

The Original Understanding of State Sovereign Immunity

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I. INTRODUCTION

In *Nevada v. Hall*,³⁵² California residents brought a suit in California against Nevada when a Nevada employee caused an accident on a California highway.³⁵³ Nevada motioned to have the case dismissed under its sovereign immunity, but California rejected the immunity and allowed the suit to continue.³⁵⁴ This case was significant because it was the first time a state ignored the sovereign immunity of a sister state.³⁵⁵ Nevada challenged California's decision.³⁵⁶ The Supreme Court held that nothing in the Constitution required states to recognize the sovereign immunity of sister states.³⁵⁷

Since *Hall*, the Court has continued to affirm its decision. In *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt I)*,³⁵⁸ the Court affirmed its decision and rejected a balancing test under the Full Faith and Credit Clause that would have allowed for states to maintain their immunity in cases of fundamental government responsibility.³⁵⁹ However the Court recently recognized that there are some limits to states' ability to refuse to apply their own sovereign immunities to sister states haled into their courts.³⁶⁰ In *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II)*,³⁶¹ California was sued in Nevada for several intentional torts.³⁶² Nevada refused to apply its sovereign immunity award limitation to California and the jury found against California in hundreds of millions of dollars.³⁶³ The Supreme Court found that Nevada had employed a policy of hostility against California, and required Nevada to apply its own sovereign immunity limitation to California.³⁶⁴

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³⁵² 440 U.S. 410 (1979).

³⁵³ *Nevada v. Hall*, 440 U.S. 410, 411–12 (1979).

³⁵⁴ *Id.* at 412.

³⁵⁵ As will be shown in § IV, there have been a couple of cases where a state was sued in the courts of a sister state, but in those cases, the state overseeing the suit dismissed the case under sovereign immunity.

³⁵⁶ *Hall*, 440 U.S. at 412.

³⁵⁷ *Id.* at 426.

³⁵⁸ 538 U.S. 488 (2003).

³⁵⁹ *Id.* at 498.

³⁶⁰ *Franchise Tax Bd. of California v. Hyatt*, 136 S.Ct. 1277, 1280 (2016) (*Hyatt II*).

³⁶¹ 136 S.Ct. 1277 (2016).

³⁶² *Id.* at 1280.

³⁶³ *Id.*

³⁶⁴ *Id.* at 1283.

These decisions are a correct application of law under the current understanding of sovereign immunity. However, these decisions are flawed because they are based on a fundamental misunderstanding of the origin of the doctrine of sovereign immunity and its placement in the Constitution. These decisions follow from the assumption that sovereign immunity is a product of common law that originated with the English feudal system,³⁶⁵ but sovereign immunity is based in natural law. This is important because sovereign immunity, as a matter of natural law, is a state privilege imbedded in the Constitution. Therefore, court opinions that do not adhere to the traditional and original understanding of the doctrine of sovereign immunity, at the time of the adoption of the Constitution, are incorrect and extraconstitutional.

This Article will lay out the origins of the doctrine of sovereign immunity and the preservation of the doctrine in the Constitution. It will then look at how the courts have interpreted the doctrine as it relates to state sovereignty in the courts of their sister states. It will finally apply the doctrine as enshrined in the Constitution with the primary Supreme Court cases *Hall*,³⁶⁶ *Hyatt I*,³⁶⁷ and *Hyatt II*.³⁶⁸ The Article will conclude that these cases do not correctly represent the sovereign rights of the states as espoused by the Constitution.

II. HISTORY OF SOVEREIGN IMMUNITY

A. **Sovereignty: A Development of the Law of Nature**

Sovereign immunity is commonly believed to be a common law doctrine that was developed under the English feudal system.³⁶⁹ According to this view, a feudal lord could not be sued in his own courts without his consent.³⁷⁰ A lord could only be sued in the court of a higher authority.³⁷¹ There was no higher authority than the King, the sovereign, and thus, the King was not subject to any suit, unless he consented to it.³⁷² The problem with this theory, however, is that if sovereign immunity was an English common law doctrine, then it would only be within English courts and courts of English

³⁶⁵ *Hall*, 440 U.S. at 414.

³⁶⁶ 440 U.S.410 (1970).

³⁶⁷ 538 U.S. 488 (2003).

³⁶⁸ 136 S.Ct. 1277 (2016).

³⁶⁹ *Alden v. Maine*, 527 U.S. 706, 733–736 (1999); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 520 (1987) (White, J., concurring); *Hall v. Nevada*, 440 U.S. 410, 414 (1979); *Chisholm v. Georgia*, 2 U.S. 419, 457 (1793) (Wilson, J.).

³⁷⁰ *Hall*, 440 U.S. at 414–415.

³⁷¹ *Id.*

³⁷² *Id.*

heritage. However, the doctrine is all across Europe and other nations.³⁷³

Justice Oliver Wendell Holmes offered another theory of the origins of the doctrine. He believed that the doctrine was based on the notion that one who creates the law is superior to the law.³⁷⁴ Holmes' theory on sovereign immunity derives from legal scholars including Jean Bodin and Sir John Eliot.³⁷⁵ This reasoning makes far more sense than the belief that it is a common law doctrine developed by the old English feudal system, considering that the doctrine carries across other nations. However, this theory merely justifies the doctrine and falls short in describing the doctrine's origins. Additionally, this theory does not provide any useful guidance as to the extent of the immunity in the courts of other sovereign nations.

Sovereign immunity is a right and privilege of sovereignty, and so to understand it, we must understand the origins of the doctrine of sovereignty. Sovereignty is a development from the law of nature as a means of protection against the dangers of living in a state of nature.³⁷⁶ Many legal scholars of the seventeenth and eighteenth century understood this concept, which dates back to Aristotle,³⁷⁷ and wrote extensively about it.³⁷⁸ Therefore, a brief review of the state of nature and its effects on rights and liberties will be helpful in understanding the doctrine of sovereignty and its extent.

All people are equal in a state of nature and are governed by rules of reciprocity and comity.³⁷⁹ There is no higher authority to set rules of behavior or meet out justice and punishment when harm is committed.³⁸⁰ Injuries can only be rectified by a self-help state

³⁷³ Johann Wolfgang Textor gives the definition of the Law of Nations as “[w]hat its natural reasonableness has established among all men, is observed among all peoples alike and is called Law of Nations, as being the Law used by all nations.” Johann Wolfgang Textor, *Synopsis of the Law of Nations* 1 (John Pawley Bate, Trans., James Brown Scott, ed. 1916) (1680) (quoting Gaius). Sovereign immunity is well established among all Law of Nations scholars, and no scholar singles out England, or any of its legal inheritors as the sole nations with sovereign immunity. This shows that the doctrine was well established and understood in all of Europe.

³⁷⁴ *The Western Maid*, 257 U.S. 419, 432–433 (1922); *Kawanakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

³⁷⁵ *The Western Maid*, 257 U.S. at 432–433; *Kawanakoa*, 205 U.S. at 353; Jean Bodin, *Six Books of the Commonwealth* 32 (M.J. Tooley, Trans. Barnes & Noble, ed. 1967) (1576); Sir Jean Elliot, *De Jure Maistatis* (Port Eliot, ed. 1882) (1628–30).

³⁷⁶ John Locke, *The Second Treatise of Government* 10, 57 (Dover Publications, Inc. 2002) (1688) (explaining that men form political societies to preserve property (life, liberty and estate) and punish offenses because a state of nature gives each man the right to protect property and right wrongs but a political society is necessary to judge and preserve property).

³⁷⁷ Aristotle, *Politics* 5–6 (Benjamin Jowett, Trans., Batoche Books, ed. 1999) (Aristotle wrote that it is the nature of man to create a city, the *polis*, to advance justice).

³⁷⁸ These scholars included Jean Bodin, Sir John Elliot, Emer de Vattel, and John Locke.

³⁷⁹ Locke, *supra* note 376, at 2–3.

³⁸⁰ Locke, *supra* note 376, at 39.

of war between one who is wronged and the one who has wronged.³⁸¹ There is no security in a state where people must rely on the good and comity of others for safety in life, liberty and property.³⁸² Thus people developed political societies, the state, by “combin[ing] their forces to procure the mutual welfare and security.”³⁸³

With the formation of the state comes the need to set up a public authority who prescribes duties of each member of the society and enforces those duties upon the populace.³⁸⁴ This public authority is the sovereign.³⁸⁵ For this authority to be effective, it must be given certain duties, rights, and privileges to carry out its work.³⁸⁶ One of those privileges is sovereign immunity, or immunity from suit for actions committed by the sovereign.³⁸⁷ Sovereign immunity is granted to sovereigns to allow them to work for the best good of the state.³⁸⁸

B. Sovereign Immunity Within a State’s Borders

All legal scholars agreed that the sovereign is immune from suit in its own courts, but did not all agree as to the extent of that immunity. Many argued that sovereignty was complete and without limitation. This included Bodin and Elliot.³⁸⁹ Bodin wrote that the sovereign “cannot in anyway be subject to the commands of another.”³⁹⁰

However, E. de Vattel wrote that the sovereign power is as extensive as it is granted by the nation.³⁹¹ The nation could grant this sovereign power without limitation, or can limit the power by the fundamental laws of the state.³⁹² Vattel was joined in this concept by Johann Wolfgang Textor, the German jurist and historian, who wrote that any act committed by a sovereign outside the fundamental laws were null and void “because of the deficiency in the doer’s power.”³⁹³

Therefore, there are differing opinions among legal scholars of the seventeenth and

³⁸¹ Locke, *supra* note 376, at 10.

³⁸² Bodin, *supra* note 375, at 28; Locke, *supra* note 376, at 57.

³⁸³ 3 E. de Vattel, *The Law of Nations or the Principles of Natural Law* 11 (Charles G. Fenwick Trans., James Brown Scott, ed. 1916) (1758).

³⁸⁴ Vattel, *supra* note 383, at 11.

³⁸⁵ *Id.*

³⁸⁶ Vattel, *supra* note 383, at 28.

³⁸⁷ *Id.*

³⁸⁸ Vattel, *supra* note 383, at 24.

³⁸⁹ Bodin, *supra* note 375, at 28; Elliot, *supra* note 375, at 19 (explaining that a sovereign is not bound by law, but a good sovereign will of its “owne accorde live according to lawe, albeit they cannot be compelled thereunto” (sic)).

³⁹⁰ Bodin, *supra* note 375, at 28.

³⁹¹ Vattel, *supra* note 383, at ix.

³⁹² Vattel, *supra* note 383, at 22.

³⁹³ Textor, *supra* note 373, at 94.

eighteenth century as to the extent of sovereign immunity within the sovereign's own courts. However, the reasoning of Vattel and Textor is more in line with the nature of creating sovereigns. Sovereigns are established as a means to protect the state. They are created when people voluntarily waive their own independence to form a community for protection. The protectorate of that community would necessarily be bound by the fundamental rules set forth by the people creating it. As this article will further explain in section III, the Constitution is based on this very principle, and therefore, this concept of sovereign immunity fits more in line with the true understanding of the doctrine and its application in American governing principles.

C. Sovereign Immunity Among Sovereign Nations

A sovereign is the supreme authority among those who create it and join the political community it governs. However, sovereigns are in a state of nature with each other.³⁹⁴ All are equal with none being subordinate to another.³⁹⁵

This is true even in situations where one nation is superior in strength, wealth, and prestige, or when one nation is under the protection of another. It is well agreed that nations may be inferior, and even at times subject to other nations, without losing their sovereignty.³⁹⁶ Sovereignty can only be lost by forcible seizure, surrender, or a transfer of sovereignty.³⁹⁷ Therefore, under these principles, a nation does not surrender its sovereignty when it interacts with another nation.

A sovereign wronged by another sovereign has the right to seek retribution from its peer.³⁹⁸ However, there is no supreme authority to appeal to for justice in a state of nature. No one sovereign has authority to judge another, and hence, the courts of one sovereign have no jurisdiction over another. Of course, a sovereign has power to legislate and could give its court's jurisdiction over other sovereigns. However, these laws would not be binding without force or the other sovereigns' consent.

Therefore, there are only two ways for a sovereign to hold another sovereign accountable for any alleged harm. The most peaceful would be by treaty or agreement that the one would subject itself to the jurisdiction of the other's courts for any harms it may cause.³⁹⁹ However, this is nothing more than the waiver of the immunity, and hence an acknowledgement of the right.

³⁹⁴ Vattel, *supra* note 383, at 113–14.

³⁹⁵ Elliot, *supra* note 375, at 10–11; Samuel Rachel, *Dissertations on the Law of Nature and of Nations* 157 (John Pawley Bate, trans., William S. Hein & Co., Inc., ed. 1995) (1676).

³⁹⁶ Elliot, *supra* note 375, at 21–22; Vattel, *supra* note 383, at 11–12.

³⁹⁷ Textor, *supra* note 373, at 315–18.

³⁹⁸ See Locke, *supra* note 376, at 4–5.

³⁹⁹ See *Id.*

The other, less peaceful, would be through entering into a state of war, and taking by force the alleged damages.⁴⁰⁰ A state of war could include taking such measures as entering into combat, increasing tariffs on imports and exports, sanctions, and other methods of hostility toward the guilty sovereign. However, a sovereign would not likely take upon itself an act of war unless it is confident that it could win because of the great costs that would be involved.

Further, sovereigns would be less inclined to make laws against other sovereigns, because it would be foolish for a sovereign to make laws that would not be respected. This would weaken the sovereign's lawmaking power and authority. Thus, sovereign immunity in foreign courts, while in practicality is an act of comity, is in fact the state in which sovereigns find themselves. The immunity is a *de facto* product of the state of nature, if not a *de jure* right granted by a foreign sovereign.

III. SOVEREIGN IMMUNITY ENSHRINED IN THE CONSTITUTION

A. The Debate on Sovereign Immunity During Formation and Ratification of the U.S. Constitution.

In 1787, representatives from 12 of the 13 colonies met in Philadelphia to propose amendments to the Articles of Confederation to solve numerous problems the confederacy was facing. Instead, on September 17, the convention proposed a whole new Constitution that created a union of 13 united sovereign states rather than a confederacy of 13 independent sovereign states.

The Constitution, among other things, created a national, federal, government, with limited powers by requiring the states to give up some of their sovereignty and, to some extent, become subject to the Federal Government.⁴⁰¹ This surrender of sovereignty made many people nervous about the power the Federal Government would hold over the states and the extent of the sovereignty each state would retain.⁴⁰² Alexander Hamilton addressed these concerns in Federalist No. 32 where he wrote that the states would retain their sovereignty unless the Constitution exclusively delegated sovereignty to the Federal Government.⁴⁰³

⁴⁰⁰ *See Id.*

⁴⁰¹ Kenneth R. Thomas, Cong. Research Serv., RL30315, Federalism, State Sovereignty and the Constitution: Basis and Limits of Congressional Power 1 (2013) *available at* <http://www.crs.gov/reports/pdf/RL30315>.

⁴⁰² The Federalist No. 32 at 240–41 (Alexander Hamilton) (Benjamin F. Wright, ed. 1961); The Federalist No. 81 at 511 (Alexander Hamilton); Daniel A. Farber & Suzanna Sherry, A History of the American Constitution, 297–99 (West, ed. 3d ed. 2013).

⁴⁰³ The Federalist No. 32, at 241 (Alexander Hamilton).

Hamilton explained there were three ways that sovereignty could be alienated under the new Constitution.⁴⁰⁴ First, where the Constitution explicitly granted exclusive authority to the Federal Government.⁴⁰⁵ Hamilton gave, as an example, the constitutional grant to Congress authority of “exclusive legislation in all cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States.”⁴⁰⁶ Second, where power was granted to the Federal Government in one place of the Constitution and denied to the States in another.⁴⁰⁷ This was exhibited by the constitutional grant of power for the Congress to collect duties, imposts, and excises,⁴⁰⁸ and a denial of such authority to the states without congressional assent.⁴⁰⁹ Third, where authority granted to the Federal Government was not explicitly removed from the states, but such authority exercised by the states “would be absolutely and totally contradictory and repugnant.”⁴¹⁰ Hamilton’s example was the Federal Government’s authority to establish a uniform rule of naturalization.⁴¹¹ There could not be a uniform rule if each state was allowed to set their own rules of naturalization.⁴¹²

Nevertheless, people continued to express concerns regarding a state’s sovereign immunity from suit in the courts of the Federal Government.⁴¹³ Article III gave federal courts jurisdiction to hear cases and controversies between two or more states, suits between a state and citizens of another state, and suits between a state and foreign governments or the citizens of a foreign government.⁴¹⁴ Many were troubled by the last two provisions allowing for suits against the states by citizens of other states and foreign governments and their citizens.⁴¹⁵ People feared that the states would be haled into federal court to account for their debts, which were substantial, from the Revolutionary War.⁴¹⁶

Numerous writers at the time argued that the idea that a sovereign could be haled into *any* court, including a foreign sovereign’s court, went completely beyond reason. This is a great display on how strong sovereign immunity was considered at the time. Hamilton wrote in Federalist 81 “[i]t is inherent in the nature of sovereignty not to be amenable to

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*; U.S. Const. art. I, § 8, cl. 17.

⁴⁰⁷ The Federalist No. 32, at 241 (Alexander Hamilton).

⁴⁰⁸ U.S. Const. art. I, § 8, cl. 1.

⁴⁰⁹ The Federalist No. 32, at 242 (Alexander Hamilton).

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ The Federalist No. 81 at 511 (Alexander Hamilton); Farber & Sherry, *supra* note 402, at 297–99.

⁴¹⁴ U.S. Const. art. III, § 2.

⁴¹⁵ The Federalist No. 81 at 511 (Alexander Hamilton); Farber & Sherry, *supra* note 402, at 297–99.

⁴¹⁶ The Federalist No. 81 at 511 (Alexander Hamilton).

the suit of an individual without its consent.”⁴¹⁷ Both James Madison and John Marshall shared this belief. James Madison argued at the Virginia Ratifying Convention that the Constitution only granted the federal courts authority to hear cases brought by states against citizens of another state.⁴¹⁸ John Marshall agreed and further added:

With respect to disputes between a State, and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope no Gentleman will think that a State will be called at the bar of the Federal Court. . . . It is not rational to suppose, that the sovereign power shall be dragged before a Court.⁴¹⁹

The founders fully understood that sovereignty protected states from any court, including the courts of another.⁴²⁰

B. *Chisolm v. Georgia* and the Eleventh Amendment.

In *Chisolm v. Georgia*⁴²¹ the Supreme Court overturned this long held view of Sovereign Immunity. In *Chisolm*, Alexander Chisolm sued Georgia in federal court on behalf of Robert Farquhar, a citizen of South Carolina, for payments due for goods Farquhar had provided Georgia during the Revolutionary War.⁴²² Justice Iredell would have ruled as Hamilton, Madison, and Marshall would have expected. He argued that Congress had not granted federal courts the authority to hear suits against states, and would have dismissed the case.⁴²³ He also argued that he did not believe that the Constitution had removed sovereign immunity from the states, because to do so would have required express language, which, he argued, the Constitution did not have.⁴²⁴

However, Justice Iredell was alone. The majority held that the Constitution did in fact give federal courts the authority to hear suits against states.⁴²⁵ Chief Justice Jay looked at the actual language of the Constitution which granted federal courts authority to hear cases “between a State and the citizen of another State.”⁴²⁶ The plain language was clear that where a state and a citizen were a party to a case, the federal government would have authority to hear the case.⁴²⁷ The language did not distinguish between plaintiff and

⁴¹⁷ *Id.*

⁴¹⁸ Donald L. Boren, *Suing a State in Federal Court Under a Private Cause of Action: An Eleventh Amendment Primer*, 37 *Clev. St. L. Rev.* 417, 424 n. 37 (1989).

⁴¹⁹ Farber & Sherry, *supra* note 402, at 301.

⁴²⁰ *Id.*

⁴²¹ 2 U.S. 419 (1793).

⁴²² Boren, *supra* note 418, at 421 n. 22.

⁴²³ *Chisolm v. Georgia*, 2 U.S. 419, 449 (1793) (Iredell, J., dissenting).

⁴²⁴ *Id.* at 449–50 (Iredell, J., dissenting).

⁴²⁵ *Georgia*, 2 U.S. 419.

⁴²⁶ U.S. Const. art. III, § 1.

⁴²⁷ *Georgia*, at 476 (Jay, J. concurring).

defendant, merely parties.⁴²⁸ Therefore, the Constitution did remove sovereign immunity from the states.⁴²⁹

The *Chisolm* court was correct in its holding. Those supporting the immunity were under the false assumption that sovereign immunity was irrevocable. However, what they failed to take into account is that the Constitution, as a fundamental law, had the power to repeal and rewrite the laws of nature. As originally written, the Constitution did not distinguish the types of suits federal courts had the authority to hear regarding states. The general assumption, under principles of the law of nature and sovereign immunity, was that the state could only be in a suit as a plaintiff, unless the state elected to waive its sovereign immunity and become a defendant. However, because the Constitution had the power to overcome natural law, and because no distinction was made as to what party a state could be, the *Chisolm* Court correctly announced that Georgia could be sued by a citizen of another state within a federal court.

This was immediately rectified in 1798 with the ratification of the Eleventh Amendment.⁴³⁰ The Eleventh Amendment removed from federal jurisdiction all suits involving states and citizens of other states, foreign governments, or citizens of foreign governments.⁴³¹ In effect, the immunity lost by fundamental law was once again restored by fundamental law.

C. Abrogation of Sovereign Immunity in the U.S. Constitution.

At a federal level, the Courts had generally interpreted the Eleventh Amendment as a complete prohibition against suing states in federal courts.⁴³² However, in 1976, the Supreme Court recognized another constitutional repeal of state sovereign immunity.⁴³³ In *Fitzpatrick v. Bitzer*,⁴³⁴ the Supreme Court recognized that the Fourteenth Amendment granted Congress authority to enforce its provisions “by appropriate legislation.”⁴³⁵ The Court held that this meant Congress could pass legislation that removed state sovereignty in federal courts for Fourteenth Amendment violations.⁴³⁶ Nonetheless, the authority was limited only to conduct that violates the Fourteenth Amendment’s

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 479.

⁴³⁰ U.S. Const. amd. 11.

⁴³¹ *Id.*

⁴³² See *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (holding that the Eleventh Amendment applied to suits brought against states by their own citizens, even though the Eleventh Amendment does not explicitly block such suits from coming forward in Federal Court).

⁴³³ *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

⁴³⁴ 427 U.S. 445 (1976).

⁴³⁵ U.S. Const. amd. 14, § 5.

⁴³⁶ *Bitzer*, 427, U.S. at 456.

substantive provisions.⁴³⁷

The Court has held that only one other provision of the Constitution abrogated state sovereign immunity. It held in *Pennsylvania v. Union Gas Co.* that the Commerce Clause gave Congress the authority to abrogate state's sovereign immunity.⁴³⁸ However, in *Seminole Tribe of Florida v. Florida*,⁴³⁹ the Supreme Court overturned *Union Gas* when asked to extend its reasoning to the Indian Commerce Clause.⁴⁴⁰ The Court held that the Court inappropriately relied on *Fitzpatrick's* holding that the Fourteenth Amendment could expand the Article III powers limited by the Eleventh Amendment.⁴⁴¹ The Fourteenth Amendment was adopted after the Eleventh Amendment and "alter[ed] the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."⁴⁴² Article I, on the other hand, fell under the balance developed by the Eleventh Amendment, and could not disrupt that balance as the Fourteenth Amendment could.⁴⁴³

Nevertheless, under the logic of *Fitzpatrick* and *Seminole Tribe*, Congress would have the authority to abrogate state's sovereign immunity under the Thirteenth, Fifteenth, Nineteenth, Twenty Fourth, and Twenty Sixth Amendments which also grant Congress the authority to enforce these amendments by statute.⁴⁴⁴ All of these Amendments provide Congress the authority to enforce them by legislation, and they were all ratified after the Eleventh Amendment and therefore would amend the "pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."⁴⁴⁵ However, outside these limited circumstances, a state retains its sovereign immunity within federal courts.

IV. STATE SOVEREIGN IMMUNITY WITHIN THE COURTS OF SISTER STATES

D. Traditional State Recognition of Sister State Sovereign Immunity

State courts have long recognized the immunity of sister states. Among the first cases in

⁴³⁷ *Florida Prepaid Postsecondary Educ. Expenses Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999).

⁴³⁸ 491 U.S. 1, 19 (1989).

⁴³⁹ 517 U.S. 44 (1996).

⁴⁴⁰ *Id.* at 66.

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ U.S. Const. amend. XIII, § 2 (prohibiting slavery); U.S. Const. amend. XV, § 2 (granting people of all races the right to vote); U.S. Const. amend. XIX, § 2 (granting women the right to vote); U.S. Const. amend. XXIV, § 2 (prohibiting the use of a poll tax); U.S. Const. amend. XXVI, § 2 (granting all people 18 years and older the right to vote).

⁴⁴⁵ *Seminole Tribe*, 517 U.S. at 66.

the legal history of the United States dates back to 1781, *Nathan v. Virginia*,⁴⁴⁶ where a Pennsylvania citizen sought to attach property belonging to Virginia in a Pennsylvania court.⁴⁴⁷ The Pennsylvania court dismissed the suit on the basis of Virginia's sovereign immunity.⁴⁴⁸

The Constitution did not specifically mention state sovereign immunity in the courts of other states. The Tenth Amendment guaranteed that powers not denied to the states or granted to the Federal Government were reserved for the states.⁴⁴⁹ However, there was no express grant or denial of the immunity anywhere written in the Constitution, except of course Article III, as already addressed in the previous section.

Very few cases exist after the ratification of the Constitution, which only emphasizes a long held recognition of the doctrine that made it futile to bring such suits. The only cases known include two cases evolving from the same incident, in North Dakota.⁴⁵⁰ A miner working for a South Dakota mine located in North Dakota brought a suit for injuries against South Dakota in a North Dakota court.⁴⁵¹ The North Dakota Supreme Court dismissed the cases holding that it was bound by comity and the Constitution to recognize the sovereign immunity of South Dakota.⁴⁵² The North Dakota Supreme Court reasoned that if the Eleventh Amendment prevented even the Federal Government from ignoring the sovereign immunity of a state, then there is a stronger argument that states are not allowed to ignore the immunity either.⁴⁵³

E. The End of the Doctrine: *Nevada v. Hall* and *Franchise Tax Bd. of California v. Hyatt I*

States appeared to recognize the doctrine of sovereign immunity until the issue came before the Supreme Court for the first time in 1979.⁴⁵⁴ In *Nevada v. Hall*,⁴⁵⁵ California residents were injured when a University of Nevada employee caused a collision on a California highway.⁴⁵⁶ The California residents brought suit against Nevada in California.⁴⁵⁷ Nevada sought to have the case dismissed under its sovereign immunity,

⁴⁴⁶ 1 U.S. 77 (1781).

⁴⁴⁷ *Nathan v. Virginia*, 1 U.S. 77 (Penn. 1781).

⁴⁴⁸ *Id.* at 81.

⁴⁴⁹ U.S. Const. amd. X.

⁴⁵⁰ *Paulus v. South Dakota*, 227 N.W. 52 (N.D. 1929) (*Paulus II*); *Paulus v. South Dakota*, 201 N.W. 867 (N.D. 1924) (*Paulus I*).

⁴⁵¹ *Paulus I*, 201 N.W. 867.

⁴⁵² *Paulus II*, 227 N.W. at 54–55; *Paulus I*, 201 N.W. at 869.

⁴⁵³ *Paulus II*, 227 N.W. at 54–55.

⁴⁵⁴ *Nevada v. Hall*, 440 U.S. 410 (1979).

⁴⁵⁵ 440 U.S. 410 (1979).

⁴⁵⁶ *Hall*, 440 U.S. at 411.

⁴⁵⁷ *Id.* at 411–12.

but was denied by the California Supreme Court.⁴⁵⁸ Nevada then tried to limit recover to \$25,000 under its statutory waiver limitation, arguing that the Full Faith and Credit Clause required California to recognize its statutory waiver limitation.⁴⁵⁹ Again, California rejected the argument, and a jury found in favor of the California residents and awarded damages of \$1,150,000.⁴⁶⁰ Nevada challenged the denial of its sovereign immunity and the rejection of its statutory waiver limitation in the U.S. Supreme Court.⁴⁶¹ The Supreme Court affirmed the California courts' decisions.⁴⁶²

The Court recognized the two aspects to sovereign immunity—immunity within a sovereign's own courts and immunity within the courts of another sovereign.⁴⁶³ The Court declared that the immunity within a sovereign's own courts was a product of the common law that was based on the old feudal system and the fiction that the King could do no wrong.⁴⁶⁴ The court rejected the fiction, but realizing that the immunity was still recognized under case law, held that it also came from the "right to govern,"⁴⁶⁵ and was "based '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.'"⁴⁶⁶ However, the Court did not find either of these justifications for the immunity helpful in determining whether the immunity extended to another state's courts.⁴⁶⁷

Therefore, the Court turned to *The Schooner Exchange v. McFaddon*,⁴⁶⁸ wherein Chief Justice Marshall maintained that any immunity enjoyed by a French vessel must be granted by American law.⁴⁶⁹ The Court held that this case recognized that it was a principle of comity for a sovereign to recognize the sovereign immunity of another.⁴⁷⁰ This same principle would apply to states, if they were separate sovereign nations, and should therefore apply to them as united sovereign states, unless there was a constitutional provision that prevented states from recognizing the immunity of sister states.⁴⁷¹

The Court rejected a constitutional protection of sovereign immunity under the Eleventh

⁴⁵⁸ Hall v. Nevada, 8 Cal.3d 522, 524, 526 (Cal. 1972).

⁴⁵⁹ Hall, 440 U.S. at 412–13.

⁴⁶⁰ Id.

⁴⁶¹ Id.

⁴⁶² Id.

⁴⁶³ Id. at 414.

⁴⁶⁴ Id. at 414–415.

⁴⁶⁵ Id. at 416 (quoting Justice Jay in *Chisholm v. Georgia*, 2 U.S. 419, 472 (1793)).

⁴⁶⁶ Id. at 416 (quoting Justice Holmes in *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907)).

⁴⁶⁷ Id. at 416.

⁴⁶⁸ 7 U.S. 116 (1812).

⁴⁶⁹ Hall, 440 U.S. at 416–417.

⁴⁷⁰ Id. at 417–418.

⁴⁷¹ Id. at 418.

Amendment, because the Eleventh Amendment extended only to federal courts.⁴⁷² It did not apply to states and did not work as a protection of a state's sovereign immunity in another state's courts.⁴⁷³ The Supreme Court further rejected Nevada's argument that the Full Faith and Credit Clause of the Constitution "implicitly establishes a Union in which the States are not free to treat each other as unfriendly sovereigns, but must respect the sovereignty of one another."⁴⁷⁴ The Supreme Court recognized that while the nation was not a complete union of 50 completely independent states, the recognition of sovereignty among them was still nothing more than "a matter of comity."⁴⁷⁵ California had chosen a policy that required full compensation in its courts for the injuries committed on its highways. The Court held that the Constitution did not give the Court authority to "frustrate that policy out of enforced respect for the sovereignty of Nevada."⁴⁷⁶

Additionally, the Supreme Court agreed that the Full Faith and Credit Clause did not bind California to recognize Nevada's statute waiving sovereign immunity to the amount of \$25,000.⁴⁷⁷ Court precedent made clear that a state was not required to recognize "another State's law in violation of its own legitimate public policy."⁴⁷⁸ The Court recognized California's legitimate interest in "providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents'" was so important to California that it had removed its own immunity in these suits.⁴⁷⁹ It found that requiring California to limit recovery against Nevada to \$25,000 "would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists for full recovery."⁴⁸⁰ The Court held that the Full Faith and Credit Clause did not require this outcome.⁴⁸¹

Hall, seemingly settled the question for 24 years. Then, in 2003, the Supreme Court once again faced the question whether a State could be haled into the court of a sister state in *Franchise Tax Bd. of California v. Hyatt (Hyatt I)*.⁴⁸² Again, the same characters in this story, California and Nevada, but the roles were reversed. This time, Nevada was haling California into its courts. The Supreme Court upheld *Hall*, and held that the Full Faith and Credit Clause does not require a state to recognize another state's sovereign

⁴⁷²*Id.* at 420.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 424–425.

⁴⁷⁵ *Id.* at 425.

⁴⁷⁶ *Id.* at 426.

⁴⁷⁷ *Id.* at 421.

⁴⁷⁸ *Id.* at 421–422.

⁴⁷⁹ *Id.* at 424.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 (2003)(*Hyatt I*).

immunity statutes.

In *Hyatt I*, a former California citizen, Gilbert P. Hyatt, moved to Nevada in 1991, and filed a part-year resident income tax return with California.⁴⁸³ In the tax return, Hyatt informed California that he had become a resident of Nevada.⁴⁸⁴ In 1993, California Franchise Tax Board (CFTB) conducted an audit to determine whether Hyatt had underpaid state taxes.⁴⁸⁵ CFTB concluded that Hyatt did not become a resident of Nevada until April, 1992.⁴⁸⁶ California assessed taxes for 1991 and 1992 and imposed civil fraud penalties.⁴⁸⁷ Hyatt initiated a suit against CFTB in Nevada.⁴⁸⁸

CFTB challenged the court's jurisdiction on the basis of sovereign immunity.⁴⁸⁹ The Nevada Supreme Court ordered the District Court to dismiss the negligence claims under principles of comity, but held that the intentional torts claims could proceed.⁴⁹⁰ In making this ruling, the Nevada Supreme Court noted that both Nevada and California had generally extended waivers to suits against their agencies, unless a statute expressly provides for immunity.⁴⁹¹ In this case, California had extended immunity to its tax collecting agency, CFTB, where Nevada had not.⁴⁹² Therefore, it was incumbent on the Court to decide whose law would be applied under principles of comity.⁴⁹³ The Court found that recognizing the immunity in negligence cases did "not contravene any Nevada interest," but recognizing the immunity in the intentional cases would because Nevada's interest in protecting its citizens from bad faith and intentional torts outweighed California's interest in giving complete immunity to its taxation agency.⁴⁹⁴

The U.S. Supreme Court upheld Nevada's decision by affirming "that the Constitution did not confer sovereign immunity on States in the courts of sister States."⁴⁹⁵ CFTB asked the court to recognize a rule within the Full Faith and Credit Clause that would grant states sovereign immunity in suits where "a refusal to do so would 'interfer[e] with a State's capacity to fulfill its own sovereign responsibilities,'" in this case, its sovereign responsibility to collect taxes.⁴⁹⁶ The court noted that in the past it tried a balancing test

⁴⁸³ *Id.* at 490.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* at 491.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* at 492.

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.* at 493.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.* at 497.

⁴⁹⁶ *Id.* at 495, 497.

in the context of the Full Faith and Credit Clause, but found the test to be unworkable, and abandoned such a test.⁴⁹⁷ The court thereafter held that “a State need not ‘substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’”⁴⁹⁸ The court also held that a similar rule to the one offered by CFTB was rejected on a federal level under the Tenth Amendment as “unsound in principle and unworkable in practice.”⁴⁹⁹ Further, if the court adopted such a rule, it would need to find a distinction between Nevada’s sovereign interest in education, the sovereign authority under question in *Hall*, and California’s sovereign interest in collecting taxes.⁵⁰⁰ The Court could not find a “constitutionally significant distinction between these relationships.”

Hall again withstood challenge in the 2016 case *Franchise Tax Bd. of California v. Hyatt (Hyatt II)*,⁵⁰¹ a follow-up case to *Hyatt I* that will be further discussed in the next subsection. A divided Court again affirmed that the Constitution does not protect state sovereign immunity.⁵⁰²

F. A Limitation on the Force Waiver: *Franchise Tax Bd. of California v. Hyatt II*

Thirteen years after the Supreme Court heard *Hyatt I*, the Court heard a follow-up case on whether, the Constitution permitted a state to award damages against a sister state greater than it would award to similar suits against itself.⁵⁰³ After *Hyatt I*, a jury found in favor of Hyatt and awarded him nearly \$500 million in damages and fees.⁵⁰⁴ California challenged the award on the basis that Nevada limited awards in similar cases against itself to \$50,000.⁵⁰⁵

In *Franchise Tax Bd. of California v. Hyatt (Hyatt II)*,⁵⁰⁶ the Supreme Court held that the Constitution did not permit Nevada to award damages against California that were greater than it would award against itself in similar cases because it evidenced a “‘policy of hostility’ toward California.”⁵⁰⁷ It reasoned that its holdings on the Full Faith and Credit Clause maintained that a state may choose to apply its own law over another

⁴⁹⁷ *Id.* at 495–96.

⁴⁹⁸ *Id.* at 496 (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 501 (1939)).

⁴⁹⁹ *Id.* at 498 (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)).

⁵⁰⁰ *Id.*

⁵⁰¹ *Franchise Tax Bd. of California v. Hyatt*, 136 S.Ct. 1277, 1280 (2016) (*Hyatt II*).

⁵⁰² *Id.* at 1280.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ 136 S.Ct. 1277 (2016).

⁵⁰⁷ *Id.* at 1281.

state's law, but consistently the court had found "that the State had 'not adopt[ed] any policy of hostility to the public Acts' of that other State."⁵⁰⁸ Nevada had "disregarded its own legal principles" of Nevada immunity law by allowing damages greater than \$50,000, which is hostile toward California without offering "sufficient policy considerations" to justify the application of a special rule of Nevada law that discriminates against its sister States.⁵⁰⁹ Nevada had justified its ruling because California agencies operate outside of Nevada's legislative control and oversight. The court held this justification was not enough to overcome a discriminatory rule against a sister state.⁵¹⁰

V. THE SUPREME COURT'S FAILURES

The Supreme Court made several mistakes in these state sovereign immunity cases. As will be further explained below, the Court incorrectly applied *McFaddon*, by not recognizing that California had not in fact rejected state sovereign immunity. Additionally, the Court ignored the inability of states and the Federal Government to enforce judgments against sovereign states. The Court also ignored a fundamental flaw with its Full Faith and Credit holdings, by forgetting to recognize the authority of states to ignore judgments that are repugnant to their own public policy. Finally, the Court's reasoning in *Hyatt II* is contradictory by allowing states to ignore a sister state's sovereign immunity, but still recognize its sister state's sovereignty. These flaws highlight the court's inaccurate application of state sovereign immunity due to a misunderstanding of its history and place in the Constitution.

G. Sovereignty Must be Granted by the Sovereign of the Territory

The Supreme Court held that *McFaddon*⁵¹¹ stood for the proposition that sovereign immunity must be given by the sovereign of the territory.⁵¹² If the sovereign of the territory does not recognize the immunity, then there is no immunity. Therefore, a state may choose to recognize or reject the immunity of a sister state.

However, the Supreme Court disregards the holding in *McFaddon* that a sovereign may ignore another sovereign's immunity, "[b]ut until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise."⁵¹³ In other words, there is a strong presumption that a sovereign enjoys its immunity in the courts of another sovereign, until that other sovereign explicitly and clearly establishes

⁵⁰⁸ *Id.* at 1281 (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)).

⁵⁰⁹ *Id.* at 1282.

⁵¹⁰ *Id.*

⁵¹¹ 7 U.S. 116 (1812).

⁵¹² *Nevada v. Hall*, 440 U.S. 410, 417 (1979).

⁵¹³ *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 146 (1812).

that it no longer recognizes the immunity. Such policy change cannot come from the courts. Chief Justice Marshall further noted in *McFaddon* that the court could not recognize the rebuttal of this presumption because of “the general inability of the judicial power to enforce its decisions.”⁵¹⁴ Therefore, “the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion.”⁵¹⁵

The Supreme Court’s misrepresentation of the immunity as a doctrine of common law allows for its fundamental error in permitting a judicial repeal of it. If the immunity is a doctrine of common law, it could be repealed by common law. However, it is a fundamental right each sovereign holds. Only the sovereign can waive its own sovereignty by legislation, or the people can remove it by fundamental law. Because the doctrine is so fundamental to a sovereign’s being, a repeal of the right through a court case without notice would be a fundamental violation on the law of nations. As Chief Justice Marshall acknowledged, it is a “question of policy,” meaning policy makers, legislators, are the only ones who can repeal the right within the territory.

Further, because the right is a fundamental right, a state would be required to give notice that it would no longer recognize the sovereignty of a sister state. Chief Justice Marshall stated in *McFaddon*, “[a] nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.”⁵¹⁶ This would be important because:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.⁵¹⁷

California had never passed legislation stating that sister states would be susceptible to suit for any harms caused by them on California’s highways. The fact that California waived its own immunity in such cases does not send a signal that another sovereigns’ sovereignty would be waived in those same circumstances. It was merely a statement that California would allow itself to be haled into its own courts for such harms.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ *Id.* at 137.

⁵¹⁷ *Id.*

California was required to give notice by statute that sister states would also be haled into California's courts for highway injuries. No such statute was passed, and California's courts could not remedy this in an *ex post facto* fashion through new case law.

H. Enforcement of Judgments Against Sovereign States

A sovereign can act as it pleases, but it must be able to enforce its actions to make them effective. The states have been stripped of all powers to enforce their judgments against a sister state. The power to declare war, or to initiate sanctions, to raise tariffs, or prohibit imports and exports with its sister states, were all stripped by the Constitution.⁵¹⁸ Further, an appeal to a higher authority, the Federal Government, would be a violation of the Eleventh Amendment. The Eleventh Amendment prohibits extending the judicial power to suits against states.⁵¹⁹ It is a judicial power to recognize judgments, and the judgment would need to be recognized before it could be enforced. So even an appeal to the President or the Congress to enforce of a judgment would first require a judicial recognition of the judgment as valid, and hence, a violation of the Eleventh Amendment.

It is within a state's best interest, to maintain its respect and authority, to only hale a sister state into court, in such cases where the sister state has waived its sovereignty. For if a state were to bring forth too many judgments against its sister states, other states may be unwilling to recognize judgments in cases where they have waived their immunity. Thus, the accusing state loses opportunities of relief for its citizens.

Additionally, a state that does not recognize the sovereignty of a sister state risks losing all respect of their own sovereignty at some future point. *Hall* and *Hyatt I*, are perfect examples of this reciprocity. In *Hall*, California ignored Nevada's sovereign immunity and held it liable for the accident that took place in California. Several years later, in *Hyatt I*, Nevada is given the same choice, whether to recognize California's immunity, and, of course, it does not.

Therefore, a state may pass judgment against a sister state, but there is no power to enforce that judgment except by the good will of the sister state under the judgment.

I. Full Faith and Credit

The Supreme Court has affirmed and reaffirmed that the Full Faith and Credit clause does not require states to recognize the sovereign immunity of sister states.⁵²⁰ However,

⁵¹⁸ U.S. Const. art. I, § 8.

⁵¹⁹ U.S. Const. amd. XI.

⁵²⁰ *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 499 (2003); *Nevada v. Hall*, 440 U.S. 410, 424 (1979).

the court is looking at only one side of the issue. While saying the Constitution does not prevent a state from issuing judgments against another state, the Court presumes that the Constitution does remove the other state's authority to ignore such judgments. Yet, there is no explanation to justify why a state's power to ignore another's sovereign immunity takes precedence over the other's power to ignore the judgments against itself.

The Full Faith and Credit Clause does not require a state to recognize judgments that are "in contravention of its own statutes or policy."⁵²¹ It would be repugnant to a state's policy to enforce a judgment against itself, where it has not waived its sovereignty. This interest would far outweigh any interest of the state issuing the judgment because to do so would be to recognize a sovereign over itself, which would in turn degrade the integrity of the state. Therefore, a state is under no obligation to recognize such judgments against it.

J. Whether a State Must Give its own Sovereign Immunity to Another State

In *Hyatt II*, the Court espouses a double standard. A state is not required to recognize the sovereign immunity of a sister state, but must provide all sovereign rights it gives unto itself. In other words, a state is not required to recognize the sovereignty of a sister state, but is at the same time required to recognize a sister state as a sovereign. A state makes the determination that a sister state is to be treated as a private person within its own courts when it makes the determination that it will not recognize the sovereignty of a sister state. If a state provides a limitation on damages to a private person, then of course, any award against a sister state that is greater than any such limitation upon private parties would be discriminatory. This could be accurately described as a policy of hostility toward a sister state.

However, it is perfectly within the rights of a state to not provide a sister state with the same sovereign privileges it grants itself in its own courts. If a state was recognizing a sister state as a sovereign, it would also recognize the sister state's sovereign rules and privileges. On the other hand, by ignoring the immunity to begin with, the state has made the determination that its sister state has no sovereign rights within its own courts, unless its legislature has made an exception for foreign sovereigns. The record does not show that Nevada provides any exceptions for other sovereigns in its courts. Thus, presumably, Nevada law does not provide the limit to damages that California was seeking.

The Court cannot pick and choose under the Constitution. Either states retain their

⁵²¹ *Hall*, 440. U.S. at 424 (quoting *Pac. Employers Ins. Co. v. Indus. Accident Comm'n of State of California*, 306 U.S. 493, 502 (1939) ("It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy")).

sovereignty under the Constitution, in which case a state cannot be haled into the courts of a sister state, or the Constitution does not recognize state sovereign immunity, in which case a state may choose to recognize the immunity, limit that immunity, or not recognize any immunity at all within its own courts.

VI. CONCLUSION

The Constitution guarantees that states retain all their sovereignty that was not forfeited to the Federal Government. Sovereign immunity, while initially forfeited in federal courts by Article III, has since been returned to the states by the Eleventh Amendment. Nowhere does the Constitution remove or limit the sovereign immunities of a state within the courts of a sister state. Under natural law, where sovereign immunity was formed, sovereigns have no authority over each other, and are only liable to each other by comity or force. The Constitution prevents states from engaging in using force against each other, leaving comity. It may be in the best interest of a state to waive its immunity in cases where citizens of a sister state has been harmed, but there is no constitutional provision that requires this waiver.

Hall answers the question whether a state may be haled into the courts a sister state and face suit. However, the Supreme Court has not yet ruled whether States are bound by these judgments. States have the right, under their constitutionally guaranteed sovereignty, to ignore these judgments. As a matter of comity and reciprocity, it may be in the states' best interest to pay the judgments against them. This will allow them to pursue remedies for harms done to their own citizens by sister states. However, this is a policy question that states are better positioned to answer. States cannot be constitutionally compelled to pay any damages they choose not to pay.