evince "a healthy regard for California's sovereign status," Nevada violated the Full Faith and Credit Clause.[43] Nevada must treat California state officials the same as it treats its own officials.

Or does it? The Nevada Supreme Court claimed that Nevada law treats agencies of other states differently because they are not subject to Nevada's "legislative control, administrative oversight, and public accountability."[44] To the *Hyatt II* Court, this argument amounted to "a conclusory statement disparaging California's own legislative, judicial, and administrative controls," which offered more evidence of Nevada's hostility to California.[45] The Court warned that a constitutional rule that permitted such "discriminatory hostility" would lead to "chaotic interference" of states in the legislative activities of each other.[46] But if the Court really feared rampant retribution among states, why permit states to assert judicial jurisdiction over each other? State A cannot "chaotically interfere" in State B's legislative activities if State B is immune from suit in State A's courts.

This inconsistency stems from *Hyatt II*, like the cases before it, treating interstate sovereign immunity as simply an extension of its Full Faith and Credit doctrine for choice-of-law issues. Perhaps because *Hall* already answered the question, the Court discarded the jurisdictional side of interstate sovereign immunity in half a sentence, noting only the vote tally with no analysis.[47] But it would revisit the issue three years later.

D. HYATT III

On remand from *Hyatt II*, the Nevada Supreme Court instructed the trial court to assess damages consistent with Nevada's statutory cap.[48] The tax board

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40 Franchise Tax Bd. of Cal. v. Hyatt (*Hyatt II*), 578 U.S. 171, 178 (2016).

41 *Id.*

42 *Id.* at 177 (quoting *Hyatt I*, 538 U.S. 488, 499 (2003)).

43 *Id.*

44 *Id.* at 178 (quoting Franchise Tax Bd. of Cal. v. Hyatt, 335 P.3d 125, 147 (2014)).

45 *Id.*

46 Franchise Tax Bd. of Cal. v. Hyatt (*Hyatt II*), 578 U.S. 171, 178 (2016).

47 *Id.* at 176 ("In light of our 4-to-4 affirmation of Nevada's exercise of jurisdiction over California's state agency . . . .").

48 Franchise Tax Bd. of Cal. v. Hyatt (*Hyatt III*), 139 S. Ct. 1485, 1491 (2019).

petitioned for certioriari to the U.S. Supreme Court.[49] In a 5-4 opinion overruling *Hall*, the Court held that the Constitution prohibited states from asserting the jurisdiction of their courts over other states.[50]

Because the board asked the Court to overrule *Hall*, Justice Clarence Thomas's majority opinion takes a decidedly different tact than *Hyatt I* and *Hyatt II*. Presented only with the question of pure sovereign immunity, the Court examined the historical record to determine that "[t]he founding generation . . . took as given that States could not be haled involuntarily before each other's courts."[51] Further, the Eleventh Amendment, which strips federal courts of jurisdiction over diversity suits against a state, "neither derives . . . [nor] limit[s]" states' sovereign immunity.[52] In light of this, the Court noted the wide range of contexts in which it held that the Constitution bars suits against nonconsenting states: "actions by private parties before federal administrative agencies,"[53] "suits by private parties against a State in its own courts,"[54] "suits by Indian tribes in federal court,"[55] "suits by foreign states in federal court,"[56] "admiralty suits by private parties in federal court,"[57] and "suits by federal corporations in federal court."[58] From this, the Court derived the principle that the Constitution "embeds interstate sovereign immunity within the constitutional design."[59] To the *Hyatt III* Court, interstate sovereign immunity is not a defense that a state court may extend to a sister state as a matter of comity; it is a constitutional mandate.

The *Hyatt III* Court dedicated the last section of its opinion to discussing stare decisis. In short two paragraphs, the Court disposed of this argument, which urged the Court to adhere to *Hall*. Noting that "stare decisis 'is not an inexorable command,'" the Court concluded that *Hall* deserved overruling because it was poorly reasoned and inconsistent with other sovereign-immunity decisions.[60] Hyatt's substantial reliance interests were simply collateral damage: "Hyatt unfortunately will suffer the loss of two decades of litigation expenses and a final judgment against the Board for its egregious

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[49] *Id.*

[50] *Id.* at 1499.

[51] *Id.* at 1494.

[52] *Id.* at 1496.

[53] *Id.* (citing Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743 (2002)).

[54] *Id.* (citing Alden v. Maine, 527 U.S. 706 (1999)).

[55] *Id.* (citing Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991)).

[56] *Id.* (citing Principality of Monaco v. Mississippi, 292 U.S. 313 (1934)).

[57] *Id.* (citing *Ex parte* New York, 256 U.S. 490 (1921)).

[58] *Id.* (citing Smith v. Reeves, 178 U.S. 436 (1900)).

[59] *Id.* at 1497.

[60] *Id.* at 1499 (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

conduct . . . . Those case-specific costs [do not] . . . persuade us to adhere to an incorrect resolution of an important constitutional question."[61]

News coverage of *Hyatt III* found little else to discuss about the case.[62] As I will argue, though, *Hyatt III*'s errors lie in its analysis of the merits. Regardless of its approach to precedent, the Court leaves us with an interpretation of the Constitution that requires that states always extend immunity to sister-states. The Court's doctrine now prevents a plaintiff harmed by state from seeking a remedy in the place of his injury, the place of his domicile, and for that matter, any other forum.

II. TWO VIEWS OF THE CATHEDRAL

What should we make of all this? Is it now simply an "inexorable command" that the Constitution compels states to grant each other immunity? Hardly. Although I will not discuss at length *Hyatt III*'s implications for stare decisis, I note the irony of its approach. By overturning forty years of precedent, *Hyatt III* unwittingly weakened its own precedential value. If "the quality of [a] decision's reasoning" provides a basis for overturning a precedent,[63] all it takes to reverse *Hyatt III* is a Supreme Court that disputes the opinion's account of the historical record and constitutional structure—a Supreme Court, for example, like *Nevada v. Hall*.

Thus, a deeper appraisal of *Hyatt III* and *Hall* is in order. We have seen that the Court has, at various times, adopted one of two distinct views of interstate sovereign immunity: constitutional command or common-law

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61 *Id.*

62 *See, e.g.*, Leah Litman, Opinion, *Supreme Court Liberals Raise Alarm Bells About* Roe v. Wade*: Conservatives May be Laying the Foundation for the Reversal of the Landmark Abortion Decision*, N.Y. TIMES (May 13, 2019), https://www.nytimes.com/2019/05/13/opinion/roe-supreme-court.html [https://perma.cc/4JDM-8FV5] (last visited March 1, 2022); Adam Liptak, *Justices Split Over the Power of Precedent*, N.Y. TIMES (May 13, 2019), https://www.nytimes.com/2019/05/13/us/politics/supreme-court-precedent-vote.html [https://perma.cc/4NK9-AWW4] (last visited March 1, 2022); Anita Kristnakumar, *Academic Highlight:* Hyatt *Is Latest Example of Textualist-Originalist Justices' Willingness to Overturn Precendent*, SCOTUSBLOG (May 24, 2019), https://www.scotusblog.com/2019/05/academic-highlight-hyatt-is-latest-example-of-textualist-originalist-justices-willingness-to-overturn-precedent [https://perma.cc/7UE6-XFNE] (last visited March 1, 2022); Eric Segall, *Clarence Thomas Is Actually Right About Supreme Court Precedent*, SLATE (June 28, 2019), https://slate.com/news-and-politics/2019/06/clarence-thomas-dissent-supreme-court-precedent.html [https://perma.cc/8VH8-QAUL] (last visited March 1, 2022); Editorial Board, *Liberals Who Cry Roe*, WALL ST. J. (May 14, 2019), https://www.wsj.com/articles/liberals-who-cry-roe-11557876134 [https://perma.cc/GR3E-7WRD] (last visited March 1, 2022).

63 *See* 139 S. Ct. at 1499 (citing Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2478–79 (2018)).

defense. The constitutional-command view of *Hyatt III* holds that the Constitutional requires that a state immunize its sister states from private suits in its courts. The common-law view—adopted by *Hall*—holds that interstate sovereign immunity exists as a rule at common law that can be waived by a sued state or abrogated by federal statute.[64] But neither view accounts fully for the constitutional values we can derive from text and structure. In this Part, I evaluate the *Hyatt III* and *Hall* approaches to interstate sovereign immunity.

A. THE *HYATT III* VIEW: STATE SOVEREIGN IMMUNITY AS CONSTITUTIONAL COMMAND

Hyatt III's doctrinal innovation is to hold that the Constitution not only permits but *requires* interstate sovereign immunity. In the Court's view, such immunity derives from the "structure" of the Constitution.[65] This view misunderstands the Constitution's structural protections for state sovereignty and the historical practice that grounded these protections.

1. Structure

To support the understanding of interstate sovereign immunity as a constitutional mandate, the *Hyatt III* Court claimed that the Constitution's "structure"—federalism—divested states of their power to disregard interstate sovereign immunity. The Constitution imposed duties on states that transformed them "from a loose league of friendship into a perpetual Union based on the 'fundamental principle of *equal* sovereignty among the states.'"[66] In the Court's view, this transformation "reflects implicit alterations to the States' relationships with each other, confirming that they are no longer fully independent nations."[67] But why does this alteration preserve states' powers to claim interstate sovereign immunity but not states' powers to deny it? Again, the Court returns to the structure of the Constitution.

> Interstate sovereign immunity is similarly integral to the structure of the Constitution. Like a dispute over borders or water rights, a State's assertion of compulsory judicial process over another State involves a direct conflict between sovereigns. The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity, just as it denies them the

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[64] For a thorough explanation of various theories of sovereign immunity, see William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017).

[65] 139 S. Ct. at 1498 (stating that interstate sovereign immunity comes from the Constitution itself).

[66] *Id.* at 1497 (quoting Shelby Cnty., v. Holder, 570 U.S. 529 544 (2013)) (emphasis in original).

[67] *Id.*

> power to resolve border disputes by political means. Interstate immunity, in other words, is "implied as an essential component of federalism."[68]

But this analysis forgets a key difference between disputes over borders or water rights and private suits, like Mr. Hyatt's, that implicate interstate sovereign immunity. Disputes over borders or water rights are disputes *between* states. Borders define the territorial bounds of the states themselves; water rights concern transient bodies of water that enter and exit a state's territory. In these cases, each state has a direct, territorial interest in the outcome.

Hyatt III, on the other hand, is a dispute between a state and the *citizen* of another state. It is true that *Hyatt III* involves a conflict between sovereigns, but the conflict is not adjudicatory. Rather, the Court abrogated Nevada's sovereign power over the operation of its courts by mandating California's sovereign immunity from a private suit. It is a different matter to abrogate a state's sovereign power to *initiate* a suit against another state in its own courts. In that case, the forum state is directly interested in the outcome, which gives rise to concerns about fairness. But the same concerns are much weaker in private suits against other states. Although Nevada has an interest in protecting its domiciliaries, it does not necessarily want Hyatt to *win*. It simply wants to give Hyatt—a Nevada domiciliary—a forum in which to vindicate his claim.

Hyatt III's laundry list of cases[69] holding that Constitution bars private suits against states involves suits against states in their own courts or in federal court present fundamentally different questions for state sovereignty than a suit in the court of another state. It should come as no surprise that the Constitution permits a state to claim sovereign immunity in its own courts. As "the founding era's foremost expert on the law of nations" recognized, "[i]t does not . . . belong to any foreign power to take cognizance of the administration of [another] sovereign."[70] It should also come as no surprise that the Constitution—the document that governs the relationship between federal and state power—permits states to claim sovereign immunity in federal courts. In both situations, states assert their sovereign power over entities that either do not have any sovereign power of their own or have consented to abrogate it. But why does this mean that the Constitution permits states to claim sovereign

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[68] *Id.* (quoting Nevada v. Hall, 440 U.S. 410, 430–31 (1979) (Blackmun, J., dissenting)).

[69] *See supra* notes 50–55 and accompanying text.

[70] 139 S. Ct. at 1493 (quoting 2 EMER DE VATTEL, THE LAWS OF NATIONS § 55, at 155 (J. Chitty ed. 1883)).

immunity in the courts of other states, which have *not* consented to abrogate their own sovereign power to administer justice in their courts?

2. History

Hyatt III's historical argument fares no better. According to the Court, "the States considered themselves fully sovereign nations" after independence in 1776 and enjoyed both common-law and law-of-nations sovereign immunity.[71] Common-law sovereign immunity held that "no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him."[72] Law-of-nations sovereign immunity "followed from the 'perfect equality and absolute independence of sovereigns' under that body of international law."[73] States retained these immunities because the Constitution did not abrogate them.[74]

But it is a stretch to say that states had these immunities in the first place. The colonies were not sovereign, and during the Revolution, they "submitted to the sense of the Congress on the conduct of the War."[75] They were not sovereign states until the Declaration of Independence and were not *constitutionally recognized* sovereign states until the Articles of Confederation in 1781.[76] The Articles explicitly afforded states sovereign power: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."[77]

Did this sovereign power survive through ratification of the Constitution? Yes and no. The Articles guaranteed that a state "retains" its sovereignty. This suggests that the Articles did not *grant* sovereign power but merely protected whatever sovereign power the states already enjoyed. Similarly, if the Constitution "preserve[d]" states' sovereign powers,[78] it only recognizes whatever sovereignty the states enjoyed immediately before ratification. And this sovereignty was not constitutionally granted; it existed as a rule of common

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71 *Id.* at 1493.

72 *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 235 (1765)).

73 *Id.* (quoting Schooner Exch. v. McFaddon, 7 Cranch 116, 137 (1812)).

74 *Id.*

75 Louise Weinberg, *Sovereign Immunity and the Interstate Government Tort*, 54 U. MICH. J. L. REFORM 1, 39–40 (2020).

76 *Id.* at 42–43.

77 ARTICLES OF CONFEDERATION OF 1781, art. II.

78 139 S. Ct. at 1496 (quoting Alden v. Maine, 527 U.S. 706, 723-724). (emphasis added).

law and within the law of nations.[79] So, there were two components to interstate sovereign immunity: its existence as a common-law rule and the protection of it that the Articles added.

The Constitution rejected whatever constitutive protection the Articles afforded to state sovereignty: It includes no text promising to "retain" sovereignty for the states. The Constitution adopted many provisions from the Articles but completely erased "the Articles' prime directive, endowing each state with 'sovereignty.'"[80] If we assume, that the original understanding of the Constitution controls,[81] I find it hard to see interstate sovereign immunity as a constitutional mandate, when the Founders authored the Constitution with the express purpose of weakening the sovereignty of the states. Even if the Founders intended the Constitution to preserve interstate sovereign immunity, this does not mean that they intended the Constitution to *require* it. It is far more likely that the Constitution preserved interstate sovereign immunity as a rule of common law and international comity but rejected the Articles' constitutive guarantee.

And even if the Founders had intended that the new Union require its states to extend sovereign immunity to each other, why do we care? No text speaks to interstate sovereign immunity. Just because an issue appears to modern eyes as constitutionally significant does not mean that the Constitution must have addressed it somewhere. We should wary to read into the Constitution anything that we believe "[t]he founding generation . . . took as given."[82] For all our uncertainty about the original intent and understanding of the Constitution, we do know that many in the founding generation feared governmental oppression and thus created a federal government of limited and enumerated powers.[83] This belief in limited government—what Professor Philip Bobbitt called our "constitutional ethos"[84]—animates our constitutional structure and our values. It would be odd, then, to infer from nothing more

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79 Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1574 (2002).

80 Weinberg, *supra* note 75, at 45.

81 I do not accept this claim. Like all pluralists, I believe that judges may draw on more sources of constitutional law than simply the Constitution's communicative content or history. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (describing six forms of legitimate constitutional argument); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1252–68 (1987) (describing a hierarchy of five "argumentative factors").

82 139 S. Ct. at 1494.

83 *See* Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 275 (1997).

84 BOBBITT, *supra* note 81, at 13.

than our paltry understanding of Founders' assumptions a constitutional rule that immunizes states from all private suits in all forums.[85]

From the Court's unconvincing structural and historical arguments, there seems to be little support for the view of interstate sovereign immunity as a constitutional mandate. With structure, history, and text working against *Hyatt III*'s view of interstate sovereign immunity, we should consider other options.

B. THE *HALL* VIEW: STATE SOVEREIGN IMMUNITY AS COMMON-LAW DEFENSE

As the case overruled by *Hyatt III*, *Nevada v. Hall* predictably occupies the opposite end of the interstate-sovereign-immunity pendulum. For the *Hall* Court, this immunity was not an independent constitutional mandate but a mere common-law defense which states could afford other states as a matter of comity, subject to traditional due-process and full-faith-and-credit constraints. Thus, the Constitution would require a state to grant sovereign immunity to a sister state only if the forum state enacted statutory immunity for itself and had no legitimate interest in refusing it to the defendant state.[86] Like *Hyatt III*, the *Hall* approach misunderstands the structure of the Constitution by failing to recognize the full range of sovereign interests.

The majority opinion in *Hall* closes with a nuanced passage on state sovereignty:

> In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is

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[85] Although it does not appear in *Hyatt III*'s majority opinion or dissent, some observers argue that the Eleventh Amendment may prohibit the Court from constitutionalizing interstate sovereign immunity. *See* Brief of Professors William Baude and Stephen E. Sachs as *Amici Curiae* in Support of Neither Party, 139 S Ct. 1485 (2019). As Professors William Baude and Stephen Sachs noted, "Hyatt's suit against the Board is one 'commenced or prosecuted against one of the United States by Citizens of another State'—to which '[t]he Judicial power of the United States,' including the power vested in this Court, 'shall not be construed to extend." *Id.* at 5 (quoting U.S. CONST. amend. XI). If the Court is the only judicial body to confer constitutional stature to interstate sovereign immunity, it would appear that the Court cannot mandate sovereign immunity in private suits against a state, for which it lacks subject-matter jurisdiction. Even a non-textual interpretation of the Eleventh Amendment might lead to this result. *See, e.g.,* Hans v. Louisiana, 134 U.S. 1 (1890) (expanding Eleventh Amendment immunity beyond text); Welch v. Texas Dept. of Highways & Pub. Transp., 483 U.S. 468 (1987) (same). If states entered the Union with sovereign power and the Eleventh Amendment restricts federal judicial authority to comport with that sovereignty, *see* Blatchford v. Vill. of Noatak, 501 U.S. 775, 779 (1991), this implicitly suggests that the Eleventh Amendment's scope extends to restrict federal judicial power that would impair *state* judicial power.

[86] Nevada v. Hall, 440 U.S. 410, 426 (1979) (noting that interstate sovereign immunity is not found in the Constitution, only the common law).

> subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect.
>
> It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. But if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union.[87]

Here, the Court distinguishes between a state's authority to enforce its legitimate policies and its authority to deny (or grant) sovereign immunity to other states. Limitations on the former are the "real" intrusions on sovereignty. But the Court does not clarify why this is so. But it seems that a lawsuit against a state for carrying out its sovereign duties qualifies as a "real intrusion" on a state's sovereign power. This is *Hall*'s crucial mistake. It is incorrect to say that, when one state is sued in the court of another, there is only one type of sovereign interest at stake.

For support, look no further than the passage above. All states govern "only with the consent of the governed." So, any sovereign duty is carried out with the explicit or implicit consent of the citizens of the sovereign. Any action by a state that impedes the sovereign functions of a sister state—whether by haling the state into court, violating its laws, or other means—refutes the wishes of the sister state's citizens, who have "no voice" in the sovereign actions of that other state. Thus, each state has not only a sovereign interest in effectuating its policies—as *Hall* recognizes—but in doing so free from interference by other states. So far, this argument would appear to support a rule that mandates interstate sovereign immunity. But the relevant sovereign interests here include both legislative and judicial action. When these conflict in private interstate suits, some constitutional rule is required.

To see why, consider *Hall*'s structural problem. Under *Hall*, a state's law can penetrate another state's sovereign immunity. Thanks to the Eleventh Amendment, most federal law cannot.[88] And yet the Supremacy Clause makes

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[87] *Id.* at 426-427.

[88] The Eleventh Amendment reads, in full, "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." U.S. CONST. amend. XI.

federal law superior to state law.[89] This is a strange result. Why should states be liable to the laws of other states but not to the supposedly superior federal law? If anything, one might expect the Constitution to weaken state immunity in relation to federal law, as a kind of consideration for entering the Union. It seems quite odd, then, to find *zero* constitutional grounding for interstate sovereign immunity within a document adopted for the express purpose of fusing the states into a Union.

In a different structural vein, Professor Ann Woolhandler offers the leading critique of *Hall*, which Justice Thomas cites in *Hyatt III* for the proposition that the founding generation assumed that states could not be sued in the courts of other states without their consent.[90] I have already rejected the argument that this assumption creates a constitutional guarantee of interstate sovereign immunity. But Professor Woolhandler makes a stronger structural argument that warrants discussion.

Reading Article III with the Eleventh Amendment, Woolhandler argues that "Article III's provision for state/citizen diversity and original jurisdiction of the Supreme Court in state-as-party cases meant that any aboriginal power in the state courts to hold each other involuntarily liable to individuals' suits had been ceded to the federal courts."[91] And the Eleventh Amendment "specified and constitutionalized" the law that federal courts would use in these state/citizen cases: "states could not be made involuntary defendants."[92]

But Woolhandler's argument assumes that states possessed some sovereign power before entering the Union. Otherwise, they would have no power to cede. So, the Constitution did not eliminate their sovereign power to hale each other into their own courts but merely shifted it so that, until the Eleventh Amendment, states could hale each other into *federal* court.[93] But the Eleventh Amendment may have shifted this power back to the states. The amendment closed off federal courts from state/citizen suits, leaving state courts as the only possible forum in which to adjudicate private causes of action against states.

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89 U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

90 139 S. Ct. 1485, 1494 (2019) (citing Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 S. CT. REV. 249, 254–259).

91 Woolhandler, *supra* note 90, at265.

92 *Id.*

93 *See* Chisholm v. Georgia, 2 U.S. 419 (1793) (holding that states may sue each other under the Constitution), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

Even if we assume that the Eleventh Amendment did not return sovereign power to the states, I find it unconvincing that Article III disabled states' capacity to be sued in other states' courts. Professor Woolhandler's assumptions are consistent with the historical understanding that, unless it stated otherwise, the Constitution left states' preexisting sovereign power in place. If it had not, the states would have had no power to cede to the federal government, and Article III would serve a different purpose than what Woolhandler suggests. If this understanding is correct, though, how could the Constitution *implicitly* strip states of sovereign power? If the founding intention was to alter explicitly some aspects of state sovereignty but preserve all others, any alterations would likely occur in explicit text. Omissions—for example, the removal of the Articles of Confederation's guarantee of state sovereignty—would serve not to strip states of their sovereignty but merely to decline to constitutionalize it.

Article III extended federal jurisdiction to state/citizen diversity suits, but this does not mean that it created *exclusive* federal jurisdiction.[94] It is just as plausible that Article III merely intended to provide an alternative forum for these disputes to resolve founding era concerns about fairness and prejudice against one state in the courts of another. In any event, this ambiguity is best resolved with an eye towards the Founders' intent to maintain the common-law backdrop of sovereign immunity, absent explicit contrary direction in the Constitution.[95] Thus, it seems unlikely that Article III's extension of jurisdiction over state/citizen suits implicitly removed state-court jurisdiction over those same suits.

Professor Woolhandler does, however, identify a critical weakness of the *Hall* approach. If a state may always, as a matter of constitutional law, make another state liable to a private citizen, the Full Faith and Credit Clause obligates the defendant state to recognize that judgment. But the Eleventh Amendment "pose[s] a direct textual barrier" to federal courts' power to enforce the judgment as a matter of full faith and credit.[96] For Woolhandler, this is evidence that "the state-court judgment is constitutionally invalid."[97] In other words, Woolhandler believes that a state can *never* enter a valid judgment against another state because a federal court would not be able to

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94 Woolhandler, *supra* note 90, at 260 (noting that neither Article III nor the 1789 Judiciary Act made federal jurisdiction over state/citizen suits exclusive).

95 Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1868–70 (2012) (arguing that state sovereign immunity is best understood as a "backdrop" to the Constitution, which only altered it by constitutional text).

96 Woolhandler, *supra* note 90, at 266-67.

97 *Id.* at 267.

follow the Full Faith and Credit Clause without violating the Eleventh Amendment.

I do not think that this argument is as clean as Woolhandler makes it out to be. The Court rarely binds itself to the text of the Eleventh Amendment. Instead, it understands the amendment "to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty."[98] So, the Eleventh Amendment limits federal judicial authority to the extent that it conflicts with states' sovereign power. But the Full Faith and Credit Clause limits states' sovereign power to reject valid judgments from other states' courts. Thus, because "Full Faith and Credit *shall be given in each State*,"[99] federal courts can likely enforce private judgments against states without violating the Eleventh Amendment.

Woolhandler, like *Hall* and *Hyatt III*, implicitly accepts a binary conception of the constitutional status of interstate sovereign immunity: Either the Constitution requires it in all circumstances, or it doesn't in any. But the Eleventh Amendment's textual barrier is not evidence that a state-court judgment against another state is always unconstitutional. The Eleventh Amendment allows state sovereign power to displace federal judicial authority but not the sovereign power of other states. Contrary to *Hall*, then, the Constitution requires interstate sovereign immunity in *some* circumstances: when it is necessary to preserve full faith and credit within "our constitutional structure."

III. THE THIRD VIEW: STATE SOVEREIGNTY AS A RULE OF PRIORITY

Neither the *Hyatt III* view nor the *Hall* view reflect an accurate understanding of the constitutional bases for interstate sovereign immunity. I propose a third view of the cathedral.[100] As I have discussed, many arguments for interstate sovereign immunity stress that states are sovereign and possess sovereign powers. But these accounts fail to see that sovereignty works both ways. Sovereignty grants states immunity from certain suits, but it also grants them the power to administer justice in their courts. When a private citizen

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98 Blatchford v. Vill. of Noatak, 501 U.S. 775, 779 (1991)

99 U.S. CONST. art. IV, § 1 (emphasis added).

100 *Cf.* Claude Monet, *Rouen Cathedral* (series of illustrations) (1892–1894); *accord* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

sues a state in the court of another state, the issue is not *whether* states have sovereign powers but *which* sovereign power deserves priority. Fortunately, the Constitution—specifically, the Full Faith and Credit Clause—helps us decide. I argue that the Full Faith and Credit Clause requires that a state receive sovereign immunity from private suits in sister-state courts only when the defendant state's interest in preserving the functioning of its sovereign power is greater than the same interest of the forum state.

A. WHY FULL FAITH AND CREDIT?

During oral arguments for *Hyatt III*, Justice Kavanaugh extolled the Constitution as "a document . . . of majestic specificity" and demanded, therefore, that interstate sovereign immunity ground itself in the explicit text of the Constitution.[101] But the Constitution does not typically exhibit "majestic specificity," except in narrow circumstances not relevant here.[102] To the contrary, the Constitution's semantic content is notoriously vague, and the Court often crafts rules to implement the values that it derives from the Constitution's text, history, and structure.[103]

Earlier, I criticized *Hyatt III* for inferring sovereign power out of nothing in the Constitution, and perhaps that is the point that Justice Kavanaugh was trying to make.[104] But it is one thing to conjure doctrinal rules without proper constitutional support for their animating values and quite another to find within the Constitution certain values that the Court implements through more specific doctrinal rules. Kavanaugh correctly notes that the Constitution does not discuss interstate sovereign immunity. But that does not mean that it has no constitutional basis at all. The Constitution does not discuss school desegregation either, and yet it undoubtably requires it because desegregation

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[101] Oral Argument at 18:30, *Hyatt III*, 139 S. Ct. 1485 (2019) (No. 17-1299) (statement of Kavanaugh, J.) https://www.oyez.org/cases/2018/17-1299 [https://perma.cc/R79Y-BT5D].

[102] *See, e.g.*, U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years . . . .").

[103] *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Forward: Implementing the Constitution*, 111 Harv. L. Rev. 54, 57 (1997) (explaining that doctrinal rules facilitate the "effective implementation" of constitutional values that are "too vague to serve as rules of law"); Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1, 89 n.301 (2004) ("That courts find it useful to concretize often vague constitutional standards into doctrine cannot be doubted."); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 Va. L. Rev. 1649, 1657–58 (2005) (explaining how the Supreme Court implements constitutional provisions).

[104] It appears that he was convinced otherwise. Justice Kavanaugh joined *Hyatt III*'s majority opinion.

is consistent with our constitutional values of equality and anti-subordination.[105] So, that the text of the Constitution does not mention interstate sovereign immunity does not strip that immunity of constitutional grounding per se. The Constitution may only require interstate sovereign immunity insofar as it is consistent with some constitutional value.[106]

What values animate interstate sovereign immunity? "Dignity and respect."[107] All the Court's cases on interstate sovereign immunity agree that the Constitution, in some way, altered the relationships among the states such that states owe each other some level of respect, cooperation, and collegiality beyond what they would as fully independent sovereigns. *Hall* called for "harmonious" relations among states.[108] In *Hyatt II*, the Court preserved this respect by invalidating Nevada's "policy of hostility" to California.[109] In *Hyatt III*, the Court adopted the view that the Constitution requires states to universally respect each other's sovereign immunity. I have argued that both approaches are incorrect, but they show a common constitutional principle—mutual respect among sovereigns—from which a third view of interstate sovereign immunity can grow.

By focusing on this principle, we can identify the clause of the Constitution in which to ground this third view and assuage Justice Kavanaugh's fears. The Full Faith and Credit Clause guarantees that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[110] A faithful reading of this text generates at least two constitutionally relevant interests in sovereign immunity: full faith and credit to another state's *laws* and to another state's *judiciary*. This creates a bilateral relationship of respect. If a citizen sues State A in State B's courts, the Constitution obligates State B to give full faith and credit to State A's laws and State A to give full faith and credit to State B's judicial proceedings.

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105 *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (concluding that segregation in public schools deprives students' equal protection of laws).

106 Through statute, a state may always grant sovereign immunity to its sister states. In this article, I focus on circumstances in which a state *must* do so.

107 Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743, 769 (2002); *see also* Coyle v. Smith, 221 U.S. 559, 567 (1911) ("States [are] equal in power, dignity and authority . . . .").

108 Nevada v. Hall, 440 U.S. 410, 426 (1979).

109 *Hyatt II*, 136 S. Ct. 1277, 1281(2016).

110 U.S. CONST. art. IV, § 1.

B. STRUCTURAL REQUIREMENTS OF FULL FAITH AND CREDIT

If full faith and credit means anything, it means that states must afford each other reciprocal respect of their sovereign duties.[111] It is well settled that the Constitution requires states to give full faith and credit to a state's *legislative* jurisdiction,[112] the power of a state to create legal interests.[113] If full faith and credit extends to a state's judicial jurisdiction, interstate sovereign immunity creates a conflict between the legislative jurisdiction of the defendant state and the judicial jurisdiction of the forum state.

The key question, then, is whether the Full Faith and Credit Clause extends to states' judicial jurisdiction. One potential reading of the Clause is that it precludes any conflicts between exercises of sovereign power because it is impossible to secure *full* faith and credit to both. And because the Clause clearly includes "public Acts," it must *not* include judicial jurisdiction if it hopes to avoid this conflict. This comports with the typical interpretation of the Full Faith and Credit Clause, which defines "judicial Proceedings" as judicial *judgments*.[114] This reading derives from the Clause's implementing statute, which Congress enacted in 1790 to require "[t]hat the records and *judicial proceedings* of the courts of any state, shall be proved or admitted *in any other court* within the United States."[115] This phrasing suggests that "judicial proceedings" means judgments in one state's court that shall be recognized in another's. Presumably, the Clause itself uses the term in the same way.

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111 *See, e.g.*, Williams v. North Carolina, 325 U.S. 226, 233 (1945) (noting that the Full Faith and Credit Clause imposes on states a "reciprocal duty of respect"); Milwaukee County v. M.E. White Co., 296 U.S. 268, 276–77 (1935) (explaining that the Clause was meant "to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation"); Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939) ("[T]he purpose of [the Full Faith and Credit Clause] was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states . . . to which are reserved some of the attributes of sovereignty . . . ."); Thomas v. Wash. Gas Light Co., 448 U.S. 261, 272 (1980) (describing the purpose of the Clause as to prevent "parochial entrenchment on the interests of other States").

112 *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) (quoting *Pac. Emp'rs Ins. Co.*, 306 U.S. at 502) (explaining that the Full Faith and Credit Clause does not require a state "to substitute for its own [laws] . . . the conflicting statutes of another state").

113 Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978).

114 *See, e.g.*, Fauntleroy v. Lum, 210 U.S. 230, 237 (1908); Smithsonian Inst. v. St. John, 214 U.S. 19, 28 (1909).

115 An Act to Prescribe the Mode in Which the Public Acts, Records and Judicial Proceedings in Each State, Shall Be Authenticated So As to Take Effect in Every Other State, 1 Stat. 122 (1790) (emphasis added). The current iteration of this statute maintains this structure. *See* 28 U.S.C. § 1738 ("The records and *judicial proceedings* of any [state] court . . . shall be proved or admitted *in other courts* . . . .").

But I argue that "judicial proceedings" must also include the judicial *process*—the assertion of jurisdiction. Jurisdiction is, of course, a prerequisite for any judgment. As a general principle, a court must secure jurisdiction over the defendant before it can enter a valid, enforceable judgment.[116] But when a court enters a valid, enforceable judgment against a defendant over which it has personal jurisdiction in a dispute over which it has subject-matter jurisdiction, that judgment is entitled to full faith and credit in the courts of other states. If the plaintiff takes her judgment to another state's court, that court cannot reverse the issuing court's finding of jurisdiction.[117] Thus, the enforcing court must give full faith and credit to the issuing court's assertion of jurisdiction over a private litigant. I see no reason why the same is not true for a court's assertion of jurisdiction over a state litigant.

Personal jurisdiction is simply power over a defendant. In all cases, a court must have personal jurisdiction—power—to enforce a judgment. In the typical, single-forum litigation, the court secures personal jurisdiction either by the defendant's consent or if the defendant had sufficient contacts with the forum.[118] But when a plaintiff secures a judgment in one court and seeks to enforce it in another, both courts need *some* power over the defendant. Personal jurisdiction grants that power to the issuing court. The Full Faith and Credit Clause grants it to the enforcing court because such jurisdiction is necessary for the court to extend full faith and credit to the judgment.

This analysis holds for private suits against state litigants in the courts of other states. The forum state's court needs jurisdiction over the defendant state. But the traditional doctrine for personal jurisdiction makes little sense for state litigants,[119] so where does this jurisdiction come from? Again, I argue that the Full Faith and Credit Clause provides it. Let's say Sally, a resident of Massachusetts, secures a judgment against the state of New Hampshire in a

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116 *Cf.* Int'l Shoe v. Washington, 326 U.S. 310, 324 (1945) (requiring courts to secure personal jurisdiction).

117 This is true for both personal and subject-matter jurisdiction. If the question of personal jurisdiction was litigated in the issuing court, the defendant is precluded from contesting it in the enforcing court. *See* S. Pac. R.R. v. United States, 168 U.S. 1, 48–49 (1897) ("[A] right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies."). The issuing court's determination of its subject-matter jurisdiction is also controlling. *See* Durfee v. Duke, 375 U.S. 106, 111 (1963) (holding that an issuing court's subject-matter jurisdiction cannot be contested in an enforcing court if the issue was litigated in the issuing court).

118 *See* 326 U.S. at 323–24 (requiring courts obtain personal jurisdiction through sufficient contacts); Daimler AG v. Bauman, 571 U.S. 117, 124 (2014) (explaining the agency test for personal jurisdiction).

119 *See* Woolhandler, *supra* note 91, at 284–85 (noting that states' immunity from suit "transcend[ed] restraints on personal jurisdiction").

Massachusetts court for violations of Massachusetts tort law. Sally tries to enforce her judgment in a Vermont court. The Vermont court cannot give full faith and credit to the judgment of the Massachusetts court unless it can secure judicial jurisdiction over New Hampshire. So, the Full Faith and Credit Clause grants the Vermont court judicial jurisdiction over New Hampshire because it is necessary to give full faith and credit to the "judicial Proceedings" of Massachusetts.

But what gives the Massachusetts court the power to enter a judgment against New Hampshire in the first place? Here, we should look again to the Full Faith and Credit Clause. If we accept the argument that the Clause extends to judicial jurisdiction, a private suit against another state creates a conflict between the sovereign interests of the defendant and forum states. Resolving this conflict requires that we give priority to the sovereign interests of one state. The Clause gives us a rule with which to make this determination. States must give *full* faith and credit to one another. What does that mean? "Full" cannot mean "complete" because it is impossible to afford complete faith and credit to the sovereign interests of both states when those interests conflict. Complete faith and credit to one impairs faith and credit to the other. Instead, "full" must mean "the maximum possible." We must seek to maximize the sovereign interests of all involved states and therefore minimize the degree to which one state's sovereign power impedes another's.

Thus, we reach a rule of priority that mirrors the conflict-of-laws method of comparative impairment, which resolves conflicts among laws that might govern an interstate claim by selecting the law that maximizes the total degree of policy satisfaction among all interested states.[120] To minimize the impairment of sovereign interests, the Full Faith and Credit Clause grants interstate sovereign immunity only when the defendant state's sovereign interest in avoiding liability is greater than the forum state's sovereign interest in asserting jurisdiction over the defendant state. If a private lawsuit would substantially burden a defendant state's ability to function as a sovereign, the Constitution mandates that the forum state extend immunity to the state litigant.

Consider how this approach would operate under the facts of *Nevada v. Hall*: A California resident sues the state of Nevada in California state court. What are the *sovereign* interests at stake? California has sovereign interests in controlling the operation of its courts, protecting its citizens from harm, and

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[120] *See generally* William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963) (developing method of comparative impairment).

enforcing its laws. Nevada has an interest in protecting its ability to carry out its executive duties as a sovereign. Because full faith and credit requires us to maximize faith and credit, we must determine whether granting sovereign immunity to Nevada impairs its sovereignty more than it impairs California's. Immunity for Nevada impairs California's sovereign powers to protect its citizens from harm that occurs within its borders and to control liability in its own courts. Being sued in California court impairs Nevada's sovereign powers to enforce its legislation and to govern its own administrative agencies.

Now, consider Mr. Hyatt's predicament: A Nevada resident sues the state of California in Nevada state court for intentional torts. Nevada has a strong sovereign interest in protecting its citizens from illegal acts committed by other sovereigns in Nevada's own territory, as well as the baseline sovereign interest of the forum state to control the operation of its courts. It is unlikely that California would suffer significant harm to its sovereign power if it incurred liability for intentional torts committed by its officials. Violating common law does not fit well into the picture of good governance. Thus, a Nevada court would not have to extend immunity to California to satisfy full faith and credit.

Of course, it is also not good governance to violate common law against a state's own citizens. But in this single-sovereign context, a court does not have to balance sovereign interests because only one sovereign's interests are at stake and the court can simply look to the state's legislature or executive for guidance. When multiple states are involved, the court must also account for the interests generated from the relationships among the states. Thus, it is not enough for a court to identify a state's immunity statute as a sovereign interest in immunizing all states from suit. The court must determine whether State A *intended* to extend its immunity statute to suits against State B. To maximize faith and credit, we assume that State A does not intend to harm its own sovereign interests. So, we assume that State A does not intend to immunize State B if doing so harms State A's sovereign power more than it harms State B's.

Approaching interstate sovereign immunity as a rule of priority to resolve conflicting sovereign power enables forum courts to provide full faith and credit to the sovereign duties of other states while securing full faith and credit from defendant states. This reciprocal relationship recognizes what *Hyatt III* and *Hall* did not: States have sovereign interests in their judicial administration, sovereign interests that cannot be ignored without ignoring full faith and credit.

C. NORMATIVE CONSIDERATIONS

Is this third way workable? Both *Hyatt I* and *Hyatt II* explicitly disavowed a form of interest analysis that is similar to what this rule-of-priority view requires.[121] *Hyatt III* took an approach so far removed from it that the two approaches are impossible to reconcile. I see two primary challenges to implementing this approach. But neither renders the approach impracticable or worse than the alternatives.

First, courts may struggle to quantify or weigh competing sovereign interests. Who's to say that Nevada's sovereign interest in its judiciary is stronger than California's in investigating potential tax fraud? This is a powerful criticism but not fatal. While legislatures are more competent than courts to balance *policy* interests, courts are more competent to balance *sovereign* interests because such balancing is grounded in constitutional values of limited government, democratic self-governance, and the like and not the policy decisions best reserved for the elected branches. While courts may not quantify exactly the strength of sovereign interests, they do not have to. They must only determine whether the extension of sovereign immunity will harm the sovereign power of the forum state more than an assertion of sister-state-court jurisdiction will harm the sovereign power of the defendant state.

More concerning, though, the rule-of-priority approach may be susceptible to bias. The forum court may always think that its sovereign interests are more important than the defendant state's and deny immunity accordingly. This is certainly a worthy concern. If the forum court—itself a function of the sovereign—must weigh the forum's sovereign interests, we may find this approach generating the discrimination and hostility of which the Court warned in *Hyatt II*. Note, however, that this approach does not ask courts to side with the more important sovereign interest. Rather, it asks them to minimize the harm to each state's sovereign power. Because it does not maximize faith and credit extended to other states, a state court may not solely maximize *one* state's sovereign power without regard to the expense of another state's. Sovereign interests can conflict, but they are not zero-sum. So, the forum state may very well find that its sovereign interests are more important than the defendant state's, but it must also demonstrate that the harm incurred to both sovereigns by denying sovereign immunity is less than the harm incurred by granting it.

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[121] *See Hyatt I*, 538 U.S. 488, 495 (2003) ("This balancing approach quickly proved unsatisfactory."); *Hyatt II*, 136 S.Ct. at 1283 ("We have since abandoned that approach [of interest analysis] . . . .").

Even if a court errs in its analysis or succumbs to some bias, this approach is still preferable to both *Hyatt III* and *Hall*. *Hyatt III* failed to recognize that states have *some* sovereign interest in the functioning of its courts. *Hall* failed to recognize that states have sovereign interests in fulfilling their sovereign duties free from interference by the courts of other states. Both adopt the erroneous view that sovereign power is all or nothing—winners and losers. As we have seen, this is not the case. A defendant state can still fulfill its sovereign duties without interstate sovereign immunity, and a forum state can still operate its judiciary without jurisdiction over a sister state. So any accounting of either of these interests will come closer to *full* faith and credit than *Hyatt III* or *Hall*.

CONCLUSION

By holding that interstate sovereign immunity is a constitutional mandate, *Hyatt III* disrupts interstate relationships. In an era in which state governments often interact with the citizens of other states, we require a more nuanced understanding of our constitutional structure. Indeed, the Full Faith and Credit Clause demands a more nuanced understanding. But we cannot simply revert to the pre-*Hyatt III* regime. Neither *Hyatt III*'s constitutional mandate nor *Hall*'s common-law conception provide a satisfactory approach to interstate sovereign immunity.

We can and should consider the values that animate the Full Faith and Credit Clause: dignity and respect among states. *Hyatt III*'s blanket requirement that all states always immunize each other from private suit enables would-be defendant states to shirk the sovereign interests of their sister states. *Hall*'s refusal to afford this immunity any constitutional status allows forum states to do the same. The approach that I offer recognizes that a private suit against a state in the courts of another state creates a conflict among sovereign powers and that the Constitution requires this conflict to be resolved in a way that ensures reciprocal dignity and respect among the states. States can fulfill this requirement by minimizing the extent to which their actions impair the sovereign duties of their sister states. If interstate sovereign immunity ensures this result, it is constitutionally required.