The Long Road to *Hyatt III*: What Happened to Full Faith and Credit?

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In Franchise Tax Board v. Hyatt *(*Hyatt III*), the Supreme Court overruled forty-year-old precedent that allowed a citizen to sue a state in another state's courts.[1] The Court's 5-4 decision creates another barrier for plaintiffs who seek to hold states accountable.* Hyatt III *expands the doctrine of sovereign immunity to provide states additional protection against citizen suits. Yet the opinion dedicates a mere three paragraphs to discussion of stare decisis.[2]*

The Court's disregard for stare decisis and expansive view of sovereign immunity are problematic. For the first time, the Court concluded that states are immune from private suits in other states' courts. But rather than address those aspects of the Court's opinion, this Note will evaluate Hyatt III *through the lens of the Full Faith and Credit Clause. In* Nevada v. Hall *and* Hyatt*'s first two trips to the Supreme Court,[3] the Court's opinions were centered around the Full Faith and Credit Clause, but* Hyatt III *barely mentions the Clause. The Full Faith and Credit Clause is also central to* Hyatt III *because it governs when a state can constitutionally apply its own law to an interstate dispute. In* Hyatt III*, a Nevada citizen brought a tort action against a California agency in Nevada state court.* Hyatt III *involved conflicting state statutes: California law immunized the agency but*

DOI: https://doi.org/10.15779/Z38QZ22J0B

* J.D. 2019, University of California, Berkeley, School of Law. I am grateful to Professor Andrew Bradt who encouraged me to write this Note and provided invaluable feedback throughout the writing process. Thank you to the *California Law Review* editors who worked with me to improve this Note. Finally, I would like to thank my fiancé, Zach, and my family for their unwavering support.

1. *See* 139 S. Ct. 1485, 1490 (2019) (overruling Nevada v. Hall, 440 U.S. 410 (1979)).

2. *See id.* at 1506 (Breyer, J., dissenting) (criticizing the majority for "surrender[ing] to the temptation to overrule *Hall* even though it is a well-reasoned decision that has caused no serious practical problems in the four decades since [the Court] decided it").

3. *See* Franchise Tax Bd. v. Hyatt (*Hyatt II*), 136 S. Ct. 1277 (2016); Franchise Tax Bd. v. Hyatt (*Hyatt I*), 538 U.S. 488 (2003) .

Nevada law did not. Thus, the Nevada court had to decide which law to apply by using conflict of law principles. The Full Faith and Credit Clause provides a constitutional limit on the Nevada court's determination. That is, the Supreme Court looks to the Full Faith and Credit Clause to determine whether the Nevada court acted constitutionally in applying its own law. By casting the Full Faith and Credit Clause aside, Hyatt III *prevents a state from applying its own law to hold another state accountable for harm to its citizens.*

In this Note, I suggest that the Court should have decided Hyatt III *on the basis of the Full Faith and Credit Clause, rather than by expanding the doctrine of sovereign immunity. The Full Faith and Credit Clause limits when a state can constitutionally apply its own law in an interstate action if another state's law conflicts. The Court's established standard should not vary simply because another state is the defendant.*

INTRODUCTION

Because the United States is a nation of states, lawsuits frequently involve residents of different states and acts that touch upon multiple states. Thus, state courts often must choose between conflicting state laws. For instance, if a car accident in California involves citizens of both Nevada and California and Nevada and California have different laws about recovery, the judge determines which law applies based on the choice-of-law principles applicable in the forum state.

The Full Faith and Credit and Due Process Clauses control when a state may constitutionally apply its own law.[4] The Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[5] The history and text of this clause do not provide much guidance, and the Supreme Court's interpretation of the clause has evolved over time.[6] In the early twentieth century, the Court more freely exercised control over state choice of law,[7] but the Court has since shifted to a more restrained approach.[8] Justice Robert Jackson found it "difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character."[9] Previously, the Court engaged in an interest-balancing approach, which required the Court to evaluate competing state interests and placed the Court in the middle of interstate conflicts. Ultimately, the Court determined that if the state has a "significant contact or significant aggregation of contacts, creating state interests," it can constitutionally apply its own law.[10]

The modern approach to choice of law under the Full Faith and Credit Clause is preferable. By removing the Court from policing choice of law, it

4. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (plurality opinion).

5. U.S. CONST. art. IV, § 1.

6. *Cf.* Ala. Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935) ("A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.").

7. *See, e.g.*, Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932), *overruled in part by* Crider v. Zurich Ins. Co., 380 U.S. 39 (1965).

8. *Allstate*, 449 U.S. at 308 n.10, 313.

9. Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 16 (1945).

10. *Allstate*, 449 U.S. at 312–13 ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.").

prevents the Court from second-guessing matters that states are in a better position to decide. A state should remain in control of enforcing its laws within its borders if it has an interest in doing so. Additionally, the Constitution indicates that Congress, not the Courts, shall determine the limits of full faith and credit.[11] *Hyatt I* correctly applied this approach and refused to override Nevada's decision to apply its own law because Nevada had an interest in doing so, despite California's interest in immunity.

In *Hyatt III*, Nevada courts heard an action brought by a Nevada citizen against a California tax agency. California argued that because California law immunized it from suit, Nevada must also recognize its immunity. But Nevada law did not immunize state agencies, including its own.[12] Thus, Nevada concluded that sovereign immunity did not shield the California tax agency from suit in its courts. The parties' briefs, oral argument, and the Court's opinion all characterize *Hyatt III* as a sovereign immunity case. But by focusing on sovereign immunity, the Court disregarded the role of full faith and credit in deciding *Hyatt III*.

This Note proceeds in three parts. Part I explains the Court's decision in *Nevada v. Hall* and the Court's three decisions in *Hyatt*. Part II describes the Court's evolved approach to the Full Faith and Credit Clause and analyzes *Hyatt III* under this standard. Further, Part II suggests it is preferable that Congress and the states decide whether immunity follows a state into another state's courts, rather than the Court decide to expand the doctrine of sovereign immunity. Part III considers the downsides to deciding *Hyatt III* as a matter of full faith and credit and evaluates whether sovereign immunity is, in fact, a better approach.

I.
HYATT: HOW WE GOT HERE

A. Nevada v. Hall

In *Nevada v. Hall*, the Supreme Court addressed for the first time whether a state may claim immunity from suit in another state's courts.[13] There, California residents suffered severe injuries in an automobile accident on a California highway.[14] The driver was an employee of the University of Nevada, engaged in official business, and driving a car owned by the State of Nevada.[15] The California residents filed suit in California trial court against the State of Nevada and the University of Nevada.[16] Ultimately, the California Supreme

11. *See* U.S. CONST. art. IV, § 1 ("And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").
12. Franchise Tax Bd. v. Hyatt (*Hyatt I*), 538 U.S. 488, 492–93, 499 (2003).
13. 440 U.S. 410, 414 (1979).
14. *Id.* at 411.
15. *Id.*
16. *Id.* at 411–12.

Court held that the plaintiff could sue Nevada in California courts as a matter of California law.[17] On remand, Nevada argued that the Full Faith and Credit Clause required California courts to enforce a Nevada statute that limited the amount of recovery to $25,000 in tort actions against Nevada.[18] The trial court rejected Nevada's argument, and a jury concluded the Nevada driver was negligent and awarded over $1 million in damages.[19] The California Court of Appeal affirmed, the California Supreme Court denied review, and Nevada successfully petitioned for review before the U.S. Supreme Court.[20]

The Supreme Court affirmed the damages award.[21] The Court first addressed Nevada's sovereign immunity and concluded that neither Article III nor "the Eleventh Amendment limitation on that power, provide[s] any basis, explicit or implicit, for this Court to impose limits on the powers of California exercised in this case."[22] The Court explained that "[a] mandate for federal-court enforcement of interstate comity must find its basis elsewhere in the constitution."[23]

Nevada next raised two arguments involving the Full Faith and Credit Clause.[24] First, Nevada argued that the Full Faith and Credit Clause required California to respect that Nevada's statutory waiver of immunity only gave Nevada's consent to suit in its own courts.[25] Second, Nevada argued that even if the Court found Nevada was amenable to suit in California, it must limit recovery to $25,000, the maximum amount allowed in Nevada's courts.[26] The Court rejected both arguments under the Full Faith and Credit Clause,[27] explaining that California has an interest in providing "full protection to those who are injured on its highways through the negligence of both residents and nonresidents."[28] Additionally, "to require California either to surrender jurisdiction or to limit respondents' recovery to the $25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery."[29] The Court also reasoned that although Nevada citizens consented to a system where Nevada is only subject to limited tort liability, "the people of California, who have had no voice in Nevada's decision,

17. *Id.* at 412 (citing Hall v. Univ. of Nev., 503 P.2d 1363 (1972)).
18. *Id.* at 412–13.
19. *Id.* at 413.
20. *Id.*
21. *Id.* at 427.
22. *Id.* at 420–21.
23. *Id.* at 421.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 424.
29. *Id.*

have adopted a different system."[30] And each state's decision "is equally entitled to [the Court's] respect."[31]

Finally, the Court explained that California's exercise of jurisdiction did not raise federalism concerns.[32] "Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities."[33] Three justices dissented.[34]

B. Hyatt I

In *Hyatt I*, the Court revisited the issue in *Hall*, with the states reversed. The Court considered whether the Full Faith and Credit Clause required Nevada to recognize California's statutory sovereign immunity in Nevada's courts.[35] *Hyatt I* involved a dispute between Gilbert Hyatt, a former resident of California, and the California Franchise Tax Board (CFTB).[36] The CFTB audited Hyatt to assess whether he underpaid state income taxes by misrepresenting when he became a Nevada resident.[37] Hyatt had received substantial licensing fees for patented inventions as a Nevada resident.[38] The CFTB determined that Hyatt was still a California resident for six months beyond the date reported, issued notices of proposed assessments, and imposed substantial civil fraud penalties.[39] Hyatt challenged the assessments through the CFTB's administrative process.[40]

While the administrative proceeding was ongoing, Hyatt filed suit against the CFTB in Nevada trial court.[41] Hyatt alleged that the CFTB committed multiple torts during the audit, including invasion of privacy, outrageous conduct, abuse of process, fraud, and negligent misrepresentation.[42] The Nevada Supreme Court rejected the CFTB's argument that Nevada must apply California law, which immunized the CFTB from suit.[43] The court concluded that it should give greater weight to "Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees" than to "California's policy favoring complete immunity for its taxation agency."[44]

30. *Id.* at 426.
31. *Id.*
32. *Id.* at 424 n.24.
33. *Id.*
34. *Id.* at 428, 431.
35. *See* Franchise Tax Bd. v. Hyatt (*Hyatt I*), 538 U.S. 488 (2003).
36. *Id.* at 490.
37. *See id.*
38. *Id.* at 490–91.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 492–93.
44. *Id.* at 493–94 (citation omitted).

The U.S. Supreme Court unanimously affirmed the judgment.[45] The Court concluded that "the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"[46] The Court determined that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here."[47] *Hyatt I* explained that "[f]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[48] The fact that there was a state defendant did not alter the Court's analysis under the Full Faith and Credit Clause; the Court adhered to the same test it would apply in a case involving a citizen defendant.[49]

The Court proceeded to reject the CFTB's argument that it "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 'interfer[e] with a State's capacity to fulfill its own sovereign responsibilities.'"[50] The Court explained that it abandoned its previous interest-balancing approach to resolving conflicts between overlapping state laws, as it "quickly proved unsatisfactory."[51] Further, this was not a case "in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State."[52] Rather, the Nevada Supreme Court "sensitively applied principles of comity with a healthy regard for California's sovereign status."[53] The Court reasoned that "[w]ithout a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause."[54]

C. Hyatt II

After a jury awarded Hyatt $500 million on remand, *Hyatt* returned to the Supreme Court.[55] The Court addressed two major questions in *Hyatt II*: (1) whether to overrule *Hall*; and (2) whether the Constitution permitted Nevada to award greater damages against California agencies than it could award against

45. *Id.* at 490.
46. *Id.* at 494 (citing Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988)).
47. *Id.*
48. *Id.* (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985)).
49. *Cf. id.* at 498 (explaining that *Hall* recognized "that a suit against a State in a sister State's court 'necessarily implicates the power and authority' of both sovereigns" (citation omitted)).
50. *Id.* at 494–95 (alteration in original) (quoting Brief for Petitioner at 13, *Hyatt I*, 538 U.S. 488 (No. 02-42)).
51. *Id.* at 495–96.
52. *Id.* at 499 (quoting Carroll v. Lanza, 349 U.S. 408, 413 (1955)).
53. *Id.*
54. *Id.* at 499.
55. *See* Franchise Tax Bd. v. Hyatt (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016).

its own agencies.[56] The CFTB had argued before the Nevada Supreme Court that because Nevada law would limit liability against Nevada officials in a similar case to $50,000, the Full Faith and Credit Clause also required Nevada to cap damages against California to that amount.[57] Although the Nevada Supreme Court accepted the CFTB's statement of Nevada law, it affirmed $1 million of the award.[58]

The U.S. Supreme Court reached the following conclusions. First, the Court did not overrule *Hall* because the justices divided 4–4 on the question.[59] Second, the Court held that it was improper for Nevada to award damages above the amount for which its own agencies could be liable.[60] The Court concluded that Nevada's application of its damages law "reflects a special, and constitutionally forbidden, '"policy of hostility to the public Acts" of a sister State,' namely, California."[61] The Court explained that because both Nevada and California would grant immunity above $50,000 in damages, by affirming damages greater than $50,000, Nevada acted inconsistently with its own law.[62] The Court expressed concern that Nevada "applied a special rule of law applicable only in lawsuits against its sister States, such as California."[63] The Court concluded that "viewed through a full faith and credit lens, a State that disregards its own ordinary legal principles on this ground is hostile to another State."[64]

The Court emphasized that its holding did not require a return to the long-abandoned interest-balancing approach under the Full Faith and Credit Clause.[65] Instead, the Court explained that Nevada demonstrated a policy of hostility by failing to apply the law as it would against its own agencies and instead applying a special rule against another state.[66] Nevada's approach was opposed to California law and inconsistent with Nevada law.[67] The Court distinguished its holding in *Hyatt I* because there, Nevada demonstrated "a healthy regard for California's sovereign status" by "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis."[68]

Chief Justice John Roberts wrote a dissenting opinion joined by Justice Clarence Thomas.[69] The dissent stated that the "majority's approach is nowhere

56. *Id.* at 1281.
57. *Id.* at 1280.
58. *Id.*
59. *Id.* at 1279.
60. *Id.* at 1281.
61. *Id.* at 1279 (quoting *Hyatt I*, 538 U.S. 488, 499 (2003)).
62. *Id.* at 1282.
63. *Id.*
64. *Id.*
65. *Id.* at 1283.
66. *Id.* at 1282–83.
67. *Id.* at 1282.
68. *Id.* (quoting Franchise Tax Bd. v. Hyatt (*Hyatt I*), 538 U.S. 488, 499 (2003)).
69. *Id.* at 1283 (Roberts, C.J., dissenting).

to be found in the Full Faith and Credit Clause."[70] Chief Justice Roberts criticized the majority's "new hybrid rule" which gave the CFTB partial immunity rather than applying Nevada law (no immunity) or California law (complete immunity).[71] The dissent reasoned that under the Full Faith and Credit Clause, "if Nevada has a sufficient policy reason to apply its own law, then Nevada law applies, and the [CFTB] is subject to full liability."[72] The dissent accepted the Nevada Supreme Court's explanation that Nevada law treats other states' agencies differently because there are administrative, legislative, and democratic controls over Nevada agencies, but the CFTB operates outside such controls.[73]

D. Hyatt III

In *Hyatt III*, the Court overruled *Hall* and held that a state has sovereign immunity from private suits in another state's courts.[74] In an opinion written by Justice Thomas, the Court concluded that *Nevada v. Hall* "is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution."[75] *Hyatt III* explained that after independence, "'[a]n integral component' of the States' sovereignty was 'their immunity from private suits.'"[76] Additionally, "[t]he founding generation thus took it as given that States could not be haled involuntarily before each other's courts."[77] Therefore, the majority concluded, "the only forums in which the States have consented to suits by one another and by the Federal Government are Article III courts."[78]

The Court only discussed the Full Faith and Credit Clause as part of the constitutional design that recognizes "equal sovereignty among the States."[79] Specifically, the Full Faith and Credit Clause precludes the several states from "'adopt[ing] any policy of hostility to the public Acts' of other States" and requires state court judgments to be "accorded full effect in other States."[80] The majority emphasized that the Constitution "implicitly strips States of any power they once had to refuse each other sovereign immunity . . . . Interstate immunity, in other words, is 'implied as an essential component of federalism.'"[81]

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70. *Id.* at 1288.
71. *Id.*
72. *Id.*
73. *Id.* at 1287.
74. *See* Franchise Tax Bd. v. Hyatt (*Hyatt III*), 139 S. Ct. 1485, 1492 (2019).
75. *See id.*
76. *Id.* at 1493 (quoting Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743, 751–52 (2002)).
77. *Id.* at 1494.
78. *Id.* at 1495.
79. *Id.* at 1497 (quoting Shelby County v. Holder, 570 U.S. 529, 544 (2013)).
80. *Id.* (quoting Franchise Tax Bd. v. Hyatt (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016)).
81. *Id.* at 1498 (quoting Nevada v. Hall, 440 U.S. 410, 430–431 (1979) (Blackmun, J., dissenting)).

Justice Stephen Breyer wrote a dissenting opinion, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.[82] The dissent explained that *Hall* permitted a state to grant its sister states immunity, and the majority adopts an absolutist approach by requiring a state to grant immunity.[83] Justice Breyer reflected that at the founding, nations granted other nations sovereign immunity in their courts "as a matter of choice, *i.e.*, of comity or grace or consent" rather than legal obligation.[84] The dissent highlighted that each state has a sovereign interest: a defendant state has an interest in immunity, whereas, the forum state has an interest in "defining the jurisdiction of its own courts."[85] Justice Breyer proceeded to identify express constitutional provisions that undermine the majority's conclusion that state sovereign immunity is an absolute right.[86] The dissent first explained that compelling states to grant immunity "risk[s] interfering with sovereign rights that the Tenth Amendment leaves to the States."[87] Further, looking only to the structure of the Constitution to "[m]andat[e] absolute interstate immunity . . . 'intru[des] on the sovereignty of the States—and the power of the people—in our Union.'"[88] Justice Breyer also pointed to the Full Faith and Credit Clause, which "prohibits States from adopting a 'policy of hostility to the public Acts' of another State."[89] The dissent concluded that the Full Faith and Credit Clause was adequate to prohibit a state from treating a sister state unfairly even if the state permits suits against its sister states in its courts.[90]

The progression of *Hyatt I* through *Hyatt III* illustrates the tension within the Court about how best to resolve questions that implicate sovereign immunity and full faith and credit. By declining to accord the necessary weight to the full faith and credit analysis, *Hyatt III* fails to resolve this problem adequately.

II.
HYATT III IS BEST RESOLVED AS AN ISSUE OF FULL FAITH AND CREDIT

The Court's decisions in *Hyatt I* and *Hyatt II* correctly analyzed the issue of interstate immunity under the Full Faith and Credit Clause. The Full Faith and Credit Clause provides a better avenue by which to decide *Hyatt III* not only because it appears in the Constitution's text but, more importantly, because the Court has developed a workable standard that provides a state adequate leeway in determining whether to apply its own law. In *Hyatt III*, the dissent correctly identified the Full Faith and Credit Clause as an express constitutional provision

82. *See id.* at 1499 (Breyer, J., dissenting).
83. *See id.*
84. *Id.* at 1500.
85. *Id.* at 1501.
86. *Id.* at 1501, 1504.
87. *Id.* at 1501 (citing Nevada v. Hall, 440 U.S. 410, 425 (1979)).
88. *Id.* at 1502 (quoting *Hall*, 440 U.S. at 426–27).
89. *Id.* at 1504 (quoting Franchise Tax Bd. v. Hyatt (*Hyatt II*), 136 S. Ct. 1277, 1279–80 (2016)).
90. *Id.*

that safeguards against a state's unfair treatment of a sister state.[91] The majority acknowledged that the Full Faith and Credit Clause limits state action but disregarded the latitude it provides states to apply their own law.[92] Under the Full Faith and Credit Clause, a state can presumptively apply its own law if it has an interest.[93] Thus, notwithstanding a state's choice-of-law approach, a state may generally constitutionally apply its own law.[94]

In *Hyatt III*, the Court's full faith and credit standard would have allowed Nevada to constitutionally apply its own law, which did not immunize the CFTB. Analyzing *Hyatt III* as a matter of full faith and credit is preferable for the following reasons: First, there should not be an exception to full faith and credit for a state defendant because by recognizing such an exception, the Court accords greater weight to a state defendant's immunity regardless of the forum state's interest and risks a return to long-rejected interest balancing. Second, a state is in a better position to decide whether an action involves the interests underlying its policies. Third, *Hyatt I* provided an adequate safeguard against interstate conflict by ensuring a state does not impose a policy of hostility.

A. This Court's Jurisprudence, the Role of States, and the Text of The Full Faith and Credit Clause Indicate That the Court Should Not Create a New Exception to Its Full Faith and Credit Jurisprudence

1. The Court's Evolved Approach to Full Faith and Credit Should Not Differ When a State is the Defendant

a. The Court's Evolved Approach to the Full Faith and Credit Clause

To determine whether a state's application of its own law is constitutional under the Full Faith and Credit Clause, the Supreme Court evolved from a balancing test to a restrained judicial role. Previously, to resolve conflicts between states' laws, the Court balanced states' interests[95] and presumed that a state could constitutionally apply its own law unless the other state had a superior interest.[96] This left the Court to decide which state had a greater interest.

Under the interest-balancing approach, the Court assessed states' laws, determined the underlying interests, and evaluated which state's interest would

91. *See id.*

92. *Id.* at 1497–98 (majority opinion).

93. *See* Sun Oil Co. v. Wortman 486 U.S. 717, 727 (1988) ("[I]t is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another.").

94. *But see, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (concluding that it was unconstitutional for Kansas to apply its own law because it did not have an interest in the action).

95. *See* Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932), *overruled in part by* Crider v. Zurich Ins. Co., 380 U.S. 39 (1965).

96. *See* Ala. Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547–48 (1935).

be more impaired if its law was not applied.[97] But in *Allstate Insurance Co. v. Hague*, the Court rejected this method.[98] Instead, the plurality concluded that a "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[99] The Court held that Minnesota could constitutionally apply its own law when resolving an interstate insurance dispute where conflicting laws from Minnesota and Wisconsin might apply.[100] There, a surviving spouse brought an action against the decedent's insurance company for recovery on the policy.[101] Minnesota law permitted stacking insurance policies but Wisconsin law did not.[102] The Court concluded that Minnesota had an interest in applying its own law through an aggregation of the case's contacts with the state: the decedent worked in Minnesota, the defendant was doing business in Minnesota, and the decedent's surviving spouse became a Minnesota resident prior to the underlying litigation.[103]

Four years later, *Phillips Petroleum Co. v. Shutts* reiterated this standard. The Court explained that the Full Faith and Credit Clause only imposes "modest restrictions" on the application of forum law.[104] In *Shutts*, the Court held that Kansas could not constitutionally apply its own law to all plaintiffs in a nationwide class action where over 99 percent of the gas leases at issue and 97 percent of the plaintiffs had no apparent connection to Kansas.[105] *Shutts* built upon *Allstate*'s mandate that a holistic approach to evaluating the relationship between a case and a state's interest in applying its own law is fundamentally a question of full faith and credit.

But the standard that the plurality articulated in *Allstate* was met with criticism. *Allstate* converged the previously separate due process and full faith and credit considerations into one test. Because the due process test protected individual defendants from an unfair application of the forum state's law, the

97. *See* Brainerd Currie, *The Constitution and Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 20 (1958) (explaining that in *Alaska Packers*, 294 U.S. 532, the Court ascertained the policy behind the law, determined California had a legitimate interest in application of the policy, and concluded the Full Faith and Credit Clause did not require application of Alaska law); *see also Ala. Packers*, 294 U.S. at 549 ("[O]nly if it appears that, in the conflict of interests which have found expression in the conflicting statutes, the interest of Alaska is superior to that of California, is there rational basis for denying the courts of California the right to apply the laws of their own state."); *Clapper*, 286 U.S. at 159 (explaining that the effectiveness of Vermont's workmen's compensation act would be gravely impaired if the New Hampshire court did not give it full faith and credit).

98. 449 U.S. 302, 308 n.10 (1981).

99. *Id.* at 313.

100. *Id.*

101. *Id.* at 305–06.

102. *Id.* at 306.

103. *See id.* at 313–19.

104. 472 U.S. 797, 818 (1985).

105. *Id.* at 815, 823.

newfound latitude states had to apply their own law concerned critics.[106] Additionally, the Court did not define a significant contact, or explain whether each contact independently would have allowed Minnesota to constitutionally apply its own law. As a result, a state can safely apply its own law to an interstate dispute with minimal judicial interference.[107]

The Court has articulated several other safeguards to ensure that a state does not act parochially. For example, a state must have personal jurisdiction over the defendant to proceed with the action: to be subject to suit, the defendant must be domiciled within the state or reach into the state and cause an injury.[108] This ensures as an initial matter that a defendant is not unfairly haled into another state's courts.[109] Further, *Shutts* demonstrates that the Court will police the limits of when a state can constitutionally apply its own law.[110] In *Shutts*, the Court invalidated a state's application of its own law, reiterating that a state must have a connection to the underlying action to apply its own law.[111]

Scholars also criticize *Allstate* for weighing all contacts, rather than assigning greater weight to those contacts that relate to the underlying transaction.[112] But articulating a standard for courts to evaluate and weigh different contacts confuses choice-of-law determinations with the constitutionality of a state's choice-of-law rules, overly burdening state courts and conflating the questions of which law can or should apply. This criticism relates to the state court's underlying choice-of-law approach, not the constitutionality of that determination. Previous attempts to limit choice of law have had perverse results. For example, the First Restatement of Conflict of Laws for choice of law involved a rigid set of rules, wherein the place of the

106. *See Allstate*, 449 U.S. at 321–22 (Stevens, J., concurring) (explaining that the Full Faith and Credit and Due Process clauses "protect different interests" and that "proper analysis requires separate consideration of each").

107. *See* W. Clark Williams, Jr., *The Impact of* Allstate Insurance Co. v. Hague *on Constitutional Limitations on Choice of Law*, 17 U. RICH. L. REV. 489, 510 (1983) ("The pendulum has swung to a point at which too little control has been retained over a state's ability to choose its own law to determine the merits of an action, inviting future instances of parochialism to occur without effective constraint.").

108. *See* Bristol–Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1779–80 (2017).

109. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (explaining a state may exercise personal jurisdiction if the defendant has "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))).

110. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) ("Given Kansas' lack of 'interest' in claims unrelated to that State . . . application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.").

111. *See id.* at 822–23.

112. *See* Williams, *supra* note 107, at 509 ("[I]t seems appropriate that any full faith and credit or due process inquiry for legislative jurisdiction purposes should place primary emphasis on contacts relating to the transaction or occurrence."); *see also* Andreas F. Lowenfeld & Linda J. Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by* Allstate Insurance Co. v. Hague, 14 U.C. DAVIS L. REV. 841, 858 (1981) (explaining that in *Allstate*, the insurance contract was made in Wisconsin so the contract's meaning should not have depended on where the plaintiff moved thereafter).

transaction or occurrence provided the applicable law.[113] This approach prevented a state with a legitimate interest from applying its own law. Often, states resisted this formalist approach and applied their own law through re-characterizing of the issue or finding a public policy exception.[114] Now, states follow a variety of choice-of-law approaches.[115] By creating a broad sphere in which a state can constitutionally apply its own law, the *Allstate* test allows a state to determine which choice-of-law approach it will follow, limiting the Court's interference with choice of law to instances where the state does not have a significant contact or aggregation of contacts. Keeping a permissive constitutional standard like that in *Allstate* gives state courts the appropriate leeway to adjudicate according to the interests expressed by their own legislatures and prevents undue federal interference.[116]

The Court's evolved approach to the limits of the Full Faith and Credit Clause reflects the Court's concern with policing choice of law. A state court should evaluate whether a case implicates an interest underlying its law rather than the Supreme Court determine which state has a greater interest. A state court has a better understanding of its laws and their underlying purposes. In most cases, a state's highest court has already evaluated whether a case implicated the policy behind its law. The Supreme Court should not second guess a state court's conclusion that the state has an interest.[117] By involving itself in this decision, the Court interferes with a state's decision about local matters. Under the evolved approach, the Court does not abdicate its judicial role. The Court still signals to states that it will remain a constitutional check but provides states with freedom to advance state policies when matters involve its citizens or harms within its borders.[118]

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113. *See generally* RESTATEMENT (FIRST) OF CONFLICT OF LAWS (AM. LAW INST. 1934).

114. *See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 767 (2012) (explaining that courts regularly refused to apply the vested-rights approach reflected in the First Restatement and instead employed "escape devices" (citation omitted)); Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 461 (1985) (noting the availability of escape devices to the First Restatement); Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 969 (1956) ("In deciding a conflict of laws question, a judge will sometimes say, 'The foreign law ordinarily applicable will not be applied in this case because to do so would violate our public policy.'").

115. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 AM. J. COMP. L. 235, 259 tbl.2 (2020) (listing each state alongside the choice-of-law methodologies it follows including traditional, significant contacts, Second Restatement, interest analysis, *lex fori*, better law, and combined modern).

116. *See* Lowenfeld & Silberman, *supra* note 112, at 867 (explaining that building a federal choice of law doctrine is problematic because if the Court creates a standard, based on the Constitution, it will prevent lower courts, state legislatures, and Congress from changing the result).

117. *See* Currie, *supra* note 97, at 78 ("If that state has an interest in the application of its law, the fact that another state has a contrary interest does not necessitate a resolution of that conflict.").

118. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822–23 (1985) (reversing the Kansas courts' application of Kansas law to all plaintiffs in a nationwide class action).

b. The Court's Current Test Is Preferable, Including Its Application to the Facts of Hyatt III

The Court's previously articulated Full Faith and Credit Clause analysis prior to *Hyatt I* through *Hyatt III* appropriately leaves choice of law to states. At the same time, it allows the Court to intervene if the forum state does not have an interest. In *Hyatt I*, the Court rejected the CFTB's argument that California law should apply in part to avoid returning to a balancing test.[119] *Hyatt I* acknowledged that to require Nevada to immunize California in its courts, the Court would first have to conclude that California had a superior interest in its sovereignty. The Nevada court applied Nevada law because it had an interest in protecting its citizens from torts committed by sister states' governments.[120] The Nevada court rejected the CFTB's argument that Nevada must recognize the immunity that the CFTB had in California courts.[121] The Court affirmed Nevada's application of Nevada law because of Nevada's clear interest.

If the Court had used a balancing test, it would instead have had to weigh California's interest in sovereignty against Nevada's interest in recovery for its citizens. This is an impossible task. The Court's perspective could never be sufficiently sensitive to state policy in determining which interest prevails. The *Allstate* plurality appreciated the Court's limitations when evaluating state interests and, as a result, constrained constitutional choice of law to avoid the reemergence of balancing tests. The Court should not depart from its approach in *Hyatt I*. If the Court had retained this approach, it would have decided *Hyatt III* differently because Nevada's interest in protecting its citizens was significant: the CFTB reached into Nevada and harmed one of its citizens. Thus, application of Nevada law was constitutional.

Some may argue that the Court should intervene as a neutral arbiter when a state defends itself in another state's courts because there is a greater risk of parochialism and unfair application of laws. But this problem is unavoidable with or without the Court weighing state interests: any time non-residents appear in another state's courts, they risk unfair application. And due process protects against this risk. Furthermore, a state court may have greater sensitivity to avoiding interstate conflict, also mitigating these concerns.

Even if leaving interstate conflicts to state courts produces problems, the Supreme Court is not the body to resolve them. States may enter into interstate agreements to respect state sovereignty.[122] Alternatively, states may expressly

119. Franchise Tax Bd. v. Hyatt (*Hyatt I*), 538 U.S. 488, 499 (2003) ("Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause.").

120. *Id.* at 493–94.

121. *Id.* at 492–93.

122. *See* Nevada v. Hall, 440 U.S. 410, 416 (1979) (explaining that a state's sovereignty in another state's courts must be found in an agreement between states or in that state's decision to respect immunity as a matter of comity).

codify intentions to immunize other states from suit through legislation. Finally, the text of the Full Faith and Credit Clause provides that Congress, not the Court, is the federal body responsible for ultimately resolving interstate conflicts.[123]

2. A State Should Remain Responsible for Deciding Whether Its Own Law Applies

States are in a better position than the Court to determine whether the interests underlying their laws are implicated. A state law that indicates another state can be liable for injuries against its citizens embodies a legislative determination that citizen redress outweighs potential interstate friction. More importantly, the legislation is a democratic statement reflecting citizens' desires and intentions. In determining that another state's sovereign immunity statute requires application of that state's law, the Court directly interferes with a state's prerogative to determine how best to redress harm.[124]

Sovereign immunity statutes do not warrant different treatment. Legislators undergo the same process when assessing whether to hold another state liable for acts committed within their state. When a state reaches into another state and harms a citizen there, the state of the harmed citizen must be able to determine the consequences. It is inequitable for a state to retain the benefit of its own sovereign immunity laws when it crosses state borders and commits harm elsewhere. In *Hyatt III*, the CFTB argued that its immunity followed it into Nevada despite the fact that it entered Nevada and injured a Nevada citizen.[125] Nevada, however, had the prerogative under Nevada law to protect Nevada citizens from this kind of harm.[126] Nevada's determination should be the end of the matter.[127]

If a state fears the possibility of liability as sovereign in other states, it can enter into interstate compacts.[128] This still allows a state, rather than the Court, to decide whether it will accord immunity to sister states. Thus, states retain ex ante control over whether they will be immune from acts committed in other states. Absent such an agreement, another state court may decide ex post whether to grant immunity to a sister state.

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123. U.S. CONST. art. IV, § 1 ("And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.").

124. *See* Currie, *supra* note 97, at 83–84 ("If the highest court of a state, having determined that the state has an interest in the application of its law to the case at hand, can reasonably be expected to do no more than uphold that interest by applying its own law, it would be anomalous for the Supreme Court to reverse the judgment of the state court because it has taken that reasonable course.").

125. *See generally* Brief for Petitioner at 2–3, Franchise Tax Bd. v. Hyatt (*Hyatt III*), 139 S. Ct. 1485 (2019) (No. 17-1299); Reply Brief for Petitioner at 11–12, 15–16, *Hyatt III*, 139 S. Ct. 1485 (2019) (No. 17-1299).

126. *See* Franchise Tax Bd. v. Hyatt (*Hyatt I*), 538 U.S. 488, 498–99 (2003).

127. There are restrictions on this, based on whether Nevada expressed a policy of hostility, which Part II.B will address.

128. *See, e.g.*, Nevada v. Hall, 440 U.S. 410, 416 (1979).

Finally, Congress has power over constitutional choice of law. The Full Faith and Credit Clause provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[129] Thus, the Constitution grants Congress authority to determine when a state must apply another state's law. Due to this express delegation of power to Congress, the Court should not choose between competing state interests.[130] Relevant here, the Court should not create an exception for sovereign immunity against a backdrop of constitutional and Congressional silence.

B. "Policy of Hostility" Is an Adequate Safeguard Against Abuse By States

The Court has already recognized a safeguard that prevents a state from unfairly applying its laws against another state. *Hyatt I* concluded that Nevada constitutionally applied its own law under the Full Faith and Credit Clause partially because it was not a case in which a state "exhibited a 'policy of hostility to the public Acts' of a sister State."[131] To ensure a system of cooperative federalism between states, the Court evaluates whether a state acted beyond the limits it would impose on itself as the defendant when a sister state is the defendant. Pursuant to this consideration, *Hyatt II* found that Nevada acted with hostility when it allowed damages against California that exceeded its own statutory cap, demonstrating that had Nevada been the defendant, it would have been subject to different, lighter treatment.[132] The "policy of hostility" safeguard allows the Court to serve as a check on states without looking into the merits of states' policies.

The problems that arise when the Court engages in interest balancing are absent from the "policy of hostility" analysis. When the Court weighs states' interests, it directly involves itself in assessing the relative merits of states' policies and determining which should apply. The Court second-guesses a state's conclusion that its law applies.[133] But the "policy of hostility" determination only requires that the Court focus on one state's treatment of another state without evaluating competing policies. The Court specifically looks at the states' interaction to determine if one state acted with hostility. This is the proper role for the Court when states have competing interests.

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129. U.S. CONST. art. IV, § 1.

130. Currie, *supra* note 97, at 77 ("[C]hoice between the competing interests of coordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary; that the Court is not equipped to perform such a function; and that the Constitution specifically confers that function upon Congress.").

131. Franchise Tax Bd. v. Hyatt (*Hyatt I*), 538 U.S. 488, 499 (2003) (quoting Carroll v. Lanza, 349 U.S. 408, 413 (1955)).

132. *See* Franchise Tax Bd. v. Hyatt (*Hyatt II*), 136 S. Ct. 1277, 1282 (2016).

133. *Cf.* Jackson, *supra* note 9, at 28 ("But only a singularly balanced mind could weigh relative state interests in such subject matter except by resort to what are likely to be strong preferences in sociology, economics, governmental theory, and politics.").

For instance, in *Hyatt II*, Nevada imposed damages against the CFTB that exceeded the damages limit for a Nevada agency under similar circumstances.[134] The Court prevented Nevada from treating a sister state adversely in its courts by requiring Nevada to adhere to its own damages cap against a sister state.[135] To reach this conclusion, the Court looked only to Nevada law, which held its state agencies liable up to $50,000 for torts.[136] The Court did not weigh Nevada's interest in recovery against California's interest in immunity. Instead, the Court left that determination to Nevada until it became apparent that Nevada acted unfairly towards California. The Court did not impose itself on Nevada's decision-making process but instead acted as a check when Nevada became hostile towards California. This is a better judicial role because it preserves the function of a neutral arbiter to prevent abuse while allowing a state to effectuate its own policy interests.

As long as states entertain suits against sister states, the Court can serve as an independent check if a state acts with hostility. In this role, the Court does not police choice of law but intervenes if one state acts in a fundamentally unfair way towards another state. In *Hyatt III*, the CFTB did not show that Nevada acted with hostility; that should have been the end of the story. Instead, the CFTB asked the Court to create a new sovereign immunity exception to its full faith and credit jurisprudence; the Court agreed.[137]

Further, the "policy of hostility" safeguard does not invite a return to interest balancing. In *Hyatt II*, Chief Justice Roberts's dissent accuses the majority of creating a new hybrid rule, and critics argue that the majority opinion looks like interest balancing.[138] Previously, when the Court balanced states' interests, it evaluated the competing interests of the two states and assessed which state had a greater interest implicated.[139] The Court engaged directly with the facts and locations of events in this determination. In contrast, to assess whether another state has applied a policy of hostility, the Court evaluates how the state would have treated itself under similar circumstances and whether it

134. *See Hyatt II*, 136 S. Ct. at 1281.

135. *See* Recent Case, Franchise Tax Board v. Hyatt, 130 HARV. L. REV. 317, 325 (2016) ("The Court in *Hyatt II* appealed to the clause's purpose as a safeguard against interstate rivalry.").

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

137. *Cf.* Franchise Tax Bd. v. Hyatt (*Hyatt III*), 139 S. Ct. 1485, 1504 (2019) (Breyer, J., dissenting) (noting that it is unnecessary to create implicit constitutional protections for states when the Full Faith and Credit Clause explicitly prohibits a state from treating another state unfairly).

138. *Hyatt II*, 136 S. Ct. at 1288 (Roberts, C.J., dissenting); *see also* Patrick J. Borchers, *Is the Supreme Court Really Going to Regulate Choice of Law Involving States?*, 50 CREIGHTON L. REV. 7, 13–15 (2016) ("The Full Faith and Credit Clause does not guarantee fair results. It prioritizes finality over individual fairness in limiting the review of state actions by another state, in particular state court judgments. . . . *Hyatt II* cannot be reconciled with current full-faith-and-credit law."); *see also* Louise Weinberg, Saving Nevada v. Hall 9 (Apr. 14, 2019) (unpublished manuscript) (on file with author) ("Chief Justice Roberts had the better of the argument. As he pointed out, the Full Faith and Credit Clause creates an obligation to the internal arrangements of *another* state, not one's own.").

139. *See, e.g.*, Ala. Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935); Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932).

treated another state worse. This judicial approach does not require balancing relative interests. It therefore avoids the interstate friction that occurs when the Court endorses one state's hostile treatment of another state. If states believe that the Court will step in if they receive hostile treatment in sister states' courts, they may be less likely to employ discriminatory policies of their own.[140]

In conclusion, abandoning the "policy of hostility" standard mires the Court in complex federalism issues that could have been avoided. Because *Hyatt III*'s approach requires the Court to balance California's immunity interest against Nevada's recovery interest, the premise of the analysis runs contrary to the Court's previous approach under the Full Faith and Credit Clause. The Court placed itself at the center of an interstate conflict, involving itself in a decision states are better suited to make and resolving a problem that the Constitution delegated to Congress.

C. The Court Erred By Concluding that Sovereign Immunity Shields States as Defendants in Other States' Courts

Although the Court decided *Hall* before later expanding the doctrine of sovereign immunity, it erred in *Hyatt III* by concluding that sovereign immunity shielded the CFTB. Following *Hall*, the Court looked beyond constitutional text to history and the Framers' intent and expanded the scope of states' sovereign immunity.[141] Additionally, the Court explained that state sovereign immunity is important to safeguarding states' dignity and self-government interests.[142] But the Court's expanded view of sovereign immunity should not have influenced its decision in *Hyatt III* because that case concerned a state's sovereign immunity in the courts of a sister state. It did not involve Article III courts or congressional abrogation of immunity.

In *Hall*, the Court determined that the language of the Constitution, debates during ratification, and the Court's prior decisions only addressed suits against states in federal court.[143] The Court explained that "the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified."[144] Rather, the debate focused on the scope of Article III and federal judicial power.[145] Additionally, according to the opinion, cases interpreting the Eleventh

140. In *Hyatt III*, forty-four states signed onto an amicus brief asking the Court to overrule *Hall*. *See* Brief of Indiana and 43 Other States as *Amici Curiae* in Support of Petitioner, Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019) (No. 17-1299). This may have been the result of seeing Nevada's treatment of California. But if the Court maintains the policy of hostility as the limit, the states should not fear that possibility.

141. Brief for Petitioner *supra* note 125, at 17 (citing Alden v. Maine, 527 U.S. 706, 713 (1999)).

142. *See id.* (citing *Alden*, 527 U.S. at 714–15, and Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58 (1996)).

143. Nevada v. Hall, 440 U.S. 410, 418–21 (1979).

144. *Id.* at 418–19.

145. *Id.* at 419.

Amendment "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."[146] The Court determined that those decisions, Article III, and the Eleventh Amendment did not answer whether one state's courts could exercise jurisdiction over another state.[147]

Over the next thirty years, the Court expanded the doctrine of sovereign immunity in cases such as *Seminole Tribe of Florida v. Florida* and *Alden v. Maine*. In *Seminole Tribe*, the Court held that Congress lacked constitutional authority to abrogate a state's sovereign immunity in federal court.[148] The Court explained that although the Eleventh Amendment's text "would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms'" that each state is a sovereign entity.[149]

Alden reiterated this expansive view of the Eleventh Amendment. The Court concluded that Congress lacked authority to subject a nonconsenting state to a private suit for damages in that state's courts.[150] The Court explained that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments."[151] The Court distinguished *Seminole Tribe* from *Hall* as involving the limits on the power of the federal government rather than state governments.[152]

Prior to *Hyatt III*, scholars debated whether *Alden* and *Seminole Tribe* were distinguishable from *Hall*.[153] *Alden* characterizes states' immunity from suit as "a fundamental aspect of sovereignty," which suggests that sovereignty applies uniformly in sister states' courts.[154] But *Alden* and *Seminole Tribe* involved the federal government's attempts to abrogate state sovereign immunity, whereas *Hall* concerned a state's ability to subject another state to suit in its courts. The

146. *Id.* at 420–21 (discussing Hans v. Louisiana, 134 U.S. 1, 18 (1890), and Monaco v. Mississippi, 292 U.S. 313, 322–23 (1934)).

147. *Id.* at 421.

148. 517 U.S. 44, 75 (1996).

149. *Id.* at 54 (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)).

150. *See* Alden v. Maine, 527 U.S. 706, 712 (1999).

151. *Id.* at 713.

152. *Id.* at 739 (explaining that the Court's failure to find an implied constitutional limit on States "cannot be construed, furthermore, to support an analogous reluctance to find implied constitutional limits on the power of the Federal Government"). *But see* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 378–79 (2006) (holding that Congress may abrogate state sovereign immunity under its Article I bankruptcy power); William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 21–22 (2017) (observing that the structure and history of bankruptcy law indicates that the states agreed in the plan of the convention not to assert sovereign immunity (citing *Katz*, 546 U.S. at 373)).

153. *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 976 (7th ed. 2015); *see also* Baude, *supra* note 152, at 22.

154. *See* 527 U.S. at 713.

Constitution does not place the same restrictions on states that it imposes on the federal government.[155] *Seminole Tribe* and *Alden* relied on Article I, Article III, and the Eleventh Amendment to evaluate state immunity; all three provisions address the federal government's power in relation to the states, not the states' power in relation to each other.[156]

It does not follow that a state is immune from suit in another state's courts because it is immune from suit in federal courts and its own courts.[157] The Tenth Amendment reserves power to the states so long as that power is not delegated to the federal government and does not violate the Constitution.[158] The Constitution does not expressly delegate to the federal government the power to abrogate a state's immunity in another state's court.[159] Therefore, a state may permit suits against other states in its courts to redress harms against its citizens.[160] Further, a state can choose to waive its immunity in its own courts; *Alden* concerned congressional interference with that state choice. By expanding state sovereign immunity to include suits in state courts, the Court directly interfered with a state's ability to protect its own citizens. Thus, the Court restricted the power of states rather than the federal government. The Court erred by taking this significant leap and failed to adequately explain its decision to do so.

III.
THE PROBLEMS WITH DECIDING *HYATT III* AS A MATTER OF FULL FAITH AND CREDIT

Although the Court traditionally addresses conflicts between states' laws under the Full Faith and Credit Clause, *Hyatt* presents an additional wrinkle

155. *See* Baude, *supra* note 152, at 24 ("The Constitution doesn't limit states to enumerated powers and imposes relatively few constraints on their treatment of one another."); *see also* Brief of Professors William Baude & Steven E. Sachs as *Amici Curiae* in Support of Neither Party at 15, Franchise Tax Bd. v. Hyatt (*Hyatt III*), 139 S. Ct. 1485 (2019) (No. 17-1299) [hereinafter Brief of Professors Baude & Sachs] ("It is dangerous to read Founding-era references to structural limits on federal judicial power as imposing similar limits on the power of the state judiciaries.").

156. Baude, *supra* note 152, at 25 ("[T]he states are bound by neither Article I, nor Article III, nor the Eleventh Amendment.").

157. *But see* Brief of Law Professors as *Amicus Curiae* In Support of Petitioner at 7, *Hyatt III*, 139 S. Ct. 1485 (2019) (No. 17-1299) ("It would be illogical for immunity principles to protect states from suit in their own courts and federal courts but not in the single class of forums most likely to exhibit hostility toward their interests: sister-state courts.").

158. *See* U.S. CONST. amend. X; *see also* Brief for Respondent Gilbert P. Hyatt at 44, *Hyatt III*, 139 S. Ct. 1485 (2019) (No. 17-1299).

159. *See* Brief of Professors Baude & Sachs, *supra* note 155, at 15 ("[T]he States retain every power with which they entered the Union—including any power to abrogate another State's immunity within their own courts—that has not been 'delegated to the United States by the Constitution, nor prohibited by it to the States.'" (quoting U.S. CONST. amend. X)).

160. *See* Brief for Respondent Gilbert P. Hyatt, *supra* note 158, at 44 ("The Tenth Amendment means that a state has the power to act unless prohibited by the Constitution. There is nothing in the Constitution that forbids a state from providing a forum for its citizens when they are injured by another state.").

because it also involves subjecting a state to suit in another state's courts. There are two reasons why the Court likely found it preferable to decide *Hyatt III* on sovereign immunity grounds. First, the Full Faith and Credit Clause does not provide adequate limiting factors for state action, so it would not offer the most straightforward basis for the Court's decision. Second, the Court's sovereign immunity jurisprudence evolved after *Hall*, allowing the Court to revisit this aspect of its decision.

A. The Full Faith And Credit Clause Is Not Clear, and the Court Has Struggled with Interpreting the Clause in Assessing Interstate Conflicts

The text and history of the Full Faith and Credit Clause do not provide much guidance for its interpretation.[161] As one scholar suggests, "[t]o simultaneously apply the conflicting law of two states is impossible; to require each state to apply the law of the other is absurd; and to let each state apply its own law repeals the Clause."[162] Although the clause provides a role for Congress, Congress has not legislated with respect to when a state should give effect to a sister state's laws.[163] This leaves the Court to determine the meaning of "full faith and credit."

As discussed previously, the Court has not adhered to a clear test. Justice Jackson was critical that the Court's full faith and credit opinions never attempted "to define the standards by which 'superior state interests' in the subject matter of conflicting statutes are to be weighed."[164] The Court's convergence test minimizes its role in interstate conflicts by only requiring that a state have a significant contact or aggregation of contacts to apply its own law.[165] The standard admittedly does not provide state courts with much guidance. As a result, a state may default to applying its own law, though this concern underestimates the ability of state judges to choose which law applies and undervalues the role of state legislators in policy-making. Nonetheless, deciding *Hyatt III* on sovereign immunity grounds allowed the Court to keep its existing full faith and credit standard intact by forgoing analysis under the Full Faith and Credit Clause.

By removing full faith and credit considerations from *Hyatt III*, the Court created a narrow exception to its full faith and credit jurisprudence and indicated that state sovereign immunity statutes raise unique considerations. Through enacting a sovereign immunity statute, a state asserts its immunity from certain lawsuits. This statute directly involves the state—rather than residents—as a

161. *See generally* Jackson, *supra* note 9, at 2–5.

162. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 297 (1992).

163. *See* Jackson, *supra* note 9, at 11 ("Congress has provided no guidance as to when extraterritorial recognition shall be accorded either to a state's statutes or to its common law.").

164. *See id.* at 16.

165. Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981).

subject. The Court's sovereign immunity jurisprudence, the Constitution, and history demonstrate that government entities differ from other defendants. Therefore, the Court reasoned that it could exempt from the Full Faith and Credit Clause the narrow subject of states being sued in sister state courts without undermining precedent.[166]

Moreover, the sovereign immunity exception indicates that the Court is unlikely to return to interest balancing. Exempting immunity statutes will not undermine the Court's general full faith and credit jurisprudence. The Court's sovereign immunity precedent already established that different rules apply when a state is the defendant. Rather than determining that immunity outweighs other state interests, the Court exempted immunity from this analysis altogether.

Because sovereign immunity involves direct conflict between states, the Court has a credible reason to police choice of law in this area. Justice Jackson suggested that the ultimate policy to be served by applying the Full Faith and Credit Clause was the federal policy of "a more perfect union of our legal systems," and "[n]o local interest and no balance of local interests" could outweigh this.[167] Justice Jackson's view suggests that a state should be immune in the courts of a sister state. If national unity is the goal, then subjecting states to suit undermines this aim.

Still, Congress is in a better position than the Court to make this determination. Ultimately, the Full Faith and Credit Clause is difficult to interpret. *Allstate* appropriately recognizes this, and Congress is better situated than the Court to evaluate competing interests. Although Congress has not acted pursuant to its constitutional authority under the Full Faith and Credit Clause, the Court should not adopt a more active role in assessing state interests.

B. The Court's Expansive View of State Sovereign Immunity Laid the Groundwork for Overruling Nevada v. Hall

In *Hall*, the Court could not find a constitutional basis by which to recognize a state's sovereign immunity in a sister state's courts.[168] However, the Court decided *Hall* before *Seminole Tribe* and *Alden*, both of which expanded

166. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."); *see also* Alden v. Maine, 527 U.S. 706, 713 (1999) ("[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.").

167. *See* Jackson, *supra* note 9, at 27.

168. Nevada v. Hall, 440 U.S. 410, 420 (1979) (explaining that nothing in the Eleventh Amendment, the Court's Eleventh Amendment decisions, or Article III "answer[s] the question whether the Constitution places any limit on the exercise of one[] State's power to authorize its courts to assert jurisdiction over another State").

the doctrine of sovereign immunity.[169] By deciding *Hyatt III* on sovereign immunity grounds, the Court removed the issue of conflicting state immunity statutes from its full faith and credit jurisprudence.

By treating *Hyatt III* as a case about sovereign immunity, the Court interfered with states' power to determine how to best protect their citizens. Regardless of the defendant, a state should remain capable of providing its citizens a forum to redress their injuries.[170] After decades of litigation, Hyatt has no recourse for the injuries that California agents inflicted on him in his state of residence. The CFTB suggested that Hyatt's lack of recourse is insignificant because a California resident would have no recourse in California courts.[171] But accepting this argument also requires accepting that a state may impose its laws beyond its own borders, even where a sister state has legislated otherwise. Because Nevada has a clear interest in protecting its citizens from harmful acts by other states, Nevada should remain capable of determining the extent to which it will hold other states liable.[172]

CONCLUSION

Although the Court decided *Hyatt III* as an issue of sovereign immunity, the Full Faith and Credit Clause provided another basis for the Court to decide the case. Under the Court's full faith and credit jurisprudence, a state can constitutionally apply its own law as long as it has an interest in the litigation. This rule should not vary when a state is the defendant. A state's interest in protecting its citizens does not change because another state, rather than an individual, inflicted harm. If a state determines that sister states merit different treatment, it can legislate accordingly or enter into compacts with other states. A state court can also recognize immunity. Ultimately, Congress and the states are in a better position than the Court to decide when it is unconstitutional for a state to refuse to recognize another state's immunity.

169. *See Alden*, 527 U.S. at 757 (holding that the federal government cannot subject nonconsenting states to private suits in those states' own courts); *see also Seminole Tribe*, 517 U.S. at 76 ("The Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court."); *see also* Brief for Petitioner, *supra* note 125, at 13 ("*Hall* is an extreme outlier in the Court's sovereign immunity jurisprudence."); Brief for Respondent, *supra* note 158, at 38 ("*The Schooner Exchange* has been seen as establishing the principle throughout American history that a sovereign is under no legal obligation to grant immunity to other sovereigns in its own courts.").

170. *See, e.g.*, Weinberg, *supra* note 138, at 19 ("Without *Nevada v. Hall*, a state's own residents cannot obtain justice for injuries received at the hands of a different state intruding on the home state's own territory.").

171. *See* Brief for Petitioner, *supra* note 125, at 39 ("None of this would have been possible in the courts of California, which, like many sovereigns, does not permit tort suits against its state agencies for alleged injuries arising from their tax-assessment activities.").

172. *See* Weinberg, *supra* note 138, at 12 ("It has always been for the forum to determine the extent of comity and grace it wishes to yield to the law of a sister state or nation.").