

*HYATT V. FRANCHISE TAX BOARD OF
CALIFORNIA: PERILS OF UNDUE
DISPUTING ZEAL AND UNDUE IMMUNITY
FOR GOVERNMENT-INFLICTED INJURY*

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Whenever you find yourself on the side of the majority, it is time to pause and reflect.

Mark Twain

A government that robs Peter to pay Paul can always depend on the support of Paul.

George Bernard Shaw

About half the practice of a decent lawyer consists of telling would-be clients that they are damned fools and should stop.

Elihu Root

Insanity is doing the same thing over and over again and expecting different results.

Albert Einstein

Everything that irritates us about others can lead us to an understanding of ourselves.

Carl Jung

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Twenty years ago, California reacted with suspicion to inventor Gilbert Hyatt's move to Nevada, concluding that he had not actually changed his residency to Las Vegas in time to avoid millions in state taxes based on a lucrative patent assignment. So convinced was California, it engaged in highly questionable shadowing of Hyatt (including dumpster dives). A jury later found this shadowing sufficiently abhorrent to support a multi-million dollar damage verdict in Hyatt's favor as part of Hyatt's invasion of privacy/abuse of power claim. Ultimately, after two trips to the U.S. Supreme Court, the verdict was substantially reduced and then limited by Nevada's own cap on damages levied against the government. Despite the long-running tort litigation and California administrative proceedings regarding Hyatt's final tax bill, it appears that his net award will be quite modest. This is largely because of a Nevada damages cap of \$50,000 in actions against the government (since increased to \$100,000), no matter how outrageous the conduct or extensive the injuries inflicted.

Most constitutionally important about the Hyatt decision is not only the Full Faith and Credit Clause decision (finding that claims by a resident against a foreign state entity were limited by the forum state's own ceiling on damages against forum state entities) but also that Hyatt nearly resulted in the demise of *Nevada v. Hall*, the U.S. Supreme Court's 1979 decision permitting suits against a state by residents of another state. *Hall* survived Hyatt—for the moment—but the *Hall* precedent remains vulnerable, perhaps surviving only because of Justice Scalia's untimely death. Unfortunately, Congress's confirmation of Scalia successor Neil Gorsuch did not examine the nominee's position on the important state sovereignty and individual rights issues presented in *Hyatt* and *Hall*. This makes it hard to know if *Hall* will survive its next examination. States should reconsider whether they have engaged in unduly harmful interstate competition and erected undue barriers to recovery against themselves or states inflicting harm on their citizens. The *Hall* and the *Hyatt* litigation should also prompt government agencies to consider the apt limits of their investigative zeal and should similarly prompt victims of excessive state investigatory zeal to think carefully about the proportionality of response.

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INTRODUCTION

The phrase “the King can do no wrong”¹ is well-known to both laypersons and lawyers. Although the phrase grates on modern ears, it remains a staple of the law reflected through a continuing presumption of sovereign immunity,² as

¹ See J.W. EHRlich, EHRlich’s BLACKSTONE 67 (1959) (“The King Can Do No Wrong”); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I 500, 518 (2d ed. 1898); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 235 (1765); *accord* Kawanakoa v. Polybank, 205 U.S. 349, 353 (1907) (“A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”). The phrase stems from the doctrine’s origins to insulate unpopular decisions of royalty from legal consequences and, despite remaining the law in many states or supporting limited liability against the government, has been heavily criticized from the mid-Twentieth Century on. See, e.g., Krause v. State, 274 N.E.2d 321, 324 (Ohio Ct. App. 1971), *rev’d*, 285 N.E.2d 736 (Ohio 1972) (“Governmental immunity is an anachronism. It represents a vestige of the ancient apotheosis of the state in the person of a king. That the king can do no wrong is a dubious concept in a nation whose very founding repudiated kings.”); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 1001 (3d ed. 1964) (“the idea that whatever the state does must be lawful, which has replaced the king who can do no wrong; [is a] very dubious theory. . .”); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001); see also Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 4, 26, 113–14 (2002) (concluding after historical analysis that case law embracing sovereign immunity misread statements and intent of Founders).

² Sovereign immunity remains the default common law in most states, although it has been waived in part in nearly all states, but ordinarily with the state establishing damages caps for potential liability. See *Sovereign Immunity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/sovereign_immunity [<https://perma.cc/VWA9-DSXJ>] (last visited Oct. 14, 2017) (defining the term as “the idea that the sovereign or government is immune from lawsuits or other legal actions except when it consents to them. Historically, this was an absolute doctrinal position that held Federal, state, and local governments immune from tort liability arising from the activities of government. These days, the application of sovereign immunity is much less clear-cut, as different governments have waived liability in differing degrees under differing circumstances.”).

curtailed or modified in statutes like the Federal Tort Claims Act³ or state analogs.⁴ Absent specific legislative intervention, sovereign immunity is still the prevailing norm.⁵ The ancient assumption of an unerring sovereign (or at least one that should not be bothered to explain its alleged misdeeds in court) has been replaced by the modern rationale that government resources should not be too easily subject to claims, lest the availability of damages from the government result in litigation frenzy burdening taxpayers or unduly chill the operation of governments by making agents hesitant to act for fear of legal consequences.⁶ Despite this evolution, sovereign immunity remains substantially in place.

But even this somewhat defanged concept of sovereign immunity is problematic both normatively and empirically. Normatively, it is hard to justify permitting a government to be absolved of potentially heinous behavior—or permitted to pay reduced damages for injuries it inflicts—when other social actors (individual and corporate) are required to be held accountable for similar behavior. Empirically, there is little actual evidence to suggest that government operations would be significantly diminished, much less imperiled, if governments were held accountable for their wrongs in the same manner as most ordinary persons or entities. In addition, sovereign immunity creates collateral public policy detriments to the extent that state policies toward immunity diverge.

Sovereign immunity combined with constitutional law in *Hyatt v. Franchise Tax Board of California*.⁷ *Hyatt* turned on whether Nevada's statutory cap

³ See 28 U.S.C. § 2674 (2012) (“[t]he United States [is] liable . . . in the same manner and to the same extent as a private individual under like circumstances, but [is not] liable for interest prior to judgment or for punitive damages.”). The statute, passed in 1948, permits private parties to sue the U.S. in federal court if alleging injury by a tort committed by persons acting on behalf of the U.S. Although establishing exclusive federal subject matter jurisdiction, the law instructs courts to apply applicable state substantive tort law.

⁴ See *State Sovereign Immunity and Tort Liability*, NAT'L CONFERENCE OF STATE LEGISLATURES, www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx [https://perma.cc/26PZ-NNE4] (last visited Oct. 17, 2017) (“state tort claims acts modeled after the FTCA are the most prevalent statutory waiver allowing tort claims against the state” with “[a]t least 33 states” limiting the amount that may be recovered and “at least 29 states” barring an award against the state of punitive damages). See, e.g., CAL. GOV'T CODE § 815 (2002) (effective Jan. 1, 2003) (regarding liability of public entities); *Id.* § 822.2 (regarding liability of public employees); CONN. GEN. STAT. § 4-141 (2016) (effective June 9, 2016) (concerning “Claims Against the State”); NEV. REV. STAT. § 41.0305 (2005) (“Liability of and Actions Against This State, Its Agencies and Political Subdivisions”).

⁵ See *Public Entity Claims Handling Resource Guide*, MUNICH REINSURANCE AM. 23 (2d. ed. 2014) (50-state survey reflects prevalence of sovereign immunity as the norm subject to legislation such as state tort claims acts permitting limited recovery in the manner of NRS 41.035); Gary L. Wickert, *Suing the King: State Sovereign Immunity and Tort Liability in All 50 States*, MATTHIESEN, WICKERT & LEHER, S.C. (Sept. 7, 2016), <https://www.mwl-law.com/suing-the-king-state-sovereign-immunity-and-tort-liability-in-all-50-states/> [https://perma.cc/R99V-A2DM].

⁶ See *infra* notes 87–98 and accompanying text.

⁷ *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt IV)*, 136 S. Ct. 1277 (2016). Apologizing in advance for being cumbersome in order to try to be clear about this long-running dispute, I will

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on damages against the state limited Plaintiff Hyatt's claim against California, which, by virtue of an earlier decision in the case, was held not to be protected by its own immunity law.⁸ The *Hyatt* case also ran the risk of the U.S. Supreme Court overruling *Hall v. Nevada*, which permits suits against State A in the courts of State B.⁹ *Hall's* demise, which would have allowed states to inflict wrongs on the citizens of other states without legal consequences, was avoided—perhaps only because of the February 2016 death of Justice Scalia, leaving the Court divided 4-4 on the issue. *Hall* dodged a bullet in *Hyatt*—but just barely. In replacing Justice Scalia on the Court, President Trump pledged to nominate a Scalia-like conservative in former Tenth Circuit Judge Neil Gorsuch.¹⁰ But will that conservatism extend to the view that one state cannot sue another over alleged wrongdoing within its borders?

One might also explore the apparent contradiction reflected by conservative jurists who, on one hand, express concern about government size, power, and abuse; but on the other hand, are unwilling to require executive agencies of

refer to the Nevada Supreme Court's initial 2002 decision in *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Court*, No. 35549, 2002 Nev. LEXIS 57 (Nev. Apr. 4, 2002) as *Hyatt I* and the U.S. Supreme Court's 2003 decision in *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) as *Hyatt II*. The Nevada Supreme Court's second decision in 2014 (*Franchise Tax Bd. of Cal. v. Hyatt*, 335 P.3d 125 (Nev. 2014)) is *Hyatt III*. See generally *Article IV—Full Faith and Credit—Sovereign Immunity—Franchise Tax Board v. Hyatt*, 130 HARV. L. REV. 317 (2016) (providing background and summary of the four *Hyatt* decisions); Julie M. Bradlow, *FTB v. Hyatt: Taxes, Torts and the Constitution*, LAW360 (Apr. 27, 2016, 11:21 AM), <https://www.law360.com/articles/787039/ftb-v-hyatt-taxes-torts-and-the-constitution> [<https://perma.cc/FB6E-FQPL>].

⁸ See *Hyatt II*, 538 U.S. at 492–94; *Hyatt I*, 2002 Nev. LEXIS 57, at *7.

⁹ *Nevada v. Hall*, 440 U.S. 410, 426–27 (1979).

¹⁰ See Sandy Fitzgerald, *Trump: My Supreme Court Pick 'Closest to Scalia I Can Find,'* NEWSMAX (MAR. 16, 2016, 9:41 AM), <http://www.newsmax.com/Newsfront/trump-SCOTUS-pick-close/2016/03/16/id/719332/> [<https://perma.cc/MB3L-35CG>] (in Fox News interview, candidate Trump states that he would appoint to the Court “someone as close to [Antonin] Scalia as I could find” and that Scalia would serve “as the model. As close to Scalia. I thought Scalia was terrific.”). President Trump followed through on this campaign promise in nominating Justice Gorsuch as Justice Scalia's replacement. See Richard L. Hasen, *Gorsuch Is the New Scalia, Just as Trump Promised*, L.A. TIMES (June 27, 2017, 3:00 AM), <http://beta.latimes.com/opinion/op-ed/la-oe=hasen-gorsuch-scalia-20170627-story.html> [<https://perma.cc/U79K-JL2V>] (Prominent law Professor Hasen notes that since joining the Court in April 2017, Justice Gorsuch has shown himself to be very conservative on many issues, as was Justice Scalia. Particularly noted was that Justice Gorsuch had encouraged review of the “soft money ban” in the McCain-Feingold campaign finance law, supported greater aid to parochial schools, encouraged review of a California gun control law, opposed the right of same sex parents to have both names on birth certificates and gave greater support to the Trump Administration's travel ban than other Justices. Professor Hasen also noted Justice Gorsuch's majority opinion in *Henson v. Santander Consumer U.S.A.*, 137 S. Ct. 1718, 1721–23 (2017) (entities purchasing debts and then trying to collect on them were not “debt collectors” within the meaning of 15 U.S.C. 1692(a) because the purchasers were not persons to whom the debt was “owed” which was the term used in the text of the statute), which endorsed the textualist approach to statutory interpretation favored by Justice Scalia but arguably reached a problematic result in that entities actually collecting debts were deemed not to be “debt collectors” under the statute).

governments to be held accountable by courts in other states where a foreign government has caused injury within the forum state. More globally, and as reflected in *Hyatt*, the very concept of immunity and limited liability for governments begs for reassessment in light of the outdatedness of the concept and the lack of uniformity of states regarding limitations on their liability. States, even if retaining damage caps, may wish to adjust the amounts so as not to unduly limit the rights of their own citizens seeking recompense for injury inflicted by other states.

I. THE *HYATT* SAGA

A. *The Case of the Moving Inventor*

The controversy regarding state court power to exercise judicial power over another state stems from inventor Gilbert Hyatt's successful computer patent for which he received millions of dollars in royalty payments. Hyatt, who lived in California most of his adult life and while inventing, maintained that he relocated to Nevada in November 1991 prior to receipt of the royalty payments. The California Tax Board took the position that Hyatt was not a Nevada resident until April 1992, by which time he had received sufficient royalty payments to owe \$4.5 million in California state income taxes for the 1991 tax year, and \$6 million in taxes for 1992—for a total of \$10 million.¹¹ According to California, this figure had grown to more than \$50 million with penalties and interest. Hyatt challenged the Board's decision through the California administrative process and courts.

Apart from the tax issues, Hyatt commenced separate tort litigation in Nevada state court in 1998, alleging that the California Tax Board was harassing him in a manner constituting fraud, invasion of privacy, and intentional inflic-

¹¹ See *Hyatt III*, 335 P.3d at 132. As this article was being finalized, the *Hyatt* saga took two significant steps toward completion, which are discussed at greater length at the conclusion of the article. By a split 3-2 vote, the Franchise Tax Board on August 29, 2017, substantially sided with *Hyatt*, dramatically reducing his tax liability, but further judicial proceedings remain possible. See Adam Ashton, *After 24 Years, Wealthy Inventor Gets His Day in Tax Court—and Wins*, SACRAMENTO BEE (Aug. 30, 2017, 7:08 AM), <http://www.sacbee.com/news/politics-government/capitol-alert/article170165567.html> [<https://perma.cc/H23J-C3FP>]. On September 14, 2017, the Nevada Supreme Court ruled on matters remanded from the U.S. Supreme Court's 2016 decision that is the focal point of this article. See *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt V)*, 401 P.3d 1110 (Nev. 2017) (for reasons that will become apparent after discussion of the other four major *Hyatt* reported opinions). The Court ruled that complete sovereign immunity did not apply to intentional torts or bad faith conduct by a state entity but that state entities were immune from punitive damages, with compensatory damages subject to the state's applicable damages cap (\$50,000 at the time of California's injuries to Hyatt; \$100,000 today). *Id.* at 1117. However, in a ruling that may be significant in the protracted *Hyatt* litigation, the Court held that pre-judgment interest, costs, and counsel fees are not subject to the cap. *Id.* at 1140-41.

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tion of emotional distress.¹² The Nevada Court did not allow the Board to remove the case to federal court because of the Eleventh Amendment.¹³ Confined to state court, the Board unsuccessfully argued before a Nevada trial court and the Nevada Supreme Court that the Board should receive the benefit of California's statutory immunity in Nevada just as it would in California.¹⁴

B. Rejection of California's Initial Full Faith and Credit Immunity Defense

In *California Franchise Tax Board v. Hyatt*, (“*Hyatt II*”), the U.S. Supreme Court upheld the Nevada Supreme Court's refusal to apply California's statute immunizing the tax collection authority from suit.¹⁵ The *Hyatt II* Court unanimously found no violation of Article IV § 1 of the U.S. Constitution, which requires that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State” where the forum state court (Nevada) found that such an application would violate the forum state's own legitimate public policy of providing its citizens a right to seek recompense for the allegedly tortious acts of a foreign state.¹⁶

C. A Huge Award Dramatically Reduced by the Nevada Supreme Court—But Full or Reciprocal Immunity Denied to California

The case proceeded to trial, with a 2008 jury verdict in favor of Hyatt, awarding damages of \$85 million for emotional distress, \$52 million for invasion of privacy, \$1.1 million for fraud, and \$250 million in punitive damages.¹⁷ Hyatt was also awarded \$2.5 million in costs, bringing the total trial court judgment to roughly \$390 million.¹⁸ The Tax Board appealed to the Nevada Supreme Court—with some success.

The Nevada Supreme Court in *Hyatt III* upheld the \$1.1 million fraud award, but overturned the invasion of privacy claims as a matter of law and remanded the emotional distress claim due to evidentiary and jury instruction er-

¹² See *Hyatt III*, 335 P.3d at 132; *Hyatt V*, 2017 WL 4079069, at *1–2. In *Hyatt V*, the Court also issued an important ruling regarding damages for intentional infliction of emotional distress, adopting a “sliding scale” approach in which medical documentation as not strictly necessary provided that there was sufficient other evidence of injury, with the amount of evidence necessary to successfully support such a claim subject to variation depending on the severity of the misconduct toward the claimant. Gilbert Hyatt refused to release his medical records but there was in the Court's view sufficient testimony supporting his claim that he incurred emotional distress. See *id.* at *18–20.

¹³ See U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

¹⁴ See *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Court (Hyatt I)*, No. 35549, 2002 Nev. LEXIS 57, at *5 (Nev. Apr. 4, 2002).

¹⁵ See *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II)*, 538 U.S. 488, 499 (2003).

¹⁶ See *id.* at 494–98.

¹⁷ See *Hyatt III*, 335 P.3d at 134.

¹⁸ See *id.*

rors in the court below.¹⁹ The Court—as a matter of comity rather than constitutional requirement—also struck down the punitive damages award.²⁰ Because of these changes, the cost award was also subject to remand.²¹ The Court also rejected Hyatt’s cross-appeal, holding that the trial court incorrectly prevented Hyatt from seeking economic damages as part of his emotional distress claim.²² Although the judgment had been drastically reduced, California still faced liability of between \$1 million and \$85 million, prompting the State’s successful cert petition,²³ and the U.S. Supreme Court’s decision largely favoring California as to the outcome (a dramatic reduction in Hyatt’s award and a requirement of comity as to sovereign immunity damage caps), but leaving *Nevada v. Hall* in place.²⁴

The Nevada Supreme Court took the view that it was not required by the Full Faith and Credit Clause or principles of comity to give the Tax Board the benefit of Nevada’s statutory cap on its own governmental liability because doing so would conflict with Nevada’s “[state] policy interest in providing adequate redress to Nevada citizens.”²⁵ The Tax Board argued that even if it could be held liable by courts of another state, its liability should be capped at \$50,000, the maximum amount courts could impose upon a Nevada government agency at the time.²⁶ The Board also argued for the overruling of *Nevada v. Hall*, which permits a sovereign State to be sued in another State without the defendant foreign state’s consent.²⁷

Pursuant to the Nevada Supreme Court’s Decision in *Hyatt III*, the \$390 million judgment was realistically reduced by more than three-fourths because, in light of the Nevada Supreme Court’s directions for retrial, a second trial on the emotional distress claim would be unlikely to result in a verdict exceeding the initial verdict of \$85 million.²⁸ But because a potential judgment between \$1 million and \$85 million is still a lot of money, even for the largest state in the union, California continued to fight. Regarding liability, *Hyatt IV* was a clear victory for the Tax Board because it effectively allowed Hyatt to recover only tens of thousands of dollars rather than the tens of millions he might have gained pursuant to *Hyatt III*. More important from a doctrinal and constitutional perspective were the issues of whether *Nevada v. Hall* should remain good law

¹⁹ See *id.* at 139–53, 157.

²⁰ See *id.* at 153–54.

²¹ *Id.* at 154.

²² See *id.* at 155–57.

²³ See *Hyatt IV*, 136 S. Ct. 1277, 1283 (2016).

²⁴ See *id.* at 1279.

²⁵ See *Hyatt III*, 335 P.3d at 153.

²⁶ See NEV. REV. STAT. § 41.035(1) (valid through Sept. 30, 2007) (statutory maximum of \$50,000 prior to 2007; \$100,000 currently).

²⁷ *Nevada v. Hall*, 440 U.S. 410, 426 (1979).

²⁸ See *Hyatt III*, 335 P.3d at 153.

and whether, even under a *Hall* regime, the courts of forum states could subject a sister state to liability that would never be permitted against the forum state.

California's argument that its liability should be capped at \$50,000—the maximum amount that could be imposed upon a Nevada government agency at the time in question²⁹—has a logical fairness to it that ultimately prevailed before the U.S. Supreme Court. Nonetheless, the Nevada Supreme Court took the view that this sort of Golden Rule-style fairness was not required by the Full Faith and Credit Clause or principles of comity and that Nevada need not give the Tax Board the benefit of Nevada's own statutory cap because this would conflict with Nevada's "[state] policy interest in providing adequate redress to Nevada citizens."³⁰ The U.S. Supreme Court's review addressed the following questions:

1. Whether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts.
2. Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.³¹

The first question addressed the real Achilles' heel of the Nevada Supreme Court's 2014 *Hyatt III* decision—its refusal to give California's Tax Board the same benefits of the cap on liability that Nevada's own state agencies enjoy. The Nevada damages cap may be unwise public policy,³² but the cap is nonetheless the law.³³ If Nevada taxing authorities hound a taxpayer in the manner alleged in *Hyatt v. Tax Board*, their liability is capped. Notwithstanding the forum state's strong interest in protecting its citizens, it is difficult to see how applying this cap to a similarly situated foreign state entity defendant can be repugnant to the public policy of the forum state when that same forum state grants its own agencies so much protection from liability.

This disparate treatment foreshadowed the U.S. Supreme Court's *Hyatt IV* decision. It clearly bothered Justice Breyer at oral argument.³⁴ It also is in ten-

²⁹ See NEV. REV. STAT. § 41.035(1) (valid through Sept. 30, 2007) (statutory maximum of \$50,000 prior to 2007; \$100,000 currently).

³⁰ See *Hyatt III*, 335 P.3d at 153.

³¹ See Petition for Writ of Certiorari, *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt IV)*, 136 S. Ct. 1277 (2016) (No. 14-1175); *Docket No. 14-1175*, SUPREME COURT OF THE UNITED STATES (June 30, 2015), <https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-1175.htm> [<https://perma.cc/5XET-NER9>] (last visited Sept. 30, 2017) ("Petition GRANTED limited to Questions 2 and 3 presented by the petition.").

³² The damages cap applies, for example, to malpractice claims against the University Medical Center, which, like most medical service providers can err in ways that inflict serious injury or death upon patients. UMC's reputation in the community is sufficiently checkered and the damages cap sufficiently known and unpopular that there is a longstanding local "joke" that cautious Las Vegas drivers should wear a name tag instructing ambulance drivers to avoid UMC in responding to an accident scene.

³³ See NEV. REV. STAT. § 41.035(1).

³⁴ See Transcript of Oral Argument at 18, *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt IV)*, 136 S. Ct. 1277 (2016) (No. 14-1175) (Justice Breyer: "[I]t seems to me intuitively at some level

sion with *Hyatt II*, where the Court, per Justice O'Connor, found the matter not a case of a "'policy of hostility to the public Acts' of a sister State" because the "Nevada Supreme Court [in its 2002 decision] sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis."³⁵

D. The U.S. Supreme Court Demands Symmetry

Perhaps unsurprisingly, the Nevada Supreme Court's arguable 2014 departure from this consistency (by a factor of more than twenty in light of the size of Hyatt's fraud award alone) resulted in the 2016 *Hyatt IV* decision requiring that, in order to comply with the Full Faith and Credit Clause, forum state courts must give foreign state entity defendants the same treatment their own agencies would receive in the forum state's courts.³⁶ In *Nevada v. Hall*, California was not only willing to impose million-dollar liability upon Nevada, but upon itself as well, at least for auto accidents.³⁷

Nevada's double standard did not survive. In *Hyatt IV*, the U.S. Supreme Court ruled that Nevada's refusal to limit California's liability as it would the forum state's own liability reflected a "policy of hostility" to the statutes of another sovereign.³⁸

The Nevada Supreme Court has ignored both Nevada's typical rules of immunity and California's immunity-related statutes (insofar as California's statutes would prohibit a monetary recovery that is greater in amount than the maximum recovery that Nevada law would permit in similar circumstances). Instead, it has applied a special rule of law that evinces a "policy of hostility" toward California. Doing so violates the Constitution's requirement that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."³⁹

The Court further noted that prior to the 2014 *Hyatt III* decision,

Nevada's courts recognized that California's law of complete immunity would prevent any recovery in this case. The Nevada Supreme Court consequently did not apply California law. It applied Nevada law instead [permitting suit against a state entity]. We upheld that decision as consistent with the *Full Faith and Credit Clause*. But in doing so, we emphasized both that (1) the Clause does not require one State to apply another State's law that violates its "own legitimate public policy," and (2) Nevada's choice of law did not "exhibi[t] a 'policy of hostility to the public Acts' of a sister State."

correct that a State like Nevada should not be able to give less sovereign immunity to California than it gives its own officials.").

³⁵ *Hyatt II*, 538 U.S. 488, 499 (2003).

³⁶ See *Hyatt IV*, 136 S. Ct. at 1281–82.

³⁷ *Nevada v. Hall*, 440 U.S. 410, 426–27 (1979).

³⁸ See *Hyatt IV*, 136 S. Ct. at 1282–83.

³⁹ See *id.* at 1281 (citation omitted).

The Nevada decision before us embodies a critical departure from its earlier approach. Nevada has not applied the principles of Nevada law ordinarily applicable to suits against Nevada's own agencies. Rather, it has applied a special rule of law applicable only in lawsuits against its sister States, such as California. . . . The Nevada Supreme Court explained its departure from those general principles by describing California's system of controlling its own agencies as failing to provide "adequate" recourse to Nevada's citizens. It expressed concerns about the fact that California's agencies "operat[e] outside" the systems of "legislative control, administrative oversight, and public accountability" that Nevada applies to its own agencies. Such an explanation, which amounts to little more than a conclusory statement disparaging California's own legislative, judicial, and administrative controls, cannot justify the application of a special and discriminatory rule. Rather, 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. A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some States into the internal, legislative affairs of others. . . . In our view, Nevada's rule lacks the "healthy regard for California's sovereign status" that was the hallmark of its earlier decision. . . .⁴⁰

Justice Alito concurred without opinion.⁴¹ Justice Roberts, joined by Justice Thomas, dissented. Noting that the differential treatment (of Nevada courts capping damages against the forum state at \$50,000 but permitting seven-figure judgments against a neighboring state) was seemingly unfair, the dissent nonetheless took the position that

for better or worse, the word "fair" does not appear in the *Full Faith and Credit Clause*. The Court's decision is contrary to our precedent holding that the Clause does not block a State from applying its own law to redress an injury within its own borders. The opinion also departs from the text of the Clause which—when it applies—requires a State to give *full* faith and credit to another State's laws. The Court instead permits partial credit: To comply with the *Full Faith and Credit Clause* [if it were applicable], the Nevada Supreme Court need only afford the Board the same limited immunity that Nevada agencies enjoy.⁴²

The dissent acknowledged that the Full Faith and Credit Clause is more difficult to apply to state laws as opposed to its "straightforward" application to state judgments, which "must be respected in another [State] provided that the first State had jurisdiction over the parties and the subject matter."⁴³ Citing *Carroll v. Lanza*,⁴⁴ Justice Roberts took the view that

⁴⁰ See *id.* at 1281–83 (citations omitted) (emphasis added).

⁴¹ See *id.* at 1283 (Alito, J., concurring).

⁴² *Id.* at 1284 (emphasis added).

⁴³ *Id.* at 1285.

⁴⁴ *Carroll v. Lanza*, 349 U.S. 408, (1955). *Carroll v. Lanza* involved a Missouri worker employed by a Missouri subcontractor injured in Arkansas who brought a negligence action in Arkansas against the general contractor. The *Carroll v. Lanza* Court rejected a Full Faith and Credit Clause defense to the application of Arkansas workers' compensation law, which allowed sued against general contractors, something not permitted under Missouri's workers' compensation law. See *id.* at 413 ("Arkansas, the State of the forum, is not adopting any policy of hostility to the public Acts of Missouri. It is choosing to apply its own rule of law to give affirmative relief for an action arising within its borders.").

[w]here a State chooses a different rule from a sister State in order “to give affirmative relief for an action arising within its borders,” the State has a sufficient policy reason for applying its own law, and the *Full Faith and Credit Clause* is satisfied.⁴⁵

Focusing on California’s misconduct, Justice Roberts noted that “Hyatt alleges that the Board committed multiple torts, including fraud and intentional infliction of emotional distress [and that] there is no doubt that Nevada has a ‘sufficient’ policy interest in protecting Nevada residents from such injuries.”⁴⁶

The dissenters found it sufficient that a state outside of the forum state, as a matter of course, is not subject to controls on its behavior by the forum state’s legislative and executive branches, thus justifying the availability of the forum state judiciary to state residents seeking recompense from a sister State. “The majority may think that Nevada is being unfair, but it cannot be said that the State failed to articulate a sufficient policy explanation for its decision to apply a damages cap to Nevada state agencies, but not to the agencies of other States.”⁴⁷ Further, the dissent noted that far from ignoring California’s sovereignty,

the Nevada court adhered to its policy of sensitivity to comity concerns this time around as well [as in *Hyatt I*]. In deference to the Board’s sovereignty, the court threw out a \$250 million punitive damages award, on top of its previous decision that the Board was not liable at all for its negligent acts. That is more than a “healthy regard” for California’s sovereign status.⁴⁸

The dissent also criticized the majority for creating a “new hybrid rule” of partial sovereign immunity that is “nowhere to be found” in the Full Faith and Credit Clause:

The Court does not require the Nevada Supreme Court to apply either Nevada law (no immunity for the Board) or California law (complete immunity for the Board). . . . [But if] the majority is correct that Nevada has no sufficient policy justification for applying Nevada immunity law, then California law applies. And under California law, the Board is entitled to *full* immunity. Or, if Nevada has a sufficient policy reason to apply its own law, then Nevada law applies, and the Board is subject to *full* liability.⁴⁹

The well-written Roberts dissent is almost enough to rehabilitate the Nevada Supreme Court’s disparate treatment of states—almost. There is a certain logic to treating a foreign state as either immune or fully liable rather than subject to hybridized liability using forum state liability as a measuring stick. But it remains unsettling to think that one state can refuse to give another the same benefits of a cap on liability that the forum state’s own state agencies enjoy. The Nevada damages cap may be unwise public policy, but the cap is nonethe-

⁴⁵ *Hyatt IV*, 136 S. Ct. at 1286 (emphasis added).

⁴⁶ *Id.* at 1287.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1288.

less the law. And even if the word “fair” does not appear in the Full Faith and Credit Clause, the purpose of the Clause and the intent behind it seems quite clearly to be about requiring fairness by the states toward one another as well as protecting their sovereignty.

Further, the Nevada Supreme Court’s *Hyatt III* decision would have created a situation in which the state’s own citizens—who are more likely to be hurt by their government than the government of another state—have only limited recourse. But if Nevadans are fortunate enough to suffer the same injury from a foreign state government, they would under *Hyatt III* face no statutory bar to full compensation. Constitutional nuances notwithstanding, this is simply a self-serving double standard. If Nevada taxing authorities treat a state taxpayer in the manner alleged in *Hyatt*, their liability is capped, at least in its own courts, even though not completely immunized as in California. Would Nevada really wish to lose these protections when sued outside its borders?

There is an appealing consistency to applying the state’s own judgment about capping government liability to a similarly situated foreign state even if the text of the Clause does not include the word “fair” and even if the forum state has a strong interest in protecting its citizens. One might rhetorically ask why Nevada, if it is so concerned about its citizens, protects itself with a damages cap when it is the tortfeasor, but finds such a cap an insufficient protection when the Nevadan is injured by the torts of a foreign state.

As discussed below, there is no good policy answer to that question.⁵⁰ Nor is the historical rationale for sovereign immunity particularly persuasive. But to the extent that sovereign immunity and damages caps are a good idea—or the inevitable reality in a world of limited government finances or governments feathering their own nests—it seems reasonable or even compelling to require some degree of uniformity regarding damage caps and some symmetry for the fate of persons injured by the misconduct of different state governments.

E. The Assault on Nevada v. Hall and its Perhaps Temporary Repulsion

Whether to retain the *Hall* precedent generated closer division of the *Hyatt IV* Court. Ironically (as noted by Justice Ginsburg during oral argument), *Nevada v. Hall* involved California’s own rejection of Nevada’s immunity. The case involved a badly injured California minor and his less injured mother suing Nevada in California state court after a State of Nevada employee driving in California negligently hit them. The jury found negligence and awarded damages of \$1.15 million (more than \$7.8 million in 2015 dollars).⁵¹

On appeal, the Supreme Court rejected the argument that Nevada’s own limited waiver of sovereign immunity (then \$25,000 pursuant to an earlier version of the same Nevada Revised Statute (NRS) § 41.035(1) at issue in *Hyatt*) precluded greater recovery by the victims in California’s own courts, which

⁵⁰ See *infra* notes 91–106, 117–131 and accompanying text.

⁵¹ See *Nevada v. Hall*, 440 U.S. 410, 411–16 (1979).

imposed no bar to recovery and no cap on damages for this type of liability.⁵² As California Tax Board counsel Paul Clement observed understatedly at the *Hyatt II* oral argument, California had some “buyer’s remorse” about the decision.⁵³

The *Hyatt v. Tax Board* saga is complex factually, chronologically, and legally. Just as one cannot readily recognize the players without a scorecard, the dispute involves difficult areas of law that put several values in tension that have never been clearly resolved by the judicial system. To borrow the analogy used by Hyatt counsel H. Bartow Farr at oral argument, the issue of state vulnerability to litigation is like a three-legged stool. One leg holds that a state may declare itself absolutely immune from suit in the state’s own courts. Another leg of the stool is provided by the Eleventh Amendment, which provides that a state may not be sued in federal court. At issue in *Hyatt* was the third leg of the stool: whether a state can be sued in the courts of another state.⁵⁴ Beyond this—and assuming the continued enforcement of *Nevada v. Hall*—there is the issue of whether a forum state willing to entertain a suit against a sister state can give that sister state less protection than the forum state’s own government would receive.

Regarding the configuration of the third leg of the stool, the California Tax Board had more than a few allies. Forty-five states submitted amicus briefs supporting California and the overruling of *Nevada v. Hall*—a perhaps unsurprising result in that most prospective defendants prefer more immunity rather than less immunity. Consequently, more than 90 percent of the states opposed the plaintiff in *Hyatt*.

Hyatt’s counsel, making the best of the adversity, argued that this clearly indicates that the states could easily work together to limit their respective liabilities and that there is no need to constitutionalize a nationwide sovereign immunity or requirement of reciprocity.⁵⁵ In response to a question from Justice Kennedy, Hyatt’s counsel argued that such inter-state arrangements would not require congressional approval because they would not be state compacts increasing the powers of the states vis-à-vis the national government.⁵⁶

Regarding *Hall*, the Court was “equally divided on this question” and “consequently affirm[ed] the Nevada courts’ exercise of jurisdiction over Cali-

⁵² See *id.* at 426–27.

⁵³ See Transcript of Oral Argument, *supra* note 34, at 14.

⁵⁴ See *id.* at 34–35. As much as I find the stool analogy educational and a good descriptive metaphor, I’m not sure it was particularly persuasive, notwithstanding that it was the metaphor chosen by a highly acclaimed Supreme Court advocate. For two of the three legs (suits in the defendant government’s home state courts and suits in federal court) there is absolute immunity. Consistency would thus suggest that there should be similar or even congruent immunity in the courts of another state—unless one is willing to openly question the entire regime of sovereign immunity, something which Hyatt counsel did not do.

⁵⁵ See *id.* at 29–30.

⁵⁶ See *id.*

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foria.”⁵⁷ In the wake Justice Scalia’s death,⁵⁸ observers have speculated as to the consequences, noting other instances of 4-4 divisions.⁵⁹ *Hyatt II* is no exception. One observer noted that the opinion as originally released identified the majority opinion as the “Opinion of Breyer, J.” rather than the corrected version’s “Breyer, J., delivered the opinion of the Court.” He read this glitch as suggesting that “it was initially either a concurrence or a dissent” (or both), in that it would not have been so initially identified had it always been intended to be the Court’s opinion.⁶⁰

Although Justice Scalia did not formally urge overturning *Nevada v. Hall* in his prior judicial opinions, he is widely viewed as having concerns about *Hall*,⁶¹ perhaps viewing the case as an affront to federalism that would never

⁵⁷ See *Hyatt IV*, 136 S. Ct. 1277, 1279 (2016).

⁵⁸ Justice Scalia died on February 13, 2016, apparently of a heart attack while resting in his room while on a hunting trip. See Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?mcubz=1> [<https://perma.cc/793A-PGH3>].

⁵⁹ In a moment of prognosticating hubris when writing about *Hyatt* in December 2015, I ventured that *Hall* would survive on a 6 (Roberts, Kennedy, Ginsburg, Breyer, Sotomayor, Kagan) to 3 (Scalia, Thomas, Alito) vote. I was obviously wrong about Justices Roberts and Kennedy. See Jeffrey W. Stempel, *Franchise Tax Board of California v. Hyatt: Questions of Reciprocal Sovereign Immunity—and the Continued Force of Nevada v. Hall*, HAMILTON & GRIFFIN ON RIGHTS (Dec. 28, 2015 (Part I) and Dec. 29, 2015 (Part II)), <http://www.hamilton-griffin.com/2015/12/28/franchise-tax-board-of-california-v-hyatt-questions-of-reciprocal-sovereign-immunity-and-the-continued-force-of-nevada-v-hall-by-jeffrey-w-stempel-part-i/> [<https://perma.cc/K499-TNCF>]. The *Hyatt IV* Court appears to have split evenly along ideological lines (conservatives wanting to overrule *Hall*; liberals wishing to retain it) and political lines (Republican appointees wanting to protect states from suit in the courts of another state; Democratic appointees finding a constitutional bar to such suits).

⁶⁰ See Nicholas Datlowe, *Minor Error, Major Effect*, U.S. LAW WEEK BLOG (Apr. 21, 2016), <https://www.bna.com/minor-error-major-b5798207019> [<https://perma.cc/EPB5-3664>]

(“Scalia’s missing vote would have been the deciding one on whether to overrule *Nevada v. Hall*.”) Datlowe reasons, correctly in my view, that if Justices Scalia and Breyer had both wanted to overrule *Nevada v. Hall*, there would have been no need to address the full faith and credit aspects of the case. “This means that, had Scalia lived, the Franchise Tax Board would have won, 5-4 on the initial question of overruling *Nevada v. Hall*.” American University law professor Stephen Vladek, who co-authored an amicus brief favoring retention of the *Hall* precedent, takes a similar view. Stempel, *supra* note 59, at 5.

⁶¹ See Jennifer McLoughlin, *Scalia Death Swayed Sovereign Immunity Case: Paul Clement*, 84 U.S. LAW WEEK 1681 (May 12, 2016) (summarizing remarks of Tax Board counsel). “It’s in the realm of speculation, I suppose, but I don’t think I’m going too far out on a limb to say that I think we probably had Justice Scalia’s vote in the case,” Paul D. Clement said May 6 during a panel at an American Bar Association Section of Taxation meeting. Clement, the former U.S. solicitor general who represented the California taxing agency in *Hyatt*, noted that the oral argument transcript suggests Scalia favoring overturning *Nevada v. Hall*. Combined with Scalia’s past opinions regarding sovereign immunity, and an original slip opinion that indicated Justice Stephen G. Breyer’s opinion “started as something other than a majority opinion,” Clement said that “it seems like at least coming out of conference, there were five votes’ to overrule the case.” *Id.*

have been permitted by the Founders or the Republic's early judges.⁶² That *Hall* did not arrive until 200 years after the founding bolsters this assessment. State governments largely feel the same way, as reflected in the nearly unanimous state government support for California against Hyatt and the overruling of *Nevada v. Hall*.⁶³

F. *Hall Hinging on the Next Justice*

Because the *Hall* precedent remains in controversy, this presents yet another area of law where filling the Scalia vacancy will obviously have an impact absent other personnel changes at the Court. Donald Trump's election as President thwarted President Obama's 2015 nomination of Merrick Garland. While there is no certainty that a Justice Garland would have joined the Court's four moderate-liberals (Ginsburg, Breyer, Sotomayor, Kagan) in supporting *Nevada v. Hall*, President Trump vowed to nominate a Justice akin to Scalia in judicial approach, which suggests more danger to *Hall* than would have been presented had Garland been confirmed. But there are no obvious indicators of new Justice Neil Gorsuch's views regarding *Nevada v. Hall*.⁶⁴ Conventional wisdom, however, is that a judicial conservative like Justice Gorsuch is more likely to favor originalist construction of the Constitution, and that originalism is more likely to favor the dispatch of *Hall*, a 1979 decision permitting the type of action against a state that probably would not have enjoyed the support of the founders.⁶⁵

⁶² See Todd Henderson, *Argument Preview: The Perversity of Tribal Sovereignty*, SCOTUSBLOG (Jan. 5, 2017, 11:40 AM), <http://www.scotusblog.com/2017/01/argument-preview-perversity-tribal-sovereignty/> [<https://perma.cc/R6WV-GL53>] (discussing pending *Lewis v. Clarke* case presenting the issue of whether Indian tribal sovereignty extends to employee of Mohegan Tribal Gaming Authority in car collision off of Indian lands, also addressing broader issues of immunity, and concluding that in *Hyatt IV*, "Justice Antonin Scalia would have been the fifth [vote for overturning *Hall*] in all likelihood."); Datlowe, *supra* note 60, at 1 (noting that Justice Breyer's opinion was likely a dissent initially, which suggests that had Justice Scalia lived he would have cast the deciding fifth vote to overturn *Nevada v. Hall*).

⁶³ See, e.g., Brief for West Virginia and 43 Other States as Amici Curiae Supporting Petitioner, *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt IV)*, 136 S. Ct. 1277 (2016) (No. 14-1175) [hereinafter States Amicus Brief]; Brief for The Council of State Governments, et al. as Amici Curiae Supporting Petitioner, *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt IV)*, 136 S. Ct. 1277 (2016) (No. 14-1175) [hereinafter Associations Amicus Brief].

⁶⁴ As of September 6, 2017, none of Justice Gorsuch's opinions, either as a Tenth Circuit judge or a Supreme Court Justice, has cited *Nevada v. Hall* and there is no evidence that he discussed the case in any public statements.

⁶⁵ But this conventional wisdom may not be accurate. It was, after all, a Supreme Court present at the creation of the Republic that decided *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which permitted suits against sovereign states in the newly created federal courts. To be sure, the body politic reacted adversely and swiftly to this decision in enacting the Eleventh Amendment, but this does not necessarily mean that a "founder's Court" of the era might not have supported *Nevada v. Hall*-like suits had one come before the Court's docket.

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Because the Scalia absence probably saved *Hall* and because judicial liberals are generally less smitten with sovereign immunity than their conservative peers, one's first reaction may be to assume a sharp ideological split regarding overturning *Hall* (Roberts-Kennedy-Thomas-Alito in favor and Ginsburg-Breyer-Sotomayor-Kagan against). But in *Hyatt IV*, dissenting Justices Roberts and Thomas would have affirmed the Nevada Supreme Court's imposition of seven-figure liability against California, which may mean they are not dead-set against *Hall* (as well as taking a different view of Full Faith and Credit than their peers) and may be willing to let *Hall* stand in the absence of a new Justice strongly opposed to *Hall*.

But it seems undeniable that *Nevada v. Hall* is at risk in even the most optimistic (for *Hall* fans) circumstances. A Trump nominee might agree with Justice Stevens's rationale in *Hall* and conclude that a state suing another state is acceptable or, like Justice Stevens, have sufficient regard for stare decisis to resist overruling. But it is perhaps equally likely that a conservative in the mold of Justice Scalia will vote to eliminate *Hall*'s expansion of state liability.

II. THE NEVADA V. HALL DEBATE

As Justice Kagan noted at oral argument, the case would be a difficult one if decided under the *de novo* standard of review.⁶⁶ Although the states ganged up on *Hall* in amicus briefs, it was nonetheless a precedent of some pedigree, having been the law for more than 35 years and having been decided by a 6-3 vote.⁶⁷ While certainly not unanimous, *Hall* was not a 5-4 squeaker. Despite its lack of a long constitutional pedigree,⁶⁸ *Hall* was not regarded as a particularly problematic precedent.⁶⁹ Pursuant to the norms of stare decisis, *Hall*'s status as

⁶⁶ See Transcript of Oral Argument, *supra* note 34, at 37–38 (comments of Justice Kagan).

⁶⁷ See *Nevada v. Hall*, 440 U.S. 410, 427 (1979) (majority opinion of Justice Stevens joined by Justices Brennan, Stewart, White, Marshall and Powell with dissenting votes of Chief Justice Burger and Justices Blackmun and Rehnquist).

⁶⁸ Where a custom, practice or precedent is of sufficiently long standing, Justice Scalia favored its retention even in the face of compelling arguments that it was outdated, unfair, or inconsistent with subsequent legal developments. See, e.g., *Burnham v. Superior Court of Cal., Cty. of Marin*, 495 U.S. 604, 621 (1990) (supporting constitutionality of “tag” or transient personal jurisdiction by mere service of process within the state notwithstanding complete lack of any other defendant contact with the state) (quote for the practice, “its validation is its pedigree. . .”).

⁶⁹ See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 203 (5th ed. 2015) (noting matter-of-factly that “The Eleventh Amendment only applies in federal court; it does not prevent a state from being sued in its own courts or in another state’s courts” and citing *Hall* without further comment on the decision); RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 2.12(b)(ii) at 209–10 (5th ed. 2012) (describing *Hall*, noting 6-3 vote on the case, and addressing dissent only in a footnote); see also *id.* at 210–11 (noting 2003 *Hyatt II* decision where “a unanimous Court later held [the Full Faith and Credit Clause] does not require Nevada to give full faith and credit to California’s statutes providing its tax agency with immunity from suit”; and “the Constitution does not confer sovereign immunity on states sued in the courts of sister states.”).

precedent put a nontrivial burden on the California Tax Board, which attacked *Hall* as being “poorly reasoned” but failed to demonstrate (or in my view even articulate well) any glaring logical errors in or notable ill effects of the decision.

To be sure, the states marshalled a historic attack on *Hall*, arguing that it ran counter to the original understanding of the Founders that states were absolutely immune. But the history of legal attitudes toward sovereign immunity is not completely clear. The bulk of the states’ argument in amici was structural and foundational, resting on the notion that being subject to suit in another state was an impermissible affront to the defendant state. While this may be true, it hardly makes *Hall* unconstitutional. The federal system is not a chivalry code demanding that states defer to one another, nor is it a non-aggression pact.

A. *Historical Considerations and the Originalist-Functionalist Divide*

The historical argument for overturning *Hall* is mixed. Defenders of *Hall* (of which I am one), have a reasonable argument that even if the “better” history suggests that the Founders would not have permitted such suits, the historical evidence is not so overwhelming as to justify overturning *Hall*, a decision approaching its fortieth anniversary. Unless one is absolutely and fundamentally an originalist—and finds the history clear—history alone does not support overturning *Hall*.⁷⁰

Nonetheless, there is a significant historical/structural argument in favor of the sovereign immunity sought by California. As the California Tax Board’s counsel noted at oral argument, a ruling in favor of Hyatt on the *Hall* issue creates the arguably bizarre situation in which a state is protected from suit in the arguably neutral federal courts but subject to the same suit in a state where the plaintiff may have a considerable home court advantage.⁷¹ Analogizing the issue to *Chisholm v. Georgia*⁷² (in which a federal court’s judgment subjecting Georgia to repayment of Revolutionary War debts quickly begat the Eleventh Amendment), the Tax Board counsel argued that the Nevada Supreme Court decision in *Hyatt* creates a situation in which South Carolinian Chisholm could have sued Georgia in his home state even though Georgia had been immunized from the suit in federal court by the Eleventh Amendment,⁷³ and in its own courts by sovereign immunity.

⁷⁰ Regarding originalist and non-originalist constitutional interpretation, see CHEMERINSKY, *supra* note 69, § 1.4; ROTUNDA & NOWAK, *supra* note 69, ch. 23; *see also id.* § 2.12(a) at 206, n.3 (citing to leading scholarly articles concerning the Eleventh Amendment and sovereign immunity).

⁷¹ *See* Transcript of Oral Argument, *supra* note 34, at 16.

⁷² *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 439 (1793).

⁷³ But in the absence of the Eleventh Amendment (which has a clear text forbidding suit against a state in federal court and which was enacted in reaction to *Chisholm* but does not mention suits in state courts), Plaintiff Chisholm was entitled to sue Georgia in federal court. And it should not be forgotten that he was not some gadfly plaintiff seeking massive law re-

The Tax Board and its allies also contended that an implicit assumption of the Constitution was that states retain their sovereign immunity that predated the Constitution, and that, notwithstanding the lack of any express textual provision of the Constitution, was an implicit but clear part of the constitutional bargain to which the states agreed. This argument is not a bad one.⁷⁴ But the *Nevada v. Hall* dissenters vociferously and ultimately, and unsuccessfully, raised this argument more than thirty years ago.⁷⁵ Furthermore, the *Hall* position enjoys non-trivial textual, historical, and doctrinal support.

First, despite the purported consensus embracing what might be termed “sovereign super-immunity” (not only in the sovereign’s courts but also wherever the sovereign may have arguably violated the laws of other states or the nation), no express language of the Constitution grants such immunity.

form at the expense of state sovereignty by seeking federal regulatory dominion over a state. Chisholm simply wanted Georgia to pay the debts it concededly owed him.

To be sure, the Chisholm episode can be invoked to argue that immunity must have been the understanding of the founders or the Eleventh Amendment would not have so quickly been passed in response to the decision. But countering that is the fact that the Court, which was composed of persons present at the founding, saw no problem with permitting the suit to go forward in a federal court. The arguably more persuasive view of the Eleventh Amendment is that it was an event of political expediency more than constitutional correction. *See, e.g.,* JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* viii (1987) (essentially arguing that the states, which had not anticipated the cost of the Revolutionary War and of repaying their war debts, used their political muscle to avoid federal jurisdiction and thereby “stiff” creditors, knowing that in their own state courts, they enjoyed sovereign immunity). This may explain why the Eleventh Amendment is textually silent regarding suit in state courts. Although modern Eleventh Amendment jurisprudence has broadened the Amendment beyond its text (*see, e.g.,* *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); and, of course, *Hans v. Louisiana*, 134 U.S. 1 (1890), which refused to give the text of the Amendment, which speaks only of suits in federal court, its plain meaning), the Court has never held it to be a blanket grant of sovereign immunity and many of the Eleventh Amendment decisions protecting the states have been controversial.

⁷⁴ *See* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 S. CT. REV. 249, 249–50 (arguing that the better historical view is that states did indeed have broad sovereign immunity in all state courts at the time of the Founding and that *Nevada v. Hall* misconstrued this history).

⁷⁵ *See Nevada v. Hall*, 440 U.S. 410, 427–28 (1979) (Blackmun, J., dissenting) (joined by Justices Burger and Rehnquist, stating “[i]t is important to note that at the time of the Constitutional Convention, as the Court [majority] concedes, there was ‘widespread acceptance of the view that a sovereign State is never amenable to suit without its consent’” and that immunity from suit was viewed as a core element of sovereignty); *id.* at 437–38 (Rehnquist, J., dissenting) (joined by Burger but not Blackmun, stating that the nature of constitutional bargain as reflected in drafting and ratification history suggests Founders viewed state sovereign immunity as applicable in all courts, not merely courts of the particular sovereign, and that it is an “established principle” that a sovereign cannot be sued “‘in its own courts, or in any other, without its consent and permission.’”) (first quoting *Beers v. Arkansas*, 61 U.S. 527, 529 (1857); and then citing *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 451 (1883) and *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 74 (1961)).

Second, as Hyatt's counsel emphasized and Justice Stevens discussed in *Nevada v. Hall*, *Schooner Exchange v. McFaddon*—a decision made by Justices much closer in time to the ratification of the Constitution—appears to reject the contention that sovereign states retain their absolute power outside their own courts or boundaries.⁷⁶ Rather, the foreign sovereign may be granted immunity as a matter of comity, like France in *Schooner Exchange*.⁷⁷ There, France, as a foreign sovereign, could not insist on obtaining immunity from an American court.⁷⁸ Further, the Supreme Court itself expressed no reservations about the continued vitality of *Hall* in its first *Hyatt* decision in 2003 (*Hyatt II*).⁷⁹ Presumably, if history were so clearly on the side of California regarding this issue, a constitutional problem of this magnitude would have been raised by at least one Justice at that time of *Schooner Exchange*.

Third, *Chisholm v. Georgia* found no immunity from suit in federal courts in the absence of the subsequently enacted Eleventh Amendment,⁸⁰ which is directed only to protecting states from suit in federal court. The Rehnquist dissent in *Nevada v. Hall* regards the passage of the Eleventh Amendment as conclusive evidence that the *Chisholm* Court misunderstood the Founders' consensus regarding sovereign immunity and mistakenly rejected the views of James Madison, John Marshall, and Alexander Hamilton.⁸¹

However, one can easily make two arguments. First, that the Justices of 1793 (including John Marshall, who authored the *Schooner Exchange* opinion) were in a better position to assess the Founders' sentiments about sovereign immunity than Justice Rehnquist; and second, that the passage of the Eleventh Amendment (which only confers immunity against federal court litigation) was an adaptation of the Constitution rather than a reaffirmation of an original understanding.

An amicus brief, authored by Professor Stephen Vladeck and Attorney Lindsay Harrison, submitted in *Hyatt IV* argued (persuasively in my view) that *Hall* was correctly decided and should stand.⁸² The brief essentially read *Schooner Exchange* as Hyatt did and noted that it would be odd to read Article III of the Constitution as expanding state sovereign immunity because Article III by definition subjects states to the judicial power of another sovereign (the national government), which was not the case prior to the enactment of the

⁷⁶ *Schooner Exchange v. McFaddon*, 11 U.S. 116, 122–23 (1812).

⁷⁷ *Id.*

⁷⁸ *See Hall*, 440 U.S. at 416–18.

⁷⁹ *See Hyatt II*, 538 U.S. 488, 497 (2003) (no criticism or concern about *Hall* expressed; *Hall* cited merely as decided precedent) (“Petitioner does not ask us to reexamine that ruling, and we therefore decline the invitation of petitioner’s amici States . . . to do so.”).

⁸⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420 (1793).

⁸¹ *See Hall*, 440 U.S. at 436–37.

⁸² *See* Brief for Professors of Federal Jurisdiction as Amici Curiae Supporting Respondent at 3, *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt IV)*, 136 S. Ct. 1277 (2016) (No. 14-1175).

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Constitution.⁸³ The amicus brief also made the argument (again, compelling in my view) that overruling *Hall* would create an unwise de facto absolute immunity for state entities as a matter of constitutional law.⁸⁴ The alternative, they suggest, is that such cases could become subject to the US Supreme Court's original jurisdiction if states were permitted to sue as *parens patriae* to vindicate the rights of their citizens vis-à-vis another state and were to do so with any frequency. But as a practical matter, a right that can only be enforced through the Supreme Court's exercise of original jurisdiction is not likely to be a right gaining much serious attention from a judicial institution that does not see itself as a forum for merely righting wrongs rather than issuing constitutional pronouncements.

Further, as previously noted, the Court itself in *Hyatt II* in 2003 expressed no reservations about the continued vitality of *Hall*, though they noted that the issue was not before the Court.⁸⁵ One might, in a similar vein, further argue that if the Tax Board were to challenge *Hall*, the time to have done so was during *Hyatt II*. Although perhaps not formally subject to waiver or estoppel, the Tax Board's attack on *Hall*, more than a decade after it had been sued in Nevada state court, seemed belated by 2016.

To be sure, at the time of the *Hall* decision, *Hall* dissenter Justice Rehnquist and others could point to writings of Madison and Hamilton that can be read as supporting absolute immunity.⁸⁶ But these writings do not warn that states entering the union might be subject to suit in other member states and arguably do not even touch upon the possibility because their focus was on whether state sovereignty would be threatened by the new national government.⁸⁷ It must also be remembered that the Founders, particularly the writers of the *Federalist Papers*, were trying to sell the ratification of the Constitution to some often reluctant state audiences.⁸⁸ It is hardly surprising then that these

⁸³ See *id.* at 10–12 (also noting that nothing in Article III or other portions of the Constitution expressly enacts sovereign immunity or limits the jurisdiction of the courts of a state).

⁸⁴ See *id.* at 12–15.

⁸⁵ See *Hyatt II*, 538 U.S. 488, 497 (2003) (“Petitioner [Tax Board] does not ask us to reexamine [*Nevada v. Hall*] and we therefore decline the invitation of petitioner’s *amici* States. . . .”) (citing *Mazer v. Stein*, 347 U.S. 201, 206, n.5 (1954)) (“We do not reach for constitutional questions not raised by the parties[.]”).

⁸⁶ See, e.g., THE FEDERALIST NO. 81 (Alexander Hamilton) (Ian Shapiro ed., 2009) (taking the position that ratification of the Constitution would not undermine traditional state sovereign immunity); THE FEDERALIST NO. 39 (James Madison) (Ian Shapiro ed., 2009) (states possess a residual sovereignty that is preserved in the Constitution); see CHEMERINSKY, *supra* note 69, § 1.3 at 11; THE FEDERALIST NO. 81, *supra* note 86, at 411 (Alexander Hamilton).

⁸⁷ See THE FEDERALIST NO. 39, *supra* note 86 (James Madison); THE FEDERALIST NO. 81, *supra* note 86 (Alexander Hamilton); see also Randall, *supra* note 1, at 3 (“much of the historical record addresses whether the states enjoyed immunity from suit in the federal courts.”).

⁸⁸ The *Federalist Papers* were a series of essays written between October 1787 and May 1788 by James Madison, Alexander Hamilton and John Jay (under the pseudonym Publius) to urge voters in New York to support ratification of the proposed Constitution. See Ian

authors may have soft-pedaled some implications of union that may not have appealed to states' rights advocates on the fence about whether to ratify.

Under these circumstances, the historical argument for the immunity sought by the Tax Board in *Hyatt* is mixed, though arguably favoring immunity. However, even if the historical argument is correct, it is not conclusive unless one is a rigid originalist regarding the Constitution. To the extent one takes a functional view of the Constitution or thinks that the original understanding of the document may be updated to comport with modern times, the historical analysis may give pause but is not compelling. It is certainly not compelling enough to warrant overturning *Nevada v. Hall*, which does not appear to be a problematic precedent, however many states may complain in an amicus brief about the ravages of having to defend injury-causing conduct in another state's courts.

B. Constitutional Structure, Federalism and Pragmatic Public Policy Concerns

Consideration of functional factors provides strong support for retaining *Nevada v. Hall*.

If one's view of the Constitution is more evolutionary, even clear historical evidence favoring California is not persuasive unless there are structural, textual, and prudential reasons supporting the demise of *Hall*. There is no constitutional text clearly favoring such a result. The language of the Full Faith and

Shapiro, *Introduction to THE FEDERALIST PAPERS: ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY ix–xxii* (explaining that the essays were contained in newspaper articles (that we now would describe as op-ed pieces) written as part of an effort to persuade New York to ratify the Constitution, and providing additional background regarding the political context of the *Papers*); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 248 (2004) (Hamilton, Madison and Jay "wrote principally to support the campaign for ratification in New York."); Chris Carlisle, Case Note, *State Sovereign Immunity Trumps the Supremacy Clause: Does Federal Law Apply to the States in the Wake of Alden v. Maine* 119 S. Ct. 2240, 23 HAMLINE L. REV. 177, 197, n.143 (1999). Consequently, it is reasonable to assume that these Founders, however honest, would be reluctant to emphasize any aspects of the proposed new union that might engender opposition from voters or political elites in the state.

Also, as Professor Randall has noted, "[b]y the time Hamilton's statements in The Federalist No. 81 appeared, eight states had already ratified," a history she reads as suggesting that the Constitution became effective "without reliance" on assurances that sovereign immunity would be preserved). See Randall, *supra* note 1, at 14; see also *id.* at 13–16 (noting that the strong view of sovereign immunity often attributed to Hamilton and Madison is not strictly accurate in view of their other statements and noting statements of other founders in derogation of sovereign immunity, even from suits in federal court that are not barred by the Eleventh Amendment). It should be emphasized that Professor Randall's very persuasive attack on sovereign immunity is directed toward the immunity states enjoy in Federal Court due to a (in her view) mistakenly enacted Eleventh Amendment and ensuing two centuries of erroneous judicial interpretation of the scope of the Amendment. Even if she is incorrect about the issue of state immunity from suit in federal court, her arguments are additional support for refusing to immunize states from suit in the courts of a sister state. For a very persuasive attack on sovereign immunity generally, see Chemerinsky, *supra* note 1, at 1201.

Credit Clause speaks—as the Court noted in its 2016 *Hyatt* decision—of symmetry but it does not establish sovereign immunity.⁸⁹ On the contrary, prior to the Eleventh Amendment, the text in *Chisholm v. Georgia* was read to permit states to be sued in federal court without any immunity.⁹⁰

If one is not an originalist, *Hall* can be well defended on grounds of constitutional structure and simple fairness. *Hall* itself involved a badly injured California minor and his less injured mother (the jury verdict was nearly \$8 million in today’s dollars) suing Nevada in California state court after a Nevada State employee negligently hit them while driving in California.⁹¹ In addition to rejecting the argument that Nevada did not have to answer for its alleged tortious conduct in the courts of another state, the *Hall* Court rejected the argument that Nevada’s own limited waiver of sovereign immunity (then \$25,000 pursuant to the same Nev. Rev. Stat. § 41.035(1) at issue in *Hyatt*) precluded greater recovery by the victims in California’s own courts, which imposed no bar to recovery and no cap on damages for this type of liability.⁹²

According to the *Nevada v. Hall* critics, states have sometimes been sued for conduct causing injury in other states, placing legal and financial pressure on the states.⁹³ But the empirical burden of such litigation is far from clear and hardly seems oppressive.⁹⁴ Further, the “wrongfulness” of such a situation is

⁸⁹ See *Hyatt IV*, 136 S. Ct. 1277, 1281 (2016) (noting that the Clause “does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy.”) (citing *Carroll v. Lanza*, 349 U.S. 408, 412 (1955)).

⁹⁰ See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 451 (1793). The vote in *Chisholm* was 4-1, suggesting that as a legal matter, jurists present at the founding had little concern that states enjoined absolute sovereign immunity. But as a political matter, the decision was unpalatable, but perhaps due to events post-dating the drafting and ratification of the founding. See ROTUNDA & NOWAK, *supra* note 69, § 2.12(a) at 207–08 (noting that “fear of suits by Tory creditors” was one of the reasons animating the Eleventh Amendment and “[w]hile the individual state debts to British citizens and loyalists were not great, increasing tensions with Great Britain [that would culminate in the War of 1812] created fear of debts arising from a new conflict and an animosity towards paying any such claims.”).

⁹¹ See *Nevada v. Hall*, 440 U.S. 410, 411 (1979).

⁹² See *id.* at 425–27.

⁹³ See, e.g., States Amicus Brief, *supra* note 63, at 31; Associations Amicus Brief, *supra* note 63, at 3. The Associations Amicus Brief is directed almost exclusively at the Full Faith and Credit issue but implicitly criticizes *Hall* as creating risky financial exposure for sovereigns.

⁹⁴ The States’ Amicus Briefs complaining about the impact of *Hall* are long on generality and short on specifics. Relatively few cases of what might be termed “*Hall*” liability for the states are cited, and they appear to involve a collectively modest amount of financial liability relative to the states’ fisc. See States Amicus Brief, *supra* note 63, at 23–26 (citing three cases regarded as exercising jurisdiction over foreign state governments “in cases that involve sensitive policy decisions” and five cases where “money judgments have been entered against States or state entities by the courts of other States” yet contending that such situations are “numerous”); Associations Amicus Brief, *supra* note 63, at 19 (broadly stating that “the resources required to defend against suits across various States could and likely would be exorbitant, and may even impede the effective functioning of government” but citing no data on the exposure created by *Hall* or that would be created in the absence of restrictions

hardly self-evident. One can make at least as compelling a case that, barring redress to a victim in the courts of the victim's own state (assuming the tortfeasor state has sufficient minimum contacts with the forum state), is equally or more troubling.

For example, the state amici favoring the Tax Board cited, as examples of unfairness, a "multi-million dollar verdict against a Pennsylvania prison,"⁹⁵ a "\$600,000 judgment against the State of Maryland after an accident involving a deputy sheriff,"⁹⁶ a "\$1.75 million damages judgment against a subdivision of New Jersey in a case arising from bridge maintenance,"⁹⁷ and a "\$225,000 judgment against a subdivision of Utah after an arrest and imprisonment."⁹⁸

such as the Nevada damages cap of N.R.S. 41.035); *see also* *Cty. of Clark ex rel. U. Med. Ctr. v. Upchurch*, 961 P.2d 754, 758 (Nev. 1998) (stating that there would be "massive and deleterious effect upon state and local treasuries" in the absence of statutory damage caps).

⁹⁵ *See* States Amicus Brief, *supra* note 63, at 25 (citing *Reynolds v. Lancaster Cty. Prison*, 739 A.2d 413, 417 (N.J. Super. Ct. App. Div. 1999)). In *Reynolds*, a guard dog business owner was given a dog by the prison but no warning about the dog's dangerous propensities, including five previous vicious attacks, two within days of the dog's delivery to the plaintiffs. The business owner and a contractor were attacked and badly injured, with bites through the skin and to the bone in what appears to have been a life-or-death struggle to escape the dog. They sued for relief, with the court determining damages and finding that the prison was 75 percent at fault. This hardly sounds like an instance where the state actor—which essentially dumped a killer dog on an unsuspecting vendor—was treated unfairly because of *Nevada v. Hall*.

⁹⁶ *See* States Amicus Brief, *supra* note 63, at 25 (citing *Kent Cty. v. Shepherd*, 713 A.2d 290, 304 (Del. 1998)). In *Shepherd*, the deputy (who was working on a routine investigation and not responding to an emergency) rear-ended a stopped vehicle at sufficiently high speed to inflict substantial injuries. Again, hardly a seemingly unfair result due to *Hall*.

⁹⁷ *See* States Amicus Brief, *supra* note 63, at 25 (citing *Laconis v. Burlington Cty. Bridge Comm'n*, 583 A.2d 1218, 1220–23 (Pa. Super. Ct. 1990)). In *Laconis*, plaintiff was rendered paralyzed when his car hydroplaned in water retained in a depression located on a portion of road found to be negligently maintained by the Commonwealth of Pennsylvania. The court found the state 51 percent negligent to Mr. Laconis's 49 percent negligence (in a bench trial) and noted that the state knew of the road's disrepair and dangerousness during rainfall but had provided no warning. Are the States supporting the Tax Board and urging repeal of *Hall* really suggesting that this is an unfair result and that the crippled Plaintiff Laconis should be denied relief or paid only a fraction of the value of the judgment he would otherwise obtain?

⁹⁸ *See* States Amicus Brief, *supra* note 63, at 25–26 (citing *Hernandez v. City of Salt Lake*, 686 P.2d 251, 252–53 (Nev. 1984)). In *Hernandez*, plaintiff prevailed in false arrest claim after he was falsely imprisoned during the course of a burglary investigation for forty-two days based on the suspect's testimony of two purported "roommates" who disappeared. Salt Lake persisted in pursuing extradition and imprisoning Hernandez despite concerns expressed by the Reno district attorney when Hernandez offered proof that he was working at a local casino at the time of the burglary. Cases like *Hernandez* make a better case for *Hall* than for its demise.

Another case cited by the States supporting the Tax Board—*Struebin v. Illinois*, 421 N.W.2d 874, 875 (Iowa 1988)—is more troubling in that it permitted two estates to sue for alleged negligent maintenance of a portion of interstate highway located in Iowa but maintained by Illinois subject to an interstate compact. Trial in Iowa state court produced two judgments totaling \$118,000 but Illinois refused to pay these claims on the ground that they were time-barred under Illinois state law. But Iowa permitted garnishment of taxes owed Illinois by an Illinois corporation with facilities in Iowa. *See* States Amicus Brief, *supra* note 63, at 25.

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At the risk of being insufficiently sensitive to Goliath, my response is “so what?” In each of these cases it appears that government actors did bad things that hurt innocent people. Under such circumstances, the law should provide compensation for the inflicted injuries without reduction simply because of the identity of the defendant.

Imagine how appalled the average American would be if there were differential limits on damages based solely on the identity of private defendants (e.g., no damage caps for a plaintiff suing author Dennis Lehane, of *Mystic River*, *Day for Night*, and other successful crime fiction for defamation, but damage caps if Michael Connolly, creator of fictional Los Angeles detective Harry Bosch, is sued for the same statements). A damages cap, if permissible disparate treatment at all, should have empirical support. But states routinely assert merely that such caps are necessary without any presenting any supporting facts.

It also should not be forgotten—but is frequently overlooked or ignored in debates over sovereign immunity—that a suit against a government is merely a claim. The claim does not result in government liability unless the claimant shoulders the burden of proving that the government did something wrong. Critics of *Hall* act as if permitting suits against a government entity imposes a regime of strict liability which is, of course, incorrect. To be sure, there are defense expenditures occasioned when sued, but this is the case in a regime of damage caps and even in a regime of total immunity in that the state will at least need to file a motion to dismiss or summary judgment motion in order to assert its purported immunity. Further, juries hearing *Hall*-permitted claims against a government, even if not directly impacted by any tax consequences of a judgment against a foreign state, are aware that undue generosity in compensating victims will have fiscal consequences.

Overruling *Nevada v. Hall* would open the door to a situation in which states outside the forum state could inflict substantial intentional harm on forum state citizens—and even the forum states themselves—with the victims having essentially no recourse. In a nation of purportedly inter-connected and cooperative states, such a dog-eat-dog view of interstate relations simply seems

While this may seem unfair and overreaching, it is to a large extent the mere consequence of the law’s longstanding treatment of limitations periods, in which such limitations of a state are applied in the state’s own courts even if the dispute largely involves matters outside the state and is subject to another state’s substantive law pursuant to prevailing choice of law principles. See JEFFREY W. STEMPEL ET AL., *LEARNING CIVIL PROCEDURE* 242–43 (2d ed. 2015); see, e.g., *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778–81 (1984) (defamation plaintiff whose suit against magazine is foreclosed by two-year limitations periods in Ohio and New York, jurisdictions most relevant to the substantive claim, sues in New Hampshire to obtain the benefit of that state’s unusually long statute of limitation (six years) applicable to defamation actions and succeeds in establishing personal jurisdiction based on relatively small number of magazines sold in New Hampshire). This treatment of limitations periods can be criticized, of course. But it is the longstanding and prevailing judicial approach. And it is this approach—at least as much as *Hall*—that accounts for the situation decried by the States Amicus Brief in *Struebin v. Illinois*.

wrong. But, of course, states compete for commerce, population, tourists, federal funds, professional sports teams, and all manner of wealth and stature. As a general matter, the Constitution and the courts should not be taking sides in these battles,⁹⁹ even if Congress and the Executive often do.

In the absence of the Constitution and the Full Faith and Credit Clause, each sovereign state presumably has the right to entertain suits against anyone from private individuals to other states in its courts. If the Clause is construed to bar Nevada from hearing a claim against a California government entity (as in *Hyatt*), or vice versa (as in *Hall*), the Constitution—rather than the forum state presumably having ultimate power within its borders—would in effect be used to mandate immunity for another state inflicting injury within the forum state.

As a functional matter, this is not good public policy. Imagine if California were intentionally dumping exposed, untreated radioactive waste onto Nevada land and into the Nevada water table. Should Nevada be prevented from seeking legal recourse? Overturning *Nevada v. Hall* would allow such a troubling result. Nevada then could not sue California in Nevada's own courts and could not sue in federal court because of the Eleventh Amendment. California (or any intentionally polluting state) could only be called to account for its misconduct if it consented to suit in its own courts, an unlikely event if the polluting state was intending to transport its problems to the victimized state.

An overruling of *Nevada v. Hall* would also open the way to the troubling possibility of states targeting and persecuting residents of another state, which is exactly what Gilbert Hyatt alleged occurred in connection with his tax sta-

⁹⁹ The Constitution has, unfortunately, some provisions that do take sides and advantage some states at the expense of others. Perhaps the most glaring examples is the Electoral College, which violates principles of equal protection and one person/one vote by providing greater voice in presidential elections to more sparsely populated states. Although the College has traditionally been regarded as a means of protecting less populated rural states from dominance by the more settled coastal states, scholars increasingly have regarded the College as part of the Constitution's accommodation of slavery in that it, like the Fugitive Slave Clause and the Three-Fifths Clause, aides the slave states of the American South by putting southern electoral votes on a par with those of the North. See Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1146–47 (2002) (“The electoral college is of course based in part on the three-fifths clause. Thus there is an immediate connection between slavery and the electoral college.”); Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, TIME (Nov. 8, 2016), <http://time.com/4558510/electoral-college-history-slavery/> [<https://perma.cc/SUV9-KJXQ>] (“Standard civics-class accounts of the Electoral College rarely mention the real demon dooming direct national election in 1787 and 1803: slavery. . . . [I]n a direct election system, the North would outnumber the South, whose many slaves (more than half a million in all) of course could not vote. But the Electoral College . . . instead let each southern state count its slaves, albeit with a two-fifths discount, in computing its share of the overall count [of electoral votes per state].”). For example, the “free state of Pennsylvania had 10% more free persons than Virginia, but got 20% fewer electoral votes.” As Amar further notes: “Perversely, the more slaves Virginia (or any other slave state) bought or bred, the more electoral votes it would receive. Were a slave state to free any blacks who then moved North, the state could actually lose electoral votes.” *Id.*

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tus—contentions with which a jury largely agreed. Had Hyatt been an average citizen (and not a multi-millionaire able to retain counsel at his own expense), he probably would have simply had to suffer in silence, all the while continuing to fight the Tax Board on its home turf in California.

Imagine if a state governor became annoyed with an out-of-state critic. State authorities might engage in tremendous harassment of the critic, who would have little legal recourse—due to the Governor’s immunity or the protection of caps in his own state—if not permitted to sue the persecuting state in another state forum. To be sure, questions of personal jurisdiction, justiciability, comity, and remedy could be difficult and might effectively bar the victim’s quest for justice in particular cases. But at least the persecuting state would not be permitted to inflict harm in other jurisdictions without being called to answer for its conduct.

The common sense of the notion that there should be a remedy, or at least a right to be heard and have the facts adjudicated, for every wrong—even wrongs committed by the sovereign—is ingrained in the American legal system. It deserves at least as much deference as the increasingly outmoded concept that the king can do no wrong. Consequently, it is a bit difficult (at least for me) to empathize with the ire and “sky is falling” apocalyptic vision proffered by critics of *Nevada v. Hall*.

California and its allies emphasized a structural argument for overturning *Hall*, in essence arguing that permitting *Hall* actions against a state is simply too inconsistent with the status of states as sovereigns and the federal system respecting state autonomy. The amicus brief of states supporting California argues that *Hall* is pernicious because it offends the “dignity” of the states if they must answer in another court for their activities,¹⁰⁰ then lists a number of cases in which forum states or their citizens sued a foreign state over alleged foreign state negligence or intentional misconduct causing damages in the forum state.¹⁰¹ For example, Nevada has sued Wisconsin for purportedly improper discharge of a sex offender committing assault in Nevada,¹⁰² while Kansas

¹⁰⁰ See States Amicus Brief, *supra* note 63, at 21 (“Failure to accord this immunity [from *Hall*-type suits] subjects a State to ‘the indignity of . . . the coercive process of judicial tribunals at the instance of private parties’” and “allows for ‘unanticipated intervention in the processes of government. . . .’”) (first quoting *Alden v. Maine*, 527 U.S. 706, 749 (1999), an Eleventh Amendment case; then quoting *In re Ayers*, 123 U.S. 443, 505 (1887); and then quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

¹⁰¹ *Id.*

¹⁰² See *id.* (citing *Mianecki v. Second Judicial Dist. Court*, 658 P.2d 422, 425 (Nev. 1983)). In *Mianecki*, a victim of a sexual assault sued Wisconsin for failure to warn the public and failure to supervise the perpetrator, who was granted probation after conviction in Wisconsin and permitted to move to Nevada. The failure to warn claim had particular strength in this case in that the perpetrator’s probationer had moved in with the family whose minor son was the eventual victim, and had received no warning. The assault was not one randomly occurring on the street. The Nevada Supreme Court permitted the action to proceed, rejecting Wisconsin’s immunity defense. *Mianecki*, 658 P.2d at 423. It grieves me that 43 State Attor-

courts have permitted a case to proceed in which a Kansas resident alleged injury by Missouri law enforcement personnel in connection with serving a warrant.¹⁰³ In a perhaps ironic twist on the *Hall* issue, San Francisco sought damages from Nevada over a state hospital's former practice of busing unwanted mentally ill patients to San Francisco (the matter has settled for \$400,000).¹⁰⁴ The States supporting the Tax Board decry such claims as a fiscal burden at odds with constitutional structure but never bother to explain why the victims in these cases should not be permitted to seek recompense in court.

One does not have to be a rabid consumer advocate to find unmoving the States' apocalyptic arguments in favor of immunity. According to the immunity-craving states, since *Nevada v. Hall*, states have sometimes been sued in other state courts for conduct causing injury in those states. What on earth is wrong with that? Should tortfeasors not have to account for the injury they inflict—in at least some sort of judicial forum (where erroneously accused defendant states will presumably be accorded due process and vindicated through adjudication)? Overruling *Nevada v. Hall* would open the door to a situation in which states outside the forum state could inflict substantial intentional harm

neys General think this a bad result and a bad decision. One wonders whether these law enforcement officials would feel the same way had one of their children had been the victim.

¹⁰³ See States Amicus Brief, *supra* note 63, at 24 (citing *Head v. Platte Cty.*, 749 P.2d 6, 7–8, 10 (Kan. 1988)). In *Head*, Overland Park, Kansas, police arrested the plaintiff at her home based on a Missouri warrant with an erroneous description of the suspect that roughly matched the plaintiff (i.e., 5'10", 120-pound white female in her mid-20s, brown hair, green eyed) but the complaining party's description of the suspect had included no such description and characterized the suspect as a white female who was "[o]verweight, bleached blond hair, capped teeth" with an address in Shawnee Mission, Kansas. No explanation for the description error was provided. "Mrs. Head denied she was the person who had written the [bad] check [yes, Platte County really wanted to arrest someone over a bounced check]." After confirmation of the warrant "by the Platte County Sheriff's Department . . . Mrs. Head's husband was required to come home from work to take care of their baby and Phyllis Head was handcuffed and transported to the Overland Park jail where she was booked, held, and eventually released." See *Head*, 749 P.2d at 7–8.

The matter arose out of the complaint of a "Missouri merchant" on May 2, 1984 but the court's opinion does not state the amount of the bounced check. Unless the amount is astronomical, the entire incident smacks more of debtor's prison than effective law enforcement. As with the other cases cited by Tax Board amici, I find nothing troubling about requiring government perpetrators of injury to defend their conduct in the courts of the victim's state and to pay damages where the conduct cannot be justified or excused.

¹⁰⁴ See Maria Castellucci, *Rawson-Neal Psychiatric Hospital Faces Lawsuit Over Patient-Dumping Practices*, MODERN HEALTHCARE (Dec. 27, 2016), <http://www.modernhealthcare.com/article/20161227/NEWS/161229957>

[<https://perma.cc/2JUB-3WQ4>] (noting settlement of that case, lack of success in similar case, and third action recently filed arising out of alleged practice of Nevada facility discharging patients involuntarily and then sending them "to locations out-of-state without any health services prepared for them."). Of twenty-four such patients bused to San Francisco, "20 required emergency medical care within a short time after their arrival" and also needed housing, according to San Francisco authorities. See *Nevada to Pay San Francisco \$400,000 in 'Patient Dumping' Settlement*, CBS SF BAY AREA (Oct. 27, 2015, 9:03 PM), <http://sanfrancisco.cbslocal.com/2015/10/27/nevada-san-francisco-patient-dumping-settlement/> [<https://perma.cc/UW9N-YJXT>].

on forum state citizens—and even the forum states themselves—with the victims having essentially no recourse.

What if, for example, the California Tax Board dispatched a SWAT team over the border to invade Hyatt's home, conduct a strip search, trash the house, and shoot the family dog (the alleged misconduct in *Leatherman v. Tarrant County Narcotics and Coordination Unit*, but inflicted in the victims' home state¹⁰⁵)? Should foreign state agency activity of that sort really be beyond the reach of not only the state's own courts and the federal courts, but also the courts of the state in which the victim resides? If Nevada had been more generous to its own citizens victimized by intentional misconduct of its own state agencies (rather than implementing the \$50,000 cap), the inequity of the situation would be even greater.

An argument in favor of Hyatt posits that concerns about federal coercive power are reduced, if not eliminated, when states entertain suits against other states in the first state's court, in that these roughly co-equal sovereigns have an implicit practical reason not to treat one another unfairly. Nevada's own judicial conduct has arguably reflected this. The Nevada Supreme Court closely policed the evidentiary rulings, legal decisions, and jury instructions of the trial court in *Hyatt III*. While not completely immunizing the Tax Board or capping its damages, Nevada's judiciary protected the Board from punitive damages in a case even though a jury found the Board's conduct toward Hyatt sufficiently reprehensible to render a quarter-billion dollar punitive damages award.¹⁰⁶

One could perhaps characterize the jury's large damages award as a large serving of "home cooking" to the Tax Board in famously tax-averse Nevada. But Hyatt is hardly a popular native son like Andre Agassi or Paul Laxalt, and is a multi-millionaire to boot. Under these circumstances, normal deference to jury decision-making would seem to suggest that the Tax Board engaged in troublesome misconduct and that the Nevada jurors were not simply assigning liability to the Tax Board because it was a nonresident government entity.

Two other factors limit a state's ability to unfairly impose civil liability upon another state. To perhaps state the obvious, the forum state's law must provide for relief. The forum state cannot (at least without violating the Constitution) maintain a cause of action peculiar to foreign states. A resident plaintiff like Hyatt must be able to fit his allegations of harm into an existing general legal construct in order to recover. This in turn means that the plaintiff's claim against the foreign state must be one sufficiently within the legal mainstream to warrant relief under legal doctrine that is equally applicable to in-state defendants, governmental or private.

The forum state is unlikely to subject its own residents (individuals or entities) to unduly broad or bizarre liability schemes, which means that subjecting

¹⁰⁵ *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164–65 (1993).

¹⁰⁶ See discussion *supra* Section I.C.

foreign state defendants to unduly broad or bizarre liability regimes is unlikely. The foreign state agency will, of course, wish it had absolute immunity or the protection of a damages cap. But this hardly means it is unfair for the forum state to subject the foreign state entity to liability—at least to the extent that similarly situated forum state entities face such liability for similar misconduct.

A second factor mitigating the risk that a forum state will unfairly persecute the foreign state entity defendant is the requirement that such a defendant be subject to the personal jurisdiction of the forum state. Without such personal jurisdiction, the forum state judgment against a foreign state entity lacks due process and any resulting judgment is not subject to enforcement in the foreign state pursuant to the Full Faith and Credit Clause. In *Hyatt*, the Tax Board was obviously subject to personal jurisdiction because it intentionally reached well into Nevada to pursue Mr. Hyatt, purportedly using its agents to survey his home, rifle through his garbage, and contact neighbors about his activities.

If the Tax Board's allegedly harassing activities stopped at the California border, Hyatt could not have subsequently sued the Tax Board in Nevada and obtained a judgment enforceable in California—or presumably in any other state applying the Supreme Court's recent personal jurisdiction law as expressed in *Walden v. Fiore*, which found mere knowledge of impact upon the plaintiff in the forum state (Nevada, once again) insufficient to sustain the exercise of personal jurisdiction consistent with due process.¹⁰⁷

On a doctrinal level, the *Hyatt III* Nevada Supreme Court position is also quite strong in that, while the Full Faith and Credit Clause has historically been vigorously enforced to require states to honor the judgments of another state (so long as the judgment met the requirements of due process), the Clause has not enjoyed similarly vigorous enforcement regarding the laws of the other states. So long as the forum state is competent to legislate in the area of law at issue, it need not displace its own law with the law of another state. Where the forum state's own public policy would be violated by application of the law of another state, the forum state need not apply that law. Indeed, this is what the Court stated in *Nevada v. Hall* and reiterated in its first *Hyatt* decision in 2003.¹⁰⁸

If the attack on *Nevada v. Hall* had prevailed in the US Supreme Court's 2016 *Hyatt IV* decision, it would appear that a state can commit even barbarous acts against a resident of another state and never be civilly liable, so long as it has absolute immunity in the courts of the tortfeasor state. Although there are some practical political brakes on such a doomsday scenario, in that the tortfeasor state's body politic might not let such a regime stand for very long, the track record of the states provides comparatively little comfort. To explain, most states place substantial limits on their own liability that do not apply to misconduct by private actors.

¹⁰⁷ See *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014).

¹⁰⁸ See *Hyatt II*, 538 U.S. 488, 497 (2003).

Governments are pretty good at protecting their own interests on their own political turf, even if this seems contrary to the public interest. Providing at least some forum in which the arguable misconduct of state entities can be called into account by the judiciary would seem the better public policy. The obvious counterargument is that the greater public interest lies in protecting the public fisc in that it is taxpayers of a state that will pay larger tort or breach of contract damages if a waiver of sovereign immunity is uncapped. Where a government, economy, or society is genuinely poor and of limited resources, the argument would have significant traction. But it becomes unpersuasive in a comparatively wealthy nation like the United States.

III. *HALL*—AND *HYATT*—AS A JURISPRUDENTIAL BATTLEGROUND

Judicial assessments of the interstate sovereign immunity question almost certainly vary according to the jurisprudence of the beholder. If one thinks the ability of any person or entity to be “above the law” should be limited or eliminated, the resolution is clear: states should not be able to avoid answering for their conduct in other states to which they are subject to personal jurisdiction unless they can convince the forum state court that comity is required. Already, a state unwilling to be responsible for inflicting injury is immune in its own and federal courts.

Perhaps the strongest argument for preserving *Hall* is pragmatic. Overturning *Hall* would drastically reduce the incentive of state agencies to behave properly, or at least confine misbehavior to home state borders. If one supports the concept of a living, evolving Constitution, one also presumably favors retaining *Hall* because *Hall* better reflects modern attitudes critical of sovereign immunity and the modern situation in which government is larger and more active (and therefore capable of inflicting more harm as well as more benefit) than was the case in 1787. If one sees the law as a vehicle for vindicating rights and achieving corrective justice, *Hall* also makes sense.

Alternatively, if one sees the law as a vehicle for preserving order and hierarchy, *Hall* is problematic, and perhaps sufficiently problematic to warrant overruling it because it makes states more vulnerable to suit, with less predictable results than if the state is permitted to control its exposure through decreeing itself absolutely immune or limiting its exposure through damage caps or other legislative devices. And if one is an originalist, there is substantial (even if not necessarily compelling) evidence supporting the view that absolute sovereign immunity was a background assumption of the Founders.

The Supreme Court relied upon *Nevada v. Hall* in unanimously deciding *Hyatt II*.¹⁰⁹ But the Court in *Hyatt IV* was perilously close to overturning *Hall*.¹¹⁰ What has prompted this shift? Perhaps concern that things have gotten out of hand, with Nevada rendering a huge award to a resident multi-

¹⁰⁹ See generally *id.*

¹¹⁰ See generally *Hyatt IV*, 136 S. Ct. 1277 (2016).

millionaire against another state for misconduct that the jury found serious but in which no one died or lost a life savings. But an observer might also suspect that the Court's originalists and the Justices favoring authority over individual rights to seek recompense are now in a stronger position to reconsider *Hall* than was the case in 2003, particularly with the replacement of *Hyatt II* author Justice O'Connor with Justice Alito, who favored overturning *Hall*.

The Court's decisions in *Alden v. Maine*,¹¹¹ and *Seminole Tribe of Florida v. Florida*,¹¹² arguably reflect doctrinal shift but both predate *Hyatt II*. *Alden* held that the national government did not have Article I constitutional power to require that state courts entertain a suit to enforce a federal cause of action (wage and hour provisions of the Fair Labor Standards Act),¹¹³ while *Seminole Tribe* found no Article I congressional power to abrogate state sovereign immunity in federal court.¹¹⁴ Both are also distinguishable as Article I or Eleventh Amendment cases rather than Full Faith and Credit Clause cases. In addition, *Alden* was a 5-4 decision, suggesting that there had not been a total turn against *Hall*,¹¹⁵ although it foreshadowed the continued deep division of the Court regarding interstate relations and immunity.

IV. THINKING MORE SERIOUSLY ABOUT SOVEREIGN IMMUNITY

The *Hyatt IV* ruling requiring Nevada to give California the benefit of the forum state caps when facing suit was a defeat for Gilbert Hyatt but may have the silver lining of prompting reconsideration of state damage caps. One cannot help but think back to John Hall, the California boy badly brain-damaged in 1968 due to the negligent driving of a Nevada employee (who, compounding the tragedy, died from the collision).¹¹⁶ Even the million-dollar judgment in Hall's favor may have been insufficient compensation for such severe injury that would be with the victim for decades. An award of \$25,000, \$50,000, or even \$100,000 for such injuries—the various amounts of Nevada's ceiling on damages against the state during the past forty years—should trouble a “civilized [nation]” (Justice Taney's words in *Beers v. Arkansas*¹¹⁷ quoted in Justice Rehnquist's *Hall* dissent)¹¹⁸ at least as much as the prospect of one state having to endure the “indignity” of answering for such injuries in the court of another.

¹¹¹ *Alden v. Maine*, 527 U.S. 706 (1999).

¹¹² *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

¹¹³ *Alden*, 527 U.S. at 712.

¹¹⁴ See *Seminole Tribe of Florida*, 517 U.S. at 47–48.

¹¹⁵ See *Alden*, 527 U.S. at 760 (Souter, J., dissenting).

¹¹⁶ See generally, *Nevada v. Hall*, 440 U.S. 410 (1979).

¹¹⁷ See *Beers v. Arkansas*, 61 U.S. 527, 529 (1857).

¹¹⁸ See *Hall*, 440 U.S. at 432–37 (Rehnquist, J., dissenting).

A. *The Questionable Case for Sovereign Immunity*

Although it is well established, the case for sovereign immunity has always rested on a questionable rationale which has only weakened over time. The stated rationale for the doctrine was originally the infallibility of the sovereign.¹¹⁹ In modern times, the rationale has changed to protect the public fisc by reducing government exposure to damage awards.¹²⁰ The modern rationale for sovereign immunity is every bit as problematic as the original “the king can do no wrong” rationale.

The normative problem with sovereign immunity, one which I am always astonished does not receive more attention, is that it treats similarly situated litigants differently—something at odds with the law’s aspiration to provide consistent and fair treatment to litigants. While perhaps stopping short of being an equal protection violation, this is clearly disparate treatment that is hard to justify. To take an example from the type of tort at issue in *Nevada v. Hall*, if an individual injures a person through negligent driving, the individual is responsible for the injured person’s damages. If a corporate driver causes injury, both the driver and the company are responsible for the damages. But under a sovereign immunity regime, the same negligent driving performed by a government worker causing the same injuries to the same victim results in either no or limited damage awards to the victim.

The same inconsistency occurs with the type of actions at issue in *Hyatt*. If another citizen egregiously invaded Hyatt’s privacy—and certainly if there was physical assault such as a SWAT home invasion—there would be individual liability for all proximately caused damages. There would be similar liability imposed upon any corporation that roughed up customers or members of the public, or improperly pried into their lives. But under a sovereign immunity regime, governments and government agents get to do this with impunity or pay for only a fraction of the injuries inflicted upon the victim.

Such inconsistency violates the concept of equal protection even if courts often stop short of finding a constitutional violation. And it is immoral. As a general rule, in a civilized society, all persons should be accorded the same treatment under law. Sovereign immunity or limits on sovereign liability facially flunks this basic “no one is above the law” normative test and should be permitted only if justified by compelling empirical or public policy rationales.

The empirical/policy argument for special treatment of the sovereign state is generally based on two arguments: (1) a purported need to protect the gov-

¹¹⁹ See BLACKSTONE, *supra* note 1, at 235; see also DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW 71–128 (2005) (providing overview of history and evolution of the doctrine); Randall, *supra* note 1, at 26–30 (also suggesting that U.S. courts read Blackstone too broadly, that he was referring largely to pleading practice, and that English law contained several means of avoiding sovereign immunity).

¹²⁰ See *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 109 (Tex. 2012) (Lehrmann, J., dissenting) (“sovereign immunity’s modern rationale is the protection of the public fisc. . .”); Randall, *supra* note 1, at 97–103; see also DOERNBERG, *supra* note 119.

ernment treasury (and by extension a need to protect taxpayers from the cost of liability); and (2) a purported need to prevent government actors from being excessively timid in the performance of their jobs, which allegedly inures to the benefit of the public.¹²¹ Both arguments are weak and chronically exaggerated by proponents of limitations on sovereign liability.

The financial argument, although superficially compelling, of course founders on the shoals of any decent human's normative sensibilities. Should a government really be allowed to hound, run over, beat up, or commit malpractice upon a person with limited or no consequences simply to allow the taxpayers of the tortfeasor government to save a few bucks in taxes?

Promising lower taxes through limited liability or immunity may be good politics but it is ethically reprehensible. As put by the George Bernard Shaw quote at the beginning of this article, a government that wants to rob Peter to pay Paul can always count on the support of Paul,¹²² and politicians will often find it expedient to gain the support of a majority at the expense of a minority. But this is a reason to permit courts to decide claims on the merits regardless of the defendant's identity rather than an argument for closing courthouse doors or limiting relief merely because of the status of a defendant. In the case of sovereign immunity, a government can get away with trashing Peter with impunity in order to enjoy the support of a sea of Pauls who are not asked to pay for their government's infliction of injury and who are lucky enough not to suffer Peter's fate.

But this hardly makes it right. By similar logic, a government could seize the property of some citizens in order to build a road desired by other citizens who seek a shorter commute to work. The Framers found this possibility so revolting that they crafted the Fifth Amendment (which subsequently became applicable to state governments via the Fourteenth Amendment¹²³) to require

¹²¹ See, e.g., GREGORY C. SISK, *LITIGATION WITH THE FEDERAL GOVERNMENT* 107–230 (2016) (discussing background and policy for federal sovereign immunity as well as statutory exceptions); Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 771–76 (2008) (reviewing sovereign immunity generally and state sovereign immunity in particular); see also Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1154–56 (2016) (empirical examination of financial consequences of suits against local governments and finding that through insurance or self-insurance, these entities are not fiscally threatened by liability in cases of federal constitutional claims for which they lack state sovereign immunity); Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 409 (2016) (finding local governments well protected by doctrinal defenses available).

¹²² See, e.g., GEORGE BERNARD SHAW, *EVERYBODY'S POLITICAL WHAT'S WHAT?* ch. 30 (1944), cited in *Michael Moncur's (Cynical) Quotations: Quotation #179*, THE QUOTATIONS PAGE, www.quotationspage.com/quote/179.html [<https://perma.cc/RF89-J8XS>] (last visited Oct. 14, 2017).

¹²³ See CHEMERINSKY, *supra* note 69, § 7.1 at 569 (Fifth Amendment taking clause and due process rights applies to the states via the Fourteenth Amendment).

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compensation to those whose property is taken for government use.¹²⁴ The state (and its subdivisions) should similarly be held responsible when its actions cause other sorts of injury to some of the populace.

Empirically, the “protect the fisc” argument also appears very weak. As noted above, the forty amicus briefs filed by states supporting the California Tax Board in *Hyatt IV* contained more than a few examples of states being sued for causing injury.¹²⁵ Any list of such cases, no matter how long, ignores the issue of whether a state should be responsible for the injuries it inflicts—the normative argument again. Additionally, citing a few cases of government liability hardly suggests that the cumulative financial burden of such liability poses a significant financial threat to the government or to the taxpayers.

Data on the issue is hard to find, in large part because limited state liability is so pervasive that one cannot know with precision what the total bill might be if governments were forced to play by the same liability rules as ordinary citizens and most commercial actors. A full survey of the state of claims against governments is beyond the scope of this article, but even a cursory look suggests that sovereign immunity or limited liability flunks any reasonable empirical test. There is little evidence suggesting that government operations would be significantly diminished, must less imperiled, if governments were held accountable for their wrongs in the same manner as persons or entities. Fortunately, government actors ordinarily perform their jobs well and do not cause injury, particularly serious injury. Although in the absence of immunity, there could be occasional large damage awards, this is unlikely to present a fiscal problem for even a relatively small state.

Consider Nevada, with a population of roughly 2.9 million persons and an annual budget of roughly \$11.5 billion.¹²⁶ Even the massive *Hyatt* damages award (after reduction on appeal), is less than 1 percent of this amount. And, of

¹²⁴ The presence of the Fifth Amendment (and to some extent other parts of the Bill of Rights) as well as the early Supreme Court decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793), (discussed above) permitting a state to be sued in federal court in connection with a debt, undermines the originalist contention that the Framers would have disagreed with *Nevada v. Hall*. If the Framers so loved government immunity, why did they thwart it through the Fifth Amendment in the context of government takings of property? To be sure, *Chisholm v. Georgia* was repudiated by the swift passage of the Eleventh Amendment—but this appears to have been driven by the peculiar problem of state fears of being required to repay Revolutionary War debts more than any sound jurisprudential basis for protecting states from litigation. See ORTH, *supra* note 73, at viii. I must concede, however, that in closing the federal courts for claims against the states, proponents of the Eleventh Amendment were of course aware that state courts of the era would likely reject creditor claims against forum State and tacitly supported that system. But it was the common law thinking of the 1700s—a view that should not be unthinkingly embraced by modern courts and legislatures, much less embraced as a matter of constitutional law.

¹²⁵ See generally States Amicus Brief, *supra* note 63.

¹²⁶ See *Nevada State Budget and Finances*, BALLOTPEDIA, https://ballotpedia.org/Nevada_state_budget_and_finances [<https://perma.cc/RQE6-24T8>] (last updated June 2017) (citing National Association of State Budget Officers, examining fiscal 2013-2015 state spending).

course, the *Hyatt* claim was not one against Nevada but against the much larger state of California, with a population of roughly thirty-nine million and an annual budget of roughly \$265 billion,¹²⁷ roughly a thousand times the amount of the likely *Hyatt* award had the case not encountered the issue of limited sovereign immunity.

In addition, *Hyatt* is a most unusual case that may lack some of the sympathy provoked by bodily injury tort claims (despite whatever oppression he suffered, Hyatt remained very wealthy and physically unharmed save for physical manifestations of his emotional distress). Sympathy for the Tax Board is at least equally hard to muster in that the Board, unlike a momentarily inattentive truck driver or law enforcement official acting in the heat of the moment, made a considered and sustained decision to pursue Mr. Hyatt. The Board can hardly be said to have unwittingly wandered into the crosshairs of potential liability.

More likely than an unusual privacy-based case like *Hyatt* (in which the plaintiff was willing and able to invest substantial resources on top legal talent), threats to the public fisc might include injuries inflicted by state employees driving state vehicles, as in *Nevada v. Hall*. But employing the frequently used figure of \$6 million as the value of a human life,¹²⁸ the state would need to be held responsible for roughly twenty wrongful deaths each year to reach the amount of the exposure presented by the *Hyatt* litigation. But in 2012, “only” 131 people nationally were killed in collisions involving emergency vehicles such as ambulances (34), fire trucks (14), or police cars (83).¹²⁹ School bus collisions accounted for only 13 deaths nationally that year.¹³⁰

There were approximately 260 traffic fatalities in the entire state of Nevada in 2012.¹³¹ Unless the State itself was responsible for more than 10 percent, an absurdly remote possibility, Nevada would be able to substantially raise its damage limits or even eliminate its immunity without serious fiscal consequences. Of course, governments without immunity would face liability for injury as well as death, and state and local governments would face potential

¹²⁷ See *California State Budget and Finances*, BALLOTPEdia, https://ballotpedia.org/California_state_budget_and_finances [<https://perma.cc/7BX4-32GE>] (last updated June 2017) (citing National Association of State Budget Officers).

¹²⁸ See Binyamin Appelbaum, *As U.S. Agencies Put More Value on a Life, Businesses Fret*, N.Y. TIMES (Feb. 16, 2011), <http://www.nytimes.com/2011/02/17/business/economy/17regulation.html> [<https://perma.cc/W8FM-R7BC>].

¹²⁹ See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 2012, at 112 (2012). And 30 of these victims were drivers of the government vehicles, who would presumably be covered by the exclusive remedy of workers compensation and could not bring a tort claim against the government. Further, these figures include emergency vehicles operated by county and local governments that might not fall within a state law on sovereign immunity and might not receive state budgetary funding. Some of the ambulances may have been privately operated under contract with local governments.

¹³⁰ *Id.* at 128.

¹³¹ See NEVADA DEP'T OF PUB. SAFETY, OFFICE OF TRAFFIC SAFETY, NEVADA HIGHWAY SAFETY: PERFORMANCE PLAN 6 (2017). Other official sources have previously stated death numbers of 262 and 258, hence the word “approximately” in text.

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claims from things other than traffic accidents, particularly if they provide services such as schooling and health care.

But the mere fact of death or injury does not mandate liability or litigation. Many injuries are not the fault of a tortfeasor and this is often so recognized by a victim or surviving family member, meaning no claim ever results. Where claims do result, governments are proficient in defending claims, reducing the amount of relief sought, or perhaps avoiding liability altogether based on an adjudicator's determination of the merits.

Before modifying an existing statute on limited liability or immunity, a state would of course need to gather and assess more data than this article can provide. But even a cursory look at the data suggests that sovereign immunity, or limited liability, is not required for the fiscal survival of the states.

Ironically, when states have enacted or revised immunity legislation, they have tended to do so with little or no empirical analysis. For example, when Nevada's limited liability statute was adopted, its initial selection of a damages cap of \$25,000 appears to have been based only on the gut feelings of the legislature. The legislative history reflects no extensive study of the fiscal impact of claims against the state.¹³² The same holds true for amendments to the statute raising the amount of the damages cap, which now is \$ 100,000.¹³³

Per capita, Nevada spending and taxation per capita is quite low compared to other states.¹³⁴ Any reasonably likely increase in state tort liability could of

¹³² See *Hearing on Assemb. B. 483 Before the Nev. Assemb. Comm. on Judiciary*, 2007 Leg., 74th Sess. (Nev. 2007) (statement of Barbara Buckley, Assemb., and Thomas Fell, Attorney with Gordon and Silver).

¹³³ See NEV. REV. STAT. § 41.035(1) (2011).

¹³⁴ Calculating an extremely precise per capita figure is difficult due to population growth and differences among empirical sources. If using Ballotpedia, one finds per capita spending of \$3,744.93 after dividing the state budget of \$7.143 billion by the 2013 population of 2.8 million. *Historical Nevada Budget and Finance Information*, BALLOTPEdia, https://ballotpedia.org/Historical_Nevada_budget_and_finance_information#tab=As_published_2016 [<https://perma.cc/9P5R-A7EH>] (last visited Sept. 30, 2017). If using the State of Nevada Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2016, one finds total expenditures of \$10.943 billion. STATE CONTROLLER, NEVADA COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2016 (2016), http://controller.nv.gov/financialreports/CAFR_pdf_files/FY16All.pdf [<https://perma.cc/28M6-3CFK>] (summarized at STATE CONTROLLER, STATE OF NEVADA: POPULAR ANNUAL FINANCIAL REPORT (2016), http://controller.nv.gov/FinancialReports/Other_Reports/ReporttoourcitizensFY16.pdf [<https://perma.cc/FH8G-ZL2R>]). Dividing by a 2016 population of 2.9 million persons yields a per expenditure figure of \$3,750 per capita. Total state tax collections of \$5.135 billion divided by the state's population results in a finding of an annual tax burden of \$1,760 per capita.

The precise figures are not particularly important. What is important is that the per capita tax burden in Nevada is not particularly heavy, which strongly suggests that the State does not need unrealistically low damages caps to ensure its fiscal survival. To be sure, the massive jury award to Hyatt would have presented problems if allowed to stand. But protecting the public fisc from the occasional runaway jury does not justify depriving University Medical Center patients injured by malpractice or pedestrians hit by a negligently driven state vehicle

course increase that tax burden, but the amounts are unlikely to be large. In return, citizens who were injured by their government would have the right to recover damages provided it was satisfactorily proven that the state wrongfully caused the injury to the courts.

In addition, of course, states not only have the not insubstantial right to defend claims that are unmeritorious or inflated, but may also purchase liability insurance as a means of offloading or spreading the risk of large judgments or a sudden surge in the number of claims. Under these circumstances, it is hard to imagine that even a small state's acceptance of market-based responsibility for wrongfully inflicted injuries would impose unacceptable financial burdens on the state in return for better protection of its citizens or those visiting the state.

Liability insurance is not free, but for a government that behaves responsibly and is not hit with an unusual run of bad luck, premiums will be relatively modest in return for the protection afforded, typically including a defense of the claims from an experienced "panel counsel" retained by the insurer, an entity with considerable sophistication in defending and settling claims. To the extent the insurance market is "hard" and premiums are unattractively high, governments are in a position to self-insure, something individuals and small businesses generally cannot do.

In short, the unaffordability argument for removing either limited or complete sovereign immunity is not a compelling one when weighed against the unfairness and costs inflicted on victims who are undercompensated. Additionally, to the extent victims of government injury are undercompensated, this does not necessarily save the government and its taxpayers money in the long run. Uncompensated or undercompensated victims are logically more likely to be eligible for government-funded assistance programs. By denying or restricting liability for its actions, a government may simply be delaying the spending of funds and changing the manner of distribution.

of something at least approaching the market rate of compensation they would obtain had they been hurt by a doctor in private practice or an ordinary driver.

A harder fiscal problem is posed by the possible large increase of more modest claims and verdicts that might be presented if the damages cap was in the low seven figures rather than current \$100,000. But this problem can be fixed through the purchase of insurance, effectively making the State's financial burden the cost of insurance premiums and any self-insured retentions or deductibles required by the insurance policy. This is unlikely to be a budget-breaking amount provided that the State generally acts with due care. The absence of sovereign immunity or damage caps does not dictate payment to claimants but only permits payment if—and this is often a big if—the claimant can survive pretrial defenses, persuade a judge or jury at trial, and survive post-trial motions and appeal. As the *Hyatt* saga itself shows, a large claim or verdict is not necessarily the final result. In the absence of a sovereign immunity damage cap, *Hyatt* would have obtained a large award, but not necessarily one imperiling Nevada's finances. A more reasonable, market-based damage cap (e.g., \$5 million rather than \$100,000) (furthermore, a cap this high would be relevant only for extremely serious injuries or very bad government conduct), would have provided substantial protection to Nevada and dramatically reduced the *Hyatt* victory without subjecting automobile collision and malpractice victims to artificially low ceilings on recovery.

The “preserving discretion” ground for restricted government immunity is also unpersuasive, at least as applied to actions such as *Hyatt* and *Hall*. A government can make a reasonably compelling case for limited liability or even immunity concerning true policy decisions. For example, a government logically should have the discretion to make taxing, spending, zoning, staffing, and related planning decisions with a healthy zone of discretion. But even these government functions are often subject to at least some judicial oversight.¹³⁵

By contrast, immunity or limited liability makes considerably less sense when applied to government action that is more ministerial and does not involve policy choices—or at the other extreme, involve specific targeting of an individual citizen as Hyatt alleged had been done to him by California. Liability resulting from use of an automobile (as in *Nevada v. Hall*) is a strong example of what the ministerial type of liability resulting from negligent action rather than harmful policy decisions. If the government is delivering things, or its workers are traveling on public highways, there should be responsibility for negligently inflicted injuries in the same manner as would exist for non-government actors.

Injuries inflicted by government law enforcement or regulations pose a more difficult question. But the answer generally is the same. If a regulatory or enforcement agency is simply carrying out its duties, this is not the sort of discretionary policymaking that justifies immunity or limited liability when government action causes injury. When the California Tax Board decided to pursue Hyatt (very aggressively) in connection with issues of residency, the Board may not have been acting in a purely ministerial fashion (it could have decided to leave Hyatt alone). But neither was it making tax policy. That policy had already been made through the state establishing rates of state income tax and rules regarding residency. The Board was merely seeking to enforce those rules—badly, in the estimation of the jury that heard the *Hyatt* case.

I am not suggesting that drawing a line between protected conduct and unprotected conduct is always or even usually easy. Rather, what I am suggesting is that a line needs to be drawn rather than giving government actors *carte blanche* to inflict injury without consequences or with only limited consequences well below what would attend similar conduct in the private sector.

For example, prosecutors are generally immune from lawsuits based on their exercise of prosecutorial discretion, and often for all of their activities that

¹³⁵ See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 404–06 (1971) (providing judicial review of U.S. Department of Transportation’s decision to route planned Interstate 40 through Overton Park in Memphis). Contrary to what readers might think upon reading that the federal government was planning to run a freeway through a local park, “Overton Park is a 342 acre rectangular park set amid an affluent, and predominantly white residential area.” See Nicole Mayer et al., Case Comment, *Citizens to Preserve Overton Park v. Volpe*, 4 (2009) (on file with Professor Ronald Staudt, Chicago-Kent College of Law). When first reading the case in law school, I incorrectly suspected the neighborhood was poor or minority and hence accounted for the apparent insensitivity in the highway routing.

are legitimately related to the prosecution.¹³⁶ But if a prosecutor acts outside his or her role (e.g., by developing a personal vendetta against a suspect or defendant and engaging in harassment or defamation outside the bounds of a criminal case), the prosecutor should logically be held accountable. Even where a prosecutor is acting solely within the bounds of the legitimate prosecutorial role, he or she may be liable for violation of clearly established law.¹³⁷

More pragmatically, one might ask whether the Tax Board and its employees would be unnecessarily “chilled” in their efforts to enforce the law by the prospect of liability (either within its home state or when pursuing a former resident in another state). The likely answer is “no” in view of the standard of practice governments have of both defending employees and paying judgments on their behalf, with these expenditures often covered by insurance.

Government workers feeling a bit chilled or deterred by the prospect of some risk of uncovered liability, or the inconvenience and stress of litigation, is not necessarily a bad thing. It may prompt the government to hesitate before spying on citizens, rifling through their garbage, or investing substantial resources on an enforcement action that is not clear-cut. At a minimum, it would incentivize governments to put in place and observe protocols designed to ensure that aggressive regulatory enforcement is undertaken only when justified and within acceptable boundaries.

I am not suggesting that governments are routinely reckless. On the contrary, most are probably, if anything, hesitant to pursue citizens absent compelling facts and a reasonable belief in liability. But even if the government track record in these matter reaches Sigma Six quality, governments should logically be responsible for wrongfully inflicted damages, no matter how unintended or well intentioned. In addition to being normatively proper, such a system is unlikely to place significant financial pressure on governments that act responsibly.

B. Liability Limitations, the Risk of Race to the Bottom and the Potentially Ameliorating Effects of Uniformity

A further problem of sovereign immunity or limited liability is that it creates the collateral public policy problem of inconsistency between state immunity regimes and incentivizes states that might otherwise be willing to relax immunity regimes for their own citizens but refrain from doing so for fear of being more vulnerable to litigation in other states. To the extent that state policies toward immunity diverge and to which states unfairly favor themselves

¹³⁶ See *Imbler v. Pachtman*, 424 U.S. 409, 417–20 (1976) (setting forth broad general rule of immunity for prosecutors when acting in that capacity).

¹³⁷ See *Harlow v. Fitzgerald*, 457 U.S. 800, 815–18 (1982) (replacing good faith qualified immunity standard for government officials facing constitutional or federal statutory claims with standard based on whether government actor violated clearly established law, which can presumably be done by both conduct within and outside official’s job description).

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relative to other sovereigns, the goal of fair compensation for victims of government wrongdoing is undermined.

One could lay blame for this situation on *Nevada v. Hall* and argue that the solution is its elimination. I prefer to lay the blame upon an unfortunate culture of sovereign immunity that lacks a compelling philosophical, fiscal, or public policy basis. But in light of *Hyatt*, it now appears that states will have undue incentive to “race to the bottom” in limiting their liability so long as *Hall* remains good law. Rather than abolish *Hall*, however, state policymakers and courts should be willing to re-examine the historical deference given to sovereign immunity. In a modern world, state governments should be willing to take responsibility for their actions.

At the very least, if state governments insist on limiting liability (presuming compliant courts continue to permit it), damage caps should bear at least a rough reflection to a reasonable median or upper range of permissible damages. One can easily understand a state’s reluctance to be on the receiving end of a \$100 million damage award simply because counsel for an irate taxpayer convinced a jury that efforts at tax collection were too aggressive. But this hardly makes low damage caps of \$50,000, \$100,000, or the like defensible.

A more reasonable approach (if caps are to remain) is to link the limitation to the reasonable approximation of the value of a completely lost or ruined life.¹³⁸ Safety planners conducting cost-benefit analysis have used “ballpark” figures such as \$6 million for the cost of a human life.¹³⁹ To be sure, calculating and adopting any such uniform figure has analytic problems.

And, in cases where state government action does not cause death, the average-value-of-a-human-life yardstick has clear potential for under-compensation. For example, the young collision victim of *Hall v. Nevada* survived. But providing the special lifetime care required by serious injuries can easily result in expenditures well in excess of the value-of-a-life amount chosen by analysts.

But such problems pale in comparison to a regime that completely immunizes even reprehensible state action, or offers only insultingly low compensation to persons mowed down by a state vehicle, destroyed by malpractice at state medical facilities, beaten by state law enforcement, harassed by state agencies, or unfairly targeted by overzealous state regulation. The first reaction of the mythical average Nevadan (annual household income of roughly \$50,000

¹³⁸ The \$6 million figure stems from a Department of Transportation cost-benefit analysis and has been used to decide whether to require installation of seat belts on school buses or stronger roofs on cars. See Appelbaum, *supra* note 128. More recently, the Environmental Protection Agency has pegged the value of a life at \$9.1 million while the Food and Drug Administration used a figure of \$7.9 million. *Id.* Rather than dwell on the macabre (but necessary from a public policy standpoint) business of reducing human lives to dollars, this article simply takes the position that human lives are worth a lot—but that even if lives are highly valued, states have sufficient economic strength to be held responsible for deaths or injuries for which the state is responsible.

¹³⁹ *Id.*

per year) or Californian (annual household income of roughly \$60,000 per year) might well be that a tech multimillionaire's suffering from a tax investigation is hardly a life or death matter. But both fair compensation and deterrence are denied if the tax investigators can abuse with impunity. The thwarting of these compensatory and deterrence goals is nearly as great when the state can abuse with only the prospect of a maximum liability of \$50,000—relative pocket change to even a small state.

The travails of the plaintiff in *Hyatt* perhaps should not subject California to a half-billion dollars of liability. But some maximum (e.g., \$5-\$10 million) more reasonable than Nevada's insultingly cosmetic \$50,000 would seem apt in view of the modern range of judgments for such misconduct against non-immunized, non-capped defendants. Similarly, one can at least argue that policy and fiscal reasons justify subjecting someone unfortunate enough to be injured in an auto collision or medical event involving the state to a lower award. Those favoring sovereign immunity or damage caps also seem to forget that even in the absence of such limitations, courts have considerable power to enter judgment as a matter of law against a verdict winner or to order new trials, or remittitur if a verdict is regarded as excessive, against the weight of the evidence, or regarded as the product of passion, prejudice, or trial misconduct.¹⁴⁰

V. THE LIKELY FUTURE OF *NEVADA V. HALL*

Hall's demise was avoided on a 4-4 tie vote, creating yet another reason why confirmation of Neal Gorsuch to the Supreme Court will have important implications. Although there are not many occasions of a citizen of State A suing State B in the courts of State A for injury inflicted in State A, the principle underlying the precedent—that states may not inflict injury outside their borders without consequence—is an important one well worth preserving.

But the principal remains controversial and divides courts and commentators. The division appears to cleave on traditional liberal-conservative lines in that, at least at the Supreme Court level, Justices appointed by Democrats tend to support *Hall* while Justices appointed by Republicans tend to not only dislike *Hall*, but support overturning it.

The split can be seen as fitting the overall traits of the respective appointees. Republicans are more originalist than Democrats and the strongest case against *Hall* is founded on the argument that the Founders would not have wanted Hall suing Nevada, or Hyatt suing California. But a broader look at the traditional differences between Democratic and Republican appointees suggests some inconsistency of the bench toward *Hall*.

Republicans generally harbor more concern about government size, power, and abuse while Democrats more frequently support a robust role for govern-

¹⁴⁰ See NEV. R. CIV. P. 59; NEVADA CIVIL PRACTICE MANUAL § 28 (STATE BAR OF NEV. PUBLICATIONS COMM'N 2016) (discussing post-trial motions for judgment as a matter of law, new trial motions and remittitur).

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ment and want to protect its functions from curtailment. It is thus, to some extent, surprising that Democratic appointees would support suits against the government—particularly if related to an essential government function like tax collection (Democrats generally support higher taxes necessary for larger governments, while Republicans typically seek smaller government and lower taxes). It is similarly surprising that Republican appointees would be unwilling to require state governments to answer for their actions in courts of another state and to have regulatory agencies, like the California Tax Board, held accountable.

But consistent or not, attitudes toward *Hall* appear to reflect a relatively predictable split between Republican and Democratic appointees. Nonetheless, instances such as the Roberts-Thomas dissent in *Hyatt IV* concerning the Full Faith and Credit Clause reflect the complexity and unpredictability surrounding the area.

Because suits like *Hyatt* and *Hall* are not all that common, it may be that the Court, as it did from 1970 to 2016, will go decades without deciding a case that would serve as an apt vehicle for interring *Hall*. But *Hall*'s brush with death in *Hyatt* could be repeated soon if the newest Justice turns out to have concerns about *Hall*.

CONCLUSION: *HYATT* AS A CAUTIONARY TALE FOR DISPUTE RESOLUTION AND PUBLIC POLICY

As the *Hyatt* litigation saga continues into its third decade, one grasps for some assessment and aspiration toward meaning. The cases and its issues are fascinating, particularly (I hope) for readers of the *Nevada Law Journal* given the local ties of the case and the ongoing social, economic and legal relationship between Nevada and neighboring California.

One initial question that should be asked is whether the entire episode is an example of mistaken judgment upon mistaken judgment? Did the Tax Board commit an unforced error in so doggedly pursuing *Hyatt*? Was *Hyatt* too reluctant to pursue settlement?¹⁴¹ Was he misallocating resources to fighting back that he could have used to fund a compromise? My own view, as someone generally sympathetic to negotiated dispute resolution, is that it that the long-running, knock-down, drag-out litigation was a mistake for both sides.¹⁴²

¹⁴¹ One cannot be sure that settlement was possible in that the Tax Board may have been inflexible. But ordinarily, any case can be settled if the antagonists are reasonable regarding their “BATNA” or best alternative to a negotiated settlement, and if they bargain over their interests (what they need and should want) rather than their positions (who is “right”). See generally ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97–144 (1981) (introducing the concepts and inaugurating the modern negotiation and dispute resolution movement).

¹⁴² In its decision of August 30, 2017, the Franchise Tax Board ruled that the total *Hyatt* tax liability was roughly \$2 million plus interest. The State of California obtained this “victory” after a quarter century of litigation, millions of dollars of out-of-pocket counsel fees, and even more expenditure of the time and effort of salaried state employees (both legal and non-

One might similarly wonder, on a jurisprudential basis, whether the case (in either its first or second trip to the U.S. Supreme Court) was really worthy of Court review? Would the High Court have been better off refusing to hear the first 2003 case, in which it merely affirmed the Nevada decision? Perhaps. What I have called *Hyatt II* (the 2003 case) was correctly decided, but so was the state decision it reviewed. And in the nearly fifteen subsequent years, *Hyatt II* does not appear to have been widely followed or particularly influential.¹⁴³

However, the 2016 *Hyatt IV* decision, although it could be styled as a needless error correction¹⁴⁴ in light of the Court's deadlock on *Nevada v. Hall*, did

legal) that surely could have been spent on something more productive than bird-dogging Hyatt. Conversely, Mr. Hyatt "won" a substantial reduction in his claimed tax liability as well as a judgment against California that will eventually become final and include significant costs, counsel fees, and pre-judgment interest. But this victory was obtained at the price of years of contentiousness, uncertainty, and distraction, as well as millions of dollars of counsel fees and other expenditures that will not be recouped.

Like any observer, I am affected by hindsight bias as well as not being privy to the non-public details of the case. Nonetheless, it remains astonishing to me that the fight between California and Hyatt went to such lengths and endured so long. See Ashton, *supra* note 11 (after Tax Board's August 30, 2017 vote, Hyatt remains liable for \$1.9 million in 1991 state taxes, a fraction of the amount sought by the state); *Hyatt V*, No. 53264, 2017 WL 4079069 at *2 (Nev. Sept. 14, 2017) (affirming Hyatt's victory against California on claims of fraud and intentional infliction of emotional distress but limiting California's liability to \$50,000 plus prejudgment interest and reasonable costs and recoverable counsel fees, remanding to the trial court for determination). Because of the length of the dispute, the final Hyatt award may be considerably larger than \$50,000 after addition of interest, costs, and counsel fees—but it will still be a only a small fraction of the initial jury award and likely only a fraction of his total economic burden shouldered in pursuing relief.

To be sure, Mr. Hyatt also appears to have achieved the emotional satisfaction of being vindicated. It seems clear from his testimony and prolonged litigation that he was genuinely upset that the Tax Board was questioning the bona fides of his move to Nevada. And for a person of wealth who can afford the legal fees, perhaps the emotional satisfaction of vindication, if it could be monetized, makes it all worthwhile. But in the meantime, the state and federal judicial systems, which offer dispute resolution services at a subsidized rate, incurred substantial cost due to the Hyatt claims against California, as did the California administrative law system because of the decisions and conduct of its own tax agency as well as the reaction of the taxpayer.

¹⁴³ As of January 2017, the 2003 *Hyatt II* decision had been cited in fewer than sixty state or federal court opinions, an extremely low figure for a U.S. Supreme Court opinion. By contrast, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), a decision from the same term dealing with technicalities retirement benefits for coal miners and essentially unknown to the legal profession, has 239 citing decisions during this same 13-year period. *Hyatt II* has received more attention in law reviews, where it has been cited in 147 articles, which outpaces the 97 articles citing *Barnhart v. Peabody Coal Co.*, but both are cited far less than a Supreme Court decision regarded as important. For example, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), also from the same term, which addressed constitutional limits on punitive damages awards in state court, has been cited roughly 2,100 times in subsequent court decisions and in more than 1,000 law review articles.

¹⁴⁴ California could have suffered the "injustice" of paying more than the Nevada cap. And it is unlikely the Nevada Supreme Court's decision refusing to give California the benefit of its own government immunity would have led to a rash of similar decisions or an aggravated battle of the states. The size of the *Hyatt* jury award and the peculiar circumstances of the

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provide a valuable service to the legal and public policy community. *Hyatt IV* sets forth a potentially valuable principle by putting some teeth into the Full Faith and Credit Clause admonition that the laws of other states—and not just their judgments—must be respected.

The largest unforced error of the *Hyatt* imbroglio is perhaps the one receiving least discussion: the problematic persistence of state government immunity and limited liability. What one critical court described fifty years ago as a device “invented to solve the marital problems of Henry VIII”¹⁴⁵ that had outlived its usefulness looks even more decrepit today. Artificially protecting government actors from the consequences faced by the rest of society fails on normative terms and cannot be rehabilitated by fiscal arguments or concerns about unduly chilling discretion. In a modern world of extensive government action constantly touching the lives of the citizenry, state governments should be required to at least account for their actions, and be subject to judgment when they violate the law. At the very least, the States should adopt respectably adequate caps on recovery in place of insultingly low limits like Nevada’s, and should adopt a consistent approach that reduces forum shopping and interstate tension.

Although perhaps excessive (and certainly a little kitschy), the wave of quotations at the beginning of this article were selected with purpose. All could apply to the most unusual *Hyatt* case and the larger issues of sovereign immunity, full faith and credit, and interstate relations. Per the Mark Twain quote, an overwhelming majority of state Attorneys General reflexively favored sovereign immunity and overturning *Hall*.¹⁴⁶ They should be a bit more reflective about this area of law.

Per the George Bernard Shaw quote, states should be more interested in fair treatment of individual citizens and less concerned about aggregate costs

case were attention-grabbing, but leaving the *Hyatt III* Nevada Supreme Court decision of 2014 alone might well have been the better part of valor.

¹⁴⁵ See *Evans v. Bd. of Cty. Comm’rs of El Paso Cty.*, 482 P.2d 968, 969 (Colo. 1971) (“The monarchical philosophies invented to solve the marital problems of Henry VIII are not sufficient justification for the denial of the right of recovery against the government in today’s society. Assuming that there was sovereign immunity of the Kings of England, our forebears won the Revolutionary War to rid themselves of such sovereign prerogatives.”); see also *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 460 (Cal. 1961) (“The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia.”); Steven A. Sindell, *Sovereign Immunity—An Argument Con.*, 22 CLEV. ST. L. REV. 55, 55 (1973) (collecting criticisms of sovereign immunity and noting split in the states on the issue).

¹⁴⁶ The States also rallied round California in *Hyatt V*, which included amicus briefs from Arkansas, Colorado, Delaware, Florida, Idaho, Louisiana, Maine, Maryland, Missouri, New Jersey, North Dakota, Ohio, Oklahoma, Tennessee, Utah, Vermont, Virginia, and Washington as well as the Multistate Tax Commission. See *Hyatt V*, 2017 WL 4079069, at *1–2. Not all of the state wrath was directed at constitutional questions. California also, with at least the tacit support of the states, successfully argued that the trial court had made evidentiary errors, but the *Hyatt V* Court found these insufficient to overturn Hyatt’s victory at trial. See *id.* at 1135–40.

and political expedience. Caps seem like a good idea when enacted by people who have not been injured by the state. It is easy for an as yet unscathed Legislator to limit recovery for state wrongs. Yet, Legislators might feel differently if they had been hit by a state vehicle, suffered malpractice at a state facility, or been hounded by a state administrative agency.

Per the Elihu Root quote, one wonders whether the *Hyatt* antagonists really needed to fight for a quarter-century with two trips to the U.S. Supreme Court. Per the quote attributed to Albert Einstein, state governments should realize the drawbacks of continuing to cling to a regime of an inconsistent quilt of sovereign immunity that hurts victims of government harm with little or no corresponding benefit to the public at large.

But the one perhaps most apt quotation is that of psychiatrist Carl Jung, which implicitly argues for a bit more empathy and cost-benefit analysis, and a little less historical formalism regarding government liability and interstate relations.¹⁴⁷ Nevada's willingness to entertain the *Hyatt* suit of course irritated California, just as Plaintiff Hall's suit irritated Nevada some thirty-five years earlier. But if states divorced themselves from short-term and self-serving fiscal and administrative considerations and thought a little more about how their injured citizens or moving taxpayers—or persons anywhere—should be treated by the legal system, they might make progress. At least enough progress to avoid or reduce such suits and the situations giving rise to these claims. Real reform and better quality control of government action would be a better expenditure of resources than attacking *Nevada v. Hall* and hoping for a return to the glory days of sovereign immunity. The persistence of states in clinging not only to sovereign immunity, but also to unduly low limits of recovery when that immunity is waived (often only in limited part), has both impoverished policymaking and proven a prescription for constitutional imbroglio.

¹⁴⁷ See *supra* p. 1.