State Borders Are New Boundaries for Sovereign Immunity - Nevada v. Hall

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STATE BORDERS ARE NEW BOUNDARIES
FOR SOVEREIGN IMMUNITY—
NEVADA V. HALL

In Nevada v. Hall,1 a tort liability action, the United States Supreme Court held that a California citizen could sue the State of Nevada without its consent in a California court. With this holding, the Court tightened the reins on the extraterritorial use of sovereign immunity as a defense. Now, whether or not one state accords immunity to another state is a mere matter of comity2—it is not a constitutionally protected right.3

A divided Court4 upheld California’s jurisdiction in the action, thereby denying Nevada’s claim of immunity. With this decision, the Court departed from traditionally accepted notions of sovereign immunity.5 Rather than an unforeseeable change in the demarcation of states’ rights, Nevada v. Hall represents a reasonable culmination of various trends. Although case law has consistently affirmed the principle of absolute immunity,6 the doctrine recently has been limited,7 reflecting judicial unwillingness to shelter states from liability and obligation.8

This Note supports the shift in attitude manifested by the Court’s decision but criticizes the Court’s failure to set forth adequate guidelines for future application of its holding. The Note will analyze the Supreme Court’s decision in light of the previously held assumption that the defense of extraterritorial immunity was a constitutionally protected state’s right. Further, it will examine the Court’s approval of California’s refusal to apply Nevada’s statutorily imposed limitation on allowable recovery. Finally, the impact of the decision will be discussed.

FACTS AND PROCEDURAL HISTORY

The respondents in Nevada v. Hall were California residents who brought a personal injury action in California against, inter alia, the State of Nevada

2. Comity of states is defined as “[s]imply a phrase designating the practice by which the courts of one state follow the decision of another on a like question, though not bound by law of precedents to do so.” It is characterized by its voluntary nature; it is accorded as a matter of deference and good will. Black’s Law Dictionary 334 (4th rev. ed. 1968).
3. 440 U.S. at 426.
4. This was a six to three decision, with two dissenting opinions. Chief Justice Burger and Justice Rehnquist joined in the dissent written by Justice Blackmun. Id. at 427-32. The Chief Justice also joined in the dissent written by Justice Rehnquist. Id. at 432-43.
5. See notes 28-37 and accompanying text infra.
6. See notes 28-33 and accompanying text infra.
7. See notes 34-35 and accompanying text infra.
8. Id.
and the University of Nevada. The injuries resulted from an automobile collision that occurred on a California highway involving respondents' car and a car owned by the State of Nevada. On motion of the State of Nevada, the trial court quashed the complaint and service of summons. The California Court of Appeal affirmed.

The California Supreme Court reversed, stating that Nevada waived its right to the defense of immunity by crossing the border into California and that "state sovereignty ends at the state boundary." Further, the court

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9. Hall v. University of Nev., 25 Cal. App. 3d 622, 102 Cal. Rptr. 67 (1972), rev'd, 8 Cal. 3d 522, 503 P.2d 1363, 105 Cal. Rptr. 355 (1972), cert. denied, 414 U.S. 820 (1973). The suit originally was filed in San Francisco Superior Court. An action also was brought against the administrator of the driver's estate. Plaintiff-respondents effected service of process on the non-resident motorist through the California long-arm statute, which provides as follows:
The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any operation by himself or agent of a motor vehicle anywhere within this state, or in the event the nonresident is the owner of a motor vehicle then by the operation of the vehicle anywhere within this state by any person with his express or implied permission, is equivalent to an appointment by the nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against the nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle anywhere within the state by himself or agent, which appointment shall also be irrevocable and binding upon his executor or administrator.

CAL. VEH. CODE § 17451 (West).

10. 440 U.S. at 441. The accident occurred in May, 1968, leaving one respondent, a minor, severely retarded due to brain damage. His mother, also a respondent, suffered severe physical and emotional injuries. The driver of the Nevada car was killed in the collision. Id. at 413 n.4. At the trial, it was conceded that the car was State-owned, University-operated, and driven on official business by an employee of the University. It also was conceded that the University is an instrumentality of the State of Nevada. Id. at 411.


12. Hall v. University of Nev., 25 Cal. App. 3d 621, 102 Cal. Rptr. 67 (1972). The California appellate court held that Nevada had not expressly consented to the suit by its own statutory waiver of immunity. See note 19 infra. The court refused to interpret the California statute as encompassing implied consent to suit based on acceptance of service of process, stating that "while such an argument has a certain appeal to one's sense of logic, it begs the fundamental question, i.e., whether one state may legislate away the sovereignty of a sister state." The court concluded that sovereignty may be waived only where there exists a "clear and unambiguous" statute of the state legislature. 25 Cal. App. 3d at 621, 102 Cal. Rptr. at 70.


[S]ister states who engage in activities within California are subject to our laws with respect to those activities and are subject to suit in California courts with respect to those activities. When the sister state enters into activities in this state, it is not exercising sovereign power over the citizens of this state and is not entitled to the benefits of the sovereign immunity doctrine as to those activities unless this state has conferred immunity by law or as a matter of comity.

8 Cal. 3d at 524, 503 P.2d at 1364, 105 Cal. Rptr. at 356.

14. Id. The court discussed decisions from other states in support of this proposition. See id. at 524, 503 P.2d at 1365, 105 Cal. Rptr. at 357, where the court cited People v. Streeper, 12
refused to grant immunity to Nevada on the basis of comity, finding that California policies regarding compensation for tort victims outweigh the potential embarrassment to a sister state. The decision was based solely on California law and its finding was consistent with other California choice of law decisions.

Nevada exhausted all avenues of review without success. Immediately prior to trial on remand, Nevada moved that the California court limit money damages to $25,000 per person, as required under Nevada Law.

Ill. 2d 204, 212, 145 N.E.2d 625, 629 (1957), noting that the "sovereignty of one State does not extend into the territory of another so as to create immunity from suit or freedom from judicial interference." Hall v. University of Nev., 8 Cal. 3d at 524, 503 P.2d at 1365, 105 Cal. Rptr. at 357. Streeprer involved an injunction proceeding against property owned by Missouri in Illinois. The property was deemed to be owned as if by a private individual. The Hall court also relied on State v. Holcomb, 85 Kan. 178, 116 P. 251 (1911), holding that property owned by Missouri in Kansas was subject to taxation because in its capacity as a property owner, Missouri was to be treated as any other private owner. Similarly, Georgia v. Chattanooga, 264 U.S. 472 (1924), held that Georgia had implicitly consented to be amenable to suit by acquiring and using Tennessee land. Accord, Parden v. Terminal Ry., 377 U.S. 184 (1964), where the Court held that state operation of a railroad in interstate commerce subjected the suit to the Federal Employer's Liability Act, and was amenable to suit in the federal courts. The Court concluded that the commercial undertakings evidenced a waiver of sovereign immunity and constituted an implied consent to suit. Although the Hall court relied on the above cases, it conceded that the cited cases "involve enforcement of property duties rather than in personam jurisdiction and a transitory action." 8 Cal. 3d at 525, 503 P.2d at 1365, 105 Cal. Rptr. at 357.

15. The court stated that "finally it must be pointed out that in a society such as ours, which places such great value on the dignity of the individual and views the government as an instrument to secure individual rights, the doctrine of sovereign immunity must be deemed suspect." 8 Cal. 3d at 526, 503 P.2d at 1365, 105 Cal. Rptr. at 358 (emphasis added).

16. As support for this "balancing test", the court cited to Hess v. Pawloski, 274 U.S. 352, 356-57 (1927), where the United States Supreme Court stated:

Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. . . . [T]he State may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served.

8 Cal. 3d at 525, 503 P.2d at 1365, 105 Cal. Rptr. at 357. The California court also noted that the Supreme Court of Nevada had applied the Hess holding in a Nevada case involving the non-resident motorist statute of that state. See Kroll v. Nevada Indus. Corp., 65 Nev. 174, 191 P.2d 889 (1948).

17. Hall v. University of Nev., 8 Cal. 3d at 525-26, 503 P.2d at 1365-66, 105 Cal. Rptr. at 357-58. See also note 84 infra.

18. Nevada's petition for rehearing was denied. The petition for writ of certiorari also was denied. University of Nev. v. Hall, 414 U.S. 820 (1973).

19. The legislation incorporating Nevada's waiver of immunity also limits Nevada's liability in tort actions brought in its own courts. The relevant sections are 41.031 and 41.035(1). Section 41.031 provides:
The trial court\textsuperscript{20} denied this motion and, after a jury finding of negligence, the superior court entered judgment on the verdict and awarded damages in the amount of $1,150,000.\textsuperscript{21} The court of appeal affirmed.\textsuperscript{22}

When the California Supreme Court denied review,\textsuperscript{23} Nevada successfully sought certiorari to the United States Supreme Court,\textsuperscript{24} claiming violations of article III, the eleventh amendment, and the full faith and credit clause.\textsuperscript{25} In a six to three decision,\textsuperscript{26} the Court upheld California's jurisdiction of the action.\textsuperscript{27}

1. The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided in NRS 41.032 to 41.036, inclusive, and subsection 3 of this section, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive, or the limitations of NRS 41.010. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the state, and their liability shall be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, and subsection 3 of this section, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive.

2. An action may be brought under this section, in a court of competent jurisdiction of this state, against the State of Nevada, any agency of the state, or any political subdivision of the state. In an action against the state or any agency of the state, the State of Nevada shall be named as defendant, and the summons and a copy of the complaint shall be served upon the secretary of state.

\textsuperscript{NEV. REV. STAT. § 41.031 (1965).}

Section 41.035(1) provides:

1. No award for damages in an action sounding in tort brought under NRS 41.031 may exceed the sum of $25,000 to or for the benefit of any claimant. No such award may include any amount as exemplary or punitive damages or as interest prior to judgment.

\textsuperscript{NEV. REV. STAT. § 41.035(1) (1965).}


21. The trial court decision was reported in the decision of the California Court of Appeal in Hall v. University of Nev., 74 Cal. App. 3d 280, 141 Cal. Rptr. 439 (1977).

22. \textit{Id.}

23. \textit{Id.} at 286, 141 Cal. Rptr. at 442.


26. See note 4 \textit{supra}.

27. The response of the states was immediate. Nevada and 41 other states petitioned the Court for rehearing. West Virginia and 40 states filed a brief requesting clarification of the Court's decision stating that "[t]he court's newly announced doctrine could result in boundless litigation against unconsenting states." On April 16, 1979, the Court denied the request.


The significance of the Court's decisions is emphasized when viewed against the historical backdrop of the doctrine of sovereign immunity. As the majority noted, the doctrine is an amalgam of two different concepts: the first involves immunity in one's own court and the second involves immunity in the courts of another sovereign state. Historically, however, the right to sovereign immunity has been viewed as absolute in either case.

A fundamental postulate of the federalist system has been that a sovereign may not be sued without its consent. This doctrine of sovereign immunity provides specifically that each state will respect the independence of every other state and that the courts of one state may not sit in judgment on the acts of another state done within the former state's territory. The concept has its roots in English feudal history and law that presumed the "King could do no wrong." The doctrine became a part of American jurisprudence and flourished for two centuries. The United States Supreme Court recognized this principle, noting that "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . .". The scope of sovereign immunity has been narrowed in its extraterritorial application. In interstate matters, a distinction has been made between acts of a private nature and acts of a public nature. Some courts have held, based on arguments of implied consent, that under certain circumstances a


28. 440 U.S. at 414.
29. See, e.g., Ex Parte New York, 256 U.S. 490 (1921) (state not amenable to suit without consent in admiralty action); Palmer v. Ohio, 248 U.S. 32 (1918) (no constitutional right to sue a state); Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (there can be no right "against the authority that makes the law on which the right depends"); Smith v. Reeves, 178 U.S. 436 (1900) (a state could not be sued without its consent by a corporation); Hans v. Louisiana, 134 U.S. 1 (1890) (state not amenable to suit by its own citizen in federal court); Nathan v. Virginia, 1 U.S. (1 DalI.) 77 (1781) (Pennsylvania court ruled that a state could not be compelled to appear in a sister state's court).
31. 99 S. Ct. at 1185 citing W. Blackstone, Commentaries on the Laws of England 239 (1765). Blackstone argued that "whatever may be amiss in the conduct of public affairs is not chargeable personally on the king, nor is he, or his ministers accountable for it to the people." This notion, however, implied that once a sovereign became aware of an injury inflicted through "misinformation or inadvertence", redress would follow. 1 W. Blackstone, Commentaries on the Laws of England 241-44 (1765). See generally 1 F. Pollock, F. Maitland, The History of English Law (2d ed. 1898).
32. 61 U.S. (20 How.) 527 (1857).
33. Id. at 529.
34. See Martiniak, supra note 27, at 1155-57. This distinction is consistent with policy changes in our dealings at the international level where we have begun to accord restrictive, rather than absolute immunity. While this is a relatively recent shift in American policy, the
state may waive its extraterritorial immunity when performing acts of a private nature.  

But even these judicial alterations in the doctrine reflected an assumption that sovereign immunity is a constitutionally protected right. Article III, the eleventh amendment, and the full faith and credit clause have been credited with providing such an extraterritorial right. Prior to Nevada v. Hall, the Court never probed this assumption because states generally had been liberal in according one another comity.  

Article III and the Eleventh Amendment—Speculations on Historical Intentions

Article III and the eleventh amendment have been controversial throughout the history of the United States. The interpretation of each has theory of restrictive sovereign immunity was introduced in international law almost 100 years ago. Mirabelli v. Winspear (1886), 38 Giur. Ital. 1 228 (Corte di Cassazione). The Mirabelli court concluded that when a state engaged in activities such as commercial transactions, it did so as a private individual, rather than as a sovereign. By the middle of the twentieth century, international law no longer adopted the principle of absolute immunity. See Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 25 B.R.T. Y.B. 111 (1951). The restrictive theory was espoused officially by the United States in 1952. 26 DEP'T STATE BULL. 984 (1952). Since then various federal courts have upheld jurisdiction over a foreign sovereign based on this theory. See, e.g., Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, 360 F.2d 103 (2d Cir. 1966); Victory Transport Inc. v. Comisia General, 336 F.2d 354 (2d Cir. 1964); Premier Steamship Corp. v. Embassy of Algeria, 336 F. Supp. 507 (S.D.N.Y. 1971). See generally Note, The Jurisdictional Immunity of Foreign Sovereigns, 63 YALE L.J. 1148 (1954); see also Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. COLO. L. REV. 1 (1972); Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV. L. REV. 1 (1963); Note, Balancing The Vindication Of Constitutional Guarantees Against The Effective Functioning of Government: The Official Immunity Scale Does Not Work—Butz v. Economou, 28 DEPAUL L. REV. 143 (1978).  

35. See, e.g., Parden v. Terminal Ry., 377 U.S. 184 (1964) (operation of a common carrier by a state implies consent); United States v. California, 297 U.S. 175 (1936) (state susceptible to suit in commercial venture). See note 14 supra for other examples of holdings consistent with this approach.  

36. In Parden v. Terminal Ry., 377 U.S. 184 (1964), the Court stated: Recognition of the congressional power to render a State suable... does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States... is here being overridden. It remains the law that a State may not be sued by an individual without its consent. Id. at 192. See also note 29 supra.  

37. The Court in Nevada v. Hall stated that "[i]n the past, this Court has presumed that the States intended to adopt policies of broad comity towards one another. But this presumption reflected an understanding of state policy, rather than a constitutional command." 440 U.S. at 425.  

38. U.S. CONST. art. III provides, in relevant part: Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. ... Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or
had impact on the doctrine of sovereign immunity. Some early jurists believed article III was the constitutional source of sovereign immunity, while others were convinced that it abrogated immunity. The popularity of this latter view has eroded, however, and the prevailing view is that the Framers did intend that the Constitution uphold immunity as it existed under American common law.

Unfortunately, however, the nature of sovereign immunity as it existed prior to the Constitution is unclear. During the constitutional debates, the question of sovereign immunity was interwoven with the politics of ratification. The prospective states were alternately threatened with loss of their sovereign powers by opponents of the Constitution and reassured or reten-

which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

39. U.S. Const. amend. XI provides: "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."

40. Virginia Coupon Cases, 114 U.S. 269, 337-38 (1885) (Bradley, J., dissenting). See also note 52 infra. More recently, Justice Marshall stated that "[t]he root of the constitutional impediment to the exercise of the federal judicial power . . . is not the Eleventh Amendment but Art. III of our Constitution." Employees v. Missouri Pub. Health Dept., 411 U.S. 279, 291 (1973). This view was founded on a literal application of the language vesting the judiciary with power in the controversies enumerated by the article.

41. See, e.g., Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) in which the Court upheld a suit against a state by a citizen of another state in a federal court. Two of the prominent debaters from the Virginia Convention who believed that article III abrogated sovereign immunity played important roles in Chisholm; James Wilson authored one of the majority opinions and Edmund Randolph was attorney for the plaintiff. See note 47 infra. See also Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 531 (1978) [hereinafter cited as Field].

42. See Field, supra note 41, at 527. See also Monaco v. Mississippi, 292 U.S. 313, 324-25 (1934) (principality of Monaco not able to bring action against State of Mississippi in U.S. Supreme Court without the consent of Mississippi); Hans v. Louisiana, 134 U.S. 1, 12-15 (1890) (eleventh amendment bars suits brought in federal courts against a state by one of its citizens); 1 C. Warren, The Supreme Court in United States History 91, 96 (1922); Cullison, Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers), 5 Hous. L. Rev. 1, 7, 9 (1967).

43. There was much disagreement among the debaters involved in the process of constitutional ratification that was not settled at the time it was ratified. See Field, supra note 41, at 529, 530, 534. See also C. Jacobs, The Eleventh Amendment and Sovereign Immunity 27-40 (1972) [hereinafter cited as Jacobs]. Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413 (1975).

44. Edmund Randolph, James Wilson, and Patrick Henry were prominent among those who claimed that article III abrogated sovereign immunity. See generally 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 207, 318, 543 (1836) [hereinafter cited as Elliot].
tion of their powers by constitutional supporters.\(^{45}\) It appears that when the Constitution was adopted, there was no consensus regarding the status of sovereign immunity.\(^{46}\)

The position that article III abrogated states' immunity was reflected in *Chisholm v. Georgia*.\(^{47}\) In that case, the United States Supreme Court held that the states may be sued in federal courts by citizens of other states. *Chisholm*, however, was criticized for its literal interpretation of article III and was overruled abruptly by the adoption of the eleventh amendment.\(^{48}\)

The ensuing case law fervently reinstated the pro-immunity position.\(^{49}\) In the leading case of *Hans v. Louisiana*,\(^{50}\) the Court held that a state was not amenable to citizen suits brought in federal courts. *Hans* thus affirmed that sovereign immunity, as a common law doctrine, had survived the ratification of article III. Additionally, *Hans* was regarded as implying a constitutional as well as a common law basis for immunity.\(^{51}\) While many courts extended their interpretation of article III to incorporate such a constitutional guarantee of immunity, this position never was adequately supported by historical sources.\(^{52}\)

\(^{45}\) The often quoted remarks of John Marshall, James Madison, and Alexander Hamilton, who were supporters of the Constitution, probably were made in response to the remarks made by the opponents to it. For example, Hamilton stated:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here.


\(^{46}\) See Jacobs, *supra* note 43, at 40. Jacobs draws this conclusion after a thorough discussion of the ratification proceedings as they involved the issue of immunity. Jacobs concluded that "the legislative history of the Constitution hardly warrants the conclusion drawn by some that there was a general understanding, at the time of ratification, that the states would retain their sovereign immunity." *Id.*

\(^{47}\) 2 U.S. (2 Dall.) 419 (1793). The Court upheld the propriety of federal jurisdiction over an action brought by a South Carolina citizen against the state of Georgia for recovery of monies owed on bonds on which Georgia had defaulted.


\(^{49}\) The pro-immunity position was represented by the Marshall-Madison view. See note 45 *supra*.

\(^{50}\) 134 U.S. 1 (1890). *Hans* held that a citizen of Louisiana could not bring an action against that state without the consent of the state. See note 29 *supra*.

\(^{51}\) This is probably because the *Hans* court quoted the remarks of Hamilton from the *Federalist*. See note 45 *supra*. Hans v. Louisiana, 134 U.S. at 13. See also Field, *supra* note 41, at 537.

\(^{52}\) For cases interpreting article III as incorporating a constitutional mandate, see, e.g., Employees v. Missouri Pub. Health Dept., 411 U.S. 279, 291 (Marshall, J., concurring) (gov-
It was widely assumed that the eleventh amendment mandated absolute sovereign immunity because it was passed to overturn Chisholm. Until Nevada v. Hall, no Justice of the United States Supreme Court disputed this assumption. On the other hand, scholars recently have suggested alternative interpretations of the amendment. One commentator contended that the amendment upholds state immunity against federal suit only on state causes of action. It also has been suggested that the effect of the amendment be restricted to actions it specifically enumerates. Finally, the eleventh amendment has been read as repudiating the theory that article III abrogated sovereign immunity, while restoring it as a "pre-existing right of the State governments." The result in Nevada v. Hall is consistent with the latter view; sovereign immunity is neither abrogated nor required by the Constitution but exists as a time-honored, common law doctrine.

Full Faith and Credit—the Lawyer’s Clause

The full faith and credit clause has been referred to as the "lawyer’s clause of the Constitution." The clause serves to orchestrate the various
independent legal systems of the United States and to unify nationally all judicially established rights. Thus, the mandates of the clause are important in the analysis of sovereign immunity.

The Supreme Court, dealing with the clause for the first time in 1813, held that a judgment that is conclusive in the state in which it was rendered must be upheld as valid elsewhere. While this position is still consistent with the current view, it is subject to various qualifications. For example, a judgment may not be accorded full faith and credit if the original court lacked jurisdiction. In addition, criteria used for the enforcement of foreign judgments are usually more stringent than criteria applied to recognition of foreign laws. Some courts have held, for example, that the clause does not require one state to apply the laws of another state in contravention of its own legislation or policies.

As states substitute legislation for common law, greater difficulty arises regarding the recognition of foreign statutes. In a multistate occurrence where each state may claim the right to govern, a choice of law problem arises. Generally, the forum is free to apply its own law, but this is con-

faith and credit clause involves a constitutional element of "one of the most baffling subjects of legal science, the so-called Conflict of Law." B. Cardozo, The Paradoxes of Legal Science 67 (1928).

59. See Jackson, supra note 58, at 2.

60. Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813) (action of debt upon a judgment of the Supreme Court of New York brought in the courts of another state).

61. See, e.g., A. Ehrenzweig, A Treatise on the Conflict of Laws 213-14 (1962) [hereinafter cited as EHRENZWEIG], noting that because of increased uniformity of jurisdictional standards, it is not common for the full faith and credit problem to arise in a jurisdictional context. But see Welch v. Downs, 1 Ill. App. 2d 424, 118 N.E.2d 51 (1954) (Ohio award not honored in Illinois due to insufficiency of service per Illinois standards); American Cas. Co. v. Kincaid, 219 Miss. 653, 69 So. 2d 820 (1954) (Wisconsin judgment denied full faith and credit even though it was in accord with Wisconsin standards for jurisdiction).

The courts have distinguished also between denial of a right and denial of a remedy and have held that full faith and credit is not required to be given to a foreign remedy. See, e.g., Tennessee Coal, Iron & R.R. v. George, 233 U.S. 354, 360 (1911) (denied the application of the full faith and credit clause to an exclusionary statute in an injury suit). See generally EHRENZWEIG, supra, at 143-44.

62. See, e.g., Pacific Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939), discussed in notes 63 and 106 infra. See also Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 548 (1935), in which the Court applied the following limitation on the full faith and credit clause: "It follows that not every statute of another state will override a conflicting statute by virtue of the full faith and credit clause."

63. In such an instance a "true conflict" may occur. A "true conflict" has been defined as occurring when "[e]ach state has a policy, expressed in its law, and each state has a legitimate interest, because of its relationship to one of the parties, in applying its law and policy to the determination of the case." Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227, 252 (1958).

Choice of law problems have been especially perplexing in certain areas: domestic relations, liability insurance, wrongful death actions, taxation, statutes of limitation, and workmen's compensation. See, e.g., Watson v. Employers Liable Assurance Corp., 348 U.S. 66 (1954) (constitutionality of "direct action" statute) discussed in notes 65-66 and accompanying text infra; Hughes v. Fetter, 341 U.S. 609 (1919) (Wisconsin courts were bound by clause to honor Illinois
ditioned upon a consideration of state interests. In Watson v. Employers Liability Assurance Corp., the Supreme Court noted that in interstate transactions each state may have an interest in enforcing its own policies. In Watson, the Court held that the full faith and credit clause did not require Louisiana to subordinate its own policy in favor of Massachusetts' policy because the interests of Massachusetts did not outweigh those of Louisiana, the forum state. Many cases have affirmed this resulting limitation on the extraterritorial effect of state legislation and policy. The basis for the limitation is the evaluated quality of the forum state's interest in maintaining the action in its courts.

Subject to certain exceptions, once an award is reduced to a judgment it is entitled to full recognition in the courts of a sister state. If recognition is refused, an asserted federal right is denied, and this denial can be grounds for review by the United States Supreme Court.

wrongful death statute for a death which occurred in Illinois); Order of Travelers v. Wolfe, 331 U.S. 586 (1947) (action brought by Ohio resident against an Ohio fraternal society in the courts of South Dakota); Williams v. North Carolina, 317 U.S. 287 (1942) (Nevada divorce upheld in North Carolina); Pacific Insurance Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939) (Massachusetts employee injured in California brought an action against the Massachusetts employer in the California courts) discussed in note 106 infra; Bonaparte v. Tax Court, 104 U.S. 592 (1881) (debt of one state not exempt from taxation in another state).

Moreover, it would appear that a "true conflict" would arise when a state asserts a special interest because, as in Nevada v. Hall, the state itself is a defendant. The resolution of the California choice of law problem is discussed at note 84 infra.

64. The Supreme Court in Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. at 547-48 stated:

Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. See generally Sedler, Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases, 44 TENN. L. REV. 975, 980 (1977) [hereinafter cited as Sedler] in which it was noted that whenever courts conclude that they have a real interest in applying their own laws, in order to implement their own policies, they usually applied their own law. In effect, the courts have been applying the interest analysis approach. See note 84 infra for discussion of interest analysis.

65. 348 U.S. 66 (1954). Watson involved the constitutionality of a "direct action" statute in an action brought against an insurance company.

66. Id. at 73.


68. See note 64 supra.

69. See Ehrenzweig, supra note 61, at 195, noting that "[t]here is of course no doubt that sister state awards reduced to judgment are entitled to recognition."

70. See, e.g., Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 443 (1943), in which the Court stated that "[w]hen a state court refuses credit to the judgment of a sister state, an asserted federal right is denied and the sufficiency of the grounds of denial are for this Court to decide." (Texas compensation award barred further recovery for same injury in Louisiana court).
Thus, there have been various factors affecting the tradition of sovereign immunity. It was within this historical context that the Court decided *Nevada v. Hall*.

**The Nevada v. Hall Decision**

In this case of first impression, the United States Supreme Court held that although a sovereign may not be sued in its own courts without its consent, the sovereign may not be immune from suit in the courts of another sovereign. In explanation, the *Nevada v. Hall* Court said that the Constitution neither implicitly nor explicitly provides for the protection of a state's extraterritorial immunity from suit. Further, the Court concluded that the full faith and credit clause did not require California to apply Nevada law in abrogation of its own law, holding that states may, *if they so choose*, accord one another immunity or respect one another's laws, but there is no constitutional imperative to do so.

Before it could evaluate the propriety of California's claimed jurisdiction of the action, the Court first had to resolve the constitutional question raised by Nevada's assertion of a protected right of immunity. The resolution of this question is the essence of the opinion. The Court addressed four major areas in its consideration of this question: (1) the source and scope of sovereign immunity; (2) the status of the doctrine at the time of the framing of the Constitution; (3) whether the full faith and credit clause mandates that California apply Nevada law; and (4) whether other constitutional provisions imply a guarantee of extraterritorial immunity.

**Source and Scope of Sovereign Immunity**

The Court acknowledged that there was an historical absolute right of sovereign immunity from suit without consent in one's own court but distinguished that situation from Nevada's claimed right to immunity in the courts of another state. As the early Colonists had done, the Court rejected as "fiction" the notion of the infallibility of the sovereign and ob-

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71. 440 U.S. at 414-18.
72. *Id.* at 425.
73. *Id.* at 424.
74. *Id.* at 426.
75. Nevada invoked the jurisdiction of the Supreme Court under 28 U.S.C. § 1257(3). The relevant section concerns the validity of a statute or treaty, the constitutionality of a state statute, or "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States." Petition for Writ of Certiorari at 2, Nevada v. Hall, 436 U.S. 925 (1978).
76. See notes 28-39 and accompanying text *supra*.
77. *See* 440 U.S. at 414, where the Court stated that "[t]he doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign."
78. *Id.* But see note 31 *supra* and Jacobs, supra note 43, at 7.
served that to apply the doctrine in a foreign sovereign’s courts would subordinate the authority of that sovereign. Only an agreement between the two sovereigns, or the voluntary decision of the second to accord immunity to the first, would avoid this result.

As support for this proposition, the Court cited the 1812 case of Schooner Exchange v. McFaddon in which a Napoleonic ship, while moored in an American harbor, was the subject of a claim of ownership by American citizens. Schooner affirmed the exclusivity of a nation’s jurisdiction within its own territory. The immunity of the foreign sovereign was upheld because the source of that immunity was found in American law, under which America waived its exclusive right of territorial jurisdiction over visiting sovereigns. The Court in Nevada v. Hall noted that Nevada’s defense of sovereign immunity probably would have been sustained at the time of the Schooner decision. Nonetheless, after a sweeping conclusion that the propriety of Nevada’s claim rested solely with California law, the Court

79. Id. at 416. The Court reasoned that “[s]uch a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.” Id.

80. 11 U.S. (7 Cranch) 116 (1812).

81. The Nevada v. Hall Court quoted Schooner:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself . . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.


83. 440 U.S. at 417. The Court’s reliance on Schooner is confusing, however, since that case involved two wholly independent, foreign nations, rather than two states joined by the potent agreement of the Union, the Constitution.

84. 440 U.S. at 417. There was no dispute as to the correctness of the California court’s interpretation of California law. The approach taken by that court is consistent with its other recent decisions regarding choice of law problems in the torts area. For example, in a 1967 wrongful death action, the California Supreme Court concluded that the traditional approach, namely the “place of the wrong” rule, was not necessarily the approach of choice in all torts cases; the various interests involved in the multistate dispute required evaluation. Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). Accord, Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).

This “governmental interest” approach was subjected to a re-examination by various scholars. The California court applied the evolved “comparative impairment” approach in Bernhard v. Harrah’s Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976). Applying this approach, a court determines which state’s interest would be more impaired if its policy were subordinated to the policy of the other state involved. The law is applied from the state which would be most impaired. In Bernhard, a Nevada tavern-owners was held liable, beyond the limits of a Nevada statute, for injuries to a California resident. The injuries resulted from a car accident between the plaintiff and an intoxicated person who had been served alcohol by the Nevada tavern-owner. The California court applied California law since such liability should have been a foreseeable and coverable business expense for the Nevada tavernkeeper, who actively solicited California patrons.
stated that California had demonstrated that it was no longer willing to sustain the sovereign immunity defense in an action such as the instant one.\textsuperscript{85}

The Court recognized that the California approach was in keeping with the recent trend away from affording absolute immunity in international disputes.\textsuperscript{86} Many nations have chosen to accord restrictive rather than absolute immunity to other nations.\textsuperscript{87} The Court also observed that states have begun to waive immunity in their own courts.\textsuperscript{88} It noted that these choices reflect an increased emphasis on the right to redress for individuals and, therefore, should have made the change in extraterritorial immunity foreseeable.\textsuperscript{89}

Thus, the Supreme Court concluded that California was free to apply its own law and to refuse immunity to Nevada unless, as Nevada argued, California was precluded from so doing by a federal rule implicit in the Constitution.\textsuperscript{90} The Court, therefore, examined the status of the doctrine of sovereign immunity at the time of the framing of the Constitution in order to ascertain whether or not such a federal rule existed.\textsuperscript{91}

\textsuperscript{85} See 440 U.S. at 417-18, where the Court observed that "by rejecting the defense in this very case, however, the California courts have told us that whatever California law may have been in the past, it no longer extends immunity to Nevada as a matter of comity." The Court's conclusion presupposed, however, that extraterritorial immunity is not constitutionally guaranteed; this conclusion was not made clearly by the Court until later in the opinion. \textit{Id.} at 426.

\textsuperscript{86} \textit{Id.} at 417 n.13.

\textsuperscript{87} See generally \textit{Note, The Jurisdictional Immunity of Foreign Sovereigns}, 63 \textit{Yale L.J.} 1148 (1954). See also note 34 \textit{supra}.

\textsuperscript{88} 440 U.S. at 417 n.13.

\textsuperscript{89} \textit{Id.} The Court stated that "as States have begun to waive their rights to immunity in their own courts, it was only to be expected that the privilege of immunity afforded to other States as a matter of comity would be subject to question." \textit{Id.} (emphasis added).

\textsuperscript{90} \textit{Id.} at 418.

\textsuperscript{91} In regard to the modern treatment of the doctrine of sovereign immunity, the Court did not discuss fully the only appellate case similar to the instant one. The majority did mention the case, \textit{Paulus v. South Dakota}, 58 N.D. 643, 227 N.W. 52 (1929), but did so only in a footnote. 440 U.S. at 417 n.13. The \textit{Paulus} case, a decision of the Supreme Court of North Dakota, held that a state, absent consent, could not be sued in the courts of a sister state by a citizen of the forum state. \textit{Paulus} involved an action against the State of South Dakota brought by a North Dakota resident who was injured in a coal mine operated by South Dakota in North Dakota. Justice Blackmun, in his dissent, stated that "the only authority that has been cited to us or that we have found is directly opposed to the Court's conclusion." \textit{Id.} at 432 (Blackmun, J., dissenting).
Status of Sovereign Immunity when the Constitution was Framed

The Court acknowledged that the doctrine of sovereign immunity was significant in the infancy of the nation. Nonetheless, the Court concluded that the suability of one state by another was "apparently not a matter of concern when the new Constitution was being drafted and ratified." While conceding that the scope of immunity was included in discussions relating to article III, the Court speculated that the omission of an appropriate, specific provision was due to the Framers' presumption that comity, as it prevailed then, would go unaltered.

It was noted that the eleventh amendment was passed to address the immunity issue and that the language of the ensuing cases reflected the widely held belief that a state was never amenable to suit without its consent. Yet, the Court distinguished these cases, as well as the ratification debates, on the ground that they involved questions of federal rather than state court jurisdiction.

The Court found this distinction important because these decisions involved the extent to which states had authorized suits against themselves in federal courts by their ratification of the Constitution. These decisions did not resolve, however, the question of whether the constitution limited the power of one state to assert jurisdiction over another state.

The Court interpreted the eleventh amendment not as a grant of immunity but solely as a limitation on the power of the federal judiciary to intervene in the actions enumerated in the amendment. The Court in Nevada v. Hall then summarily concluded that neither article III nor the eleventh amendment provide any basis to justify interference with California's exercise of power.

Mandates of the Full Faith and Credit Clause

The Court also considered Nevada's claim that the full faith and credit clause required California to honor Nevada's consent to suit in Nevada.
courts only. Nevada further argued that if its waiver of sovereign immunity in Nevada courts were interpreted to include consent to suit in California courts, then the full faith and credit clause required California to honor Nevada's statutorily imposed limitation on recovery.

The Court stated that the full faith and credit clause does require recognition of the official acts and statutes of sister states. The Court also held, however, that the clause does not require that legislation of a foreign state be applied in abrogation of the law of the forum state, noting that the clause does not mandate extraterritorial effect for statutes.

Evaluating California's policy interests, the Nevada v. Hall Court noted that various provisions in California legislation reflect a policy of full compensation for tort victims. Additionally, the Court noted that California had unconditionally waived its immunity in tort actions, regardless of the identity of the tortfeasor. Having concluded that the California policy was as deserving of affirmation as the Nevada policy, the Court upheld California's sovereign right to legislate for its own citizens.

**Ramifications of Other Constitutional Provisions**

Finally, the Court reviewed Nevada's contention that a mandate for each state to accord sovereignty to sister states is implicit in the Constitution. Nevada claimed that states “are not free to [treat] each other as unfriendly sovereigns.” Nevada supported this claim by citing article I, section 8, which declares states are not free to levy discriminatory taxes on goods of other states, nor to bar their entry altogether. Nevada further supported this claim on the basis of article IV, section 1, which mandates extradition.

103. 440 U.S. at 421.
104. Id. See note 19 supra.
105. 440 U.S. at 421. See notes 62 & 67 supra.
106. For this proposition, the Court cited Pacific Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939), which held that the clause did not require California to apply Massachusetts law in contravention of its own policy. The case involved a Workmen's Compensation claim of a Massachusetts employee injured in California in the course of his employment by a Massachusetts employer. The Pacific court said the "[full faith and credit] does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." 306 U.S. at 504-05.
107. 440 U.S. at 424. The Court also noted that California has unequivocally waived its own immunity from liability for torts. Id.
108. Id. at 426. The Court said:

In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect.

Id. (emphasis added).
109. Id. at 424. See also Brief for Petitioner at 12.
110. Id. See also Brief for Petitioner at 15.
112. U.S. Const. art. IV, § 2, cl. 1 & 2.
tion of fugitives from other states, and on the basis of the privileges and immunities clause.

The Court reasoned that while each of these constitutional provisions places a specific limitation on the sovereignty of the states, nonetheless they do not imply that according sovereign immunity is "anything other than a matter of comity." It was further observed that, given the tenth amendment's reservation of powers to the states and people, caution was necessary before concluding that the Framers intended any unstated limitations on state power.

While conceding that broad policies of comity between states had been presumed historically, the Court emphasized that this reflected policy rather than a constitutional mandate. It cited Bank of Augusta v. Earle for the proposition that a state merely needs to "declare its will" in order to restrict the presumed comity between states. In Nevada v. Hall the Court held that "California had 'declared its will'" by adopting a policy of full compensation for tort victims. The Court reasoned that if it were to overturn California's right to legislate for its own citizens, based solely on "inference from the structure of our Constitution and nothing else," the decision would result in an impermissible intrusion on the sovereignty of California.

CRITICISM

In its majority opinion, the Court correctly concluded that extraterritorial immunity is not a constitutionally protected state's right. The resulting limi-

113. 440 U.S. at 425. The Court in Nevada v. Hall stated:

Each of these provisions places a specific limitation on the sovereignty of the several States. Collectively they demonstrate that ours is not a union of 50 wholly independent sovereigns. But these provisions do not imply that any one State's immunity from suit in the courts of another State is anything other than a matter of comity. 

Id. at 425.

114. U.S. CONST, amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

115. 440 U.S. at 425.

116. Id.

117. 38 U.S. (13 Peters) 519 (1839). This case involved an action brought by a Georgia bank against an Alabama resident for non-payment of bills of exchange.

118. The Nevada Court stated:

The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end.


119. 440 U.S. at 426.

120. Id. The Court stated that "[n]othing in the Federal Constitution authorizes or obligates this Court to frustrate that policy out of enforced respect for the sovereignty of Nevada." Id.
tation on the use of the defense of immunity at the interstate level was compared with the similar trend at the federal and international levels. The Court did not, however, set forth adequate guidelines for future courts to follow, nor did it thoroughly discuss all of the issues addressed.

While the Court's historical analysis was arguably correct, it was supported by only a brief discussion. The majority reasoned that extraterritorial immunity was not provided by the Framers due to their assumption that the prevailing policy of comity would remain unaltered. As some commentators have suggested, however, it may be equally reasonable to conclude that the Framers presumed that sovereign immunity would go unaltered.

Support for this contention lies in the fact that at the time of the framing of the Constitution, states had little reason to fear suits by other states; their major concern was preventing foreign and federal intrusions on their sovereign powers. It is reasonable to maintain that the states did not insure against suits by other states because they did not foresee the technological advances which resulted in a mobile society with concomitantly complex interstate commerce.

In regard to the Court's narrow interpretation of the eleventh amendment, the dissent asserted that the majority's view was too literal. Moreover, the majority supported its departure from case precedent and prior interpretation by a discussion that is cursory, in light of the wealth of commentary available regarding the eleventh amendment.

The major contention of the dissenting opinions was that there should be a finding of an implied constitutional guarantee of extraterritorial immunity. Justice Rehnquist urged that such immunity is an inherent part of the "constitutional plan" and construed the majority's opinion as working a "fundamental readjustment" to it. Justice Blackmun cited other instances where the Court inferred a provision from the Constitution, rather than rely

121. See note 94 and accompanying text supra.
122. See Field, supra note 41; Jacobs, supra note 43.
123. In response to the majority's contention that extraterritorial immunity was "apparently not a matter of concern" for the Framers, Justice Blackmun asserted flatly: "The only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention." 440 U.S. at 431 (Blackmun, J., dissenting).
124. The Paulus court emphasized this and noted that the states were immune from suit in the federal courts because of the eleventh amendment. The court explained it would be much less "consistent with any sound conception of sovereignty that a state might be haled into the courts of a sister sovereign state at the will or behest of citizens or residents of the latter." Paulus v. South Dakota, 58 N.D. at 649, 227 N.W. at 55.
125. See note 100 and accompanying text supra.
126. 440 U.S. at 434 (Rehnquist, J., dissenting).
127. See notes 49-63 and accompanying text supra.
128. 440 U.S. at 432 (Rehnquist, J., dissenting). Justice Rehnquist cited to McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) and National League of Cities v. Usery, 426 U.S. 833 (1976) for the proposition that the Court has often relied on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable
on a literal interpretation of it. The dissenting opinions emphasized the historical consistency with which the Court has upheld sovereign immunity. They also stressed the Court's traditional unwillingness to disturb the federalist system.

While it should be conceded that extraterritorial immunity is not expressly provided for, there is certain appeal in finding it implied in the Constitution. This would preserve 200 years of precedent. If the Court had found immunity to be implicitly guaranteed, it still could have found that Nevada had waived its right based on implied consent because its actions in California were not sovereign in nature. Such a holding, however, would have created other problems. For example, the nature of the activities that would result in "implied consent" would have to be determined on a case by case basis. Such determinations would leave states in a position of uncertainty every time they crossed their own borders. The Court was correct, therefore, in making a direct and conclusive analysis of the constitutional source for sovereign immunity.

The majority appropriately looked to the current needs of the country, instead of following outdated rationales, in holding that a state may be held fully accountable for its torts outside its own borders. The Court noted with approval the trend in international and federal cases reflecting a limitation on the use of sovereign immunity as a defense. This important observation,

governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning.

Id. at 433 (Rehnquist, J., dissenting).

129. Justice Blackmun referred to the instances when the Court implied a guarantee of freedom of association in the first amendment, and also to the cases in which the Court implied a right of interstate travel. He contended that the same approach should be taken in regard to a constitutional implication of interstate sovereign immunity. He stated that he "would find that source not in an express provision of the Constitution but in a guaranty that is implied as an essential component of federalism." Id. at 430 (Blackmun, J., dissenting).

130. Id. at 430 (Blackmun, J., dissenting). See note 128 supra.

131. It is interesting to note that throughout the lower California court decisions, California appears to have reserved the "implied consent" argument as an alternative. It even appeared as an argument in the Respondent's Brief for the writ of certiorari. Brief of Respondent at 9-10, Nevada v. Hall, 436 U.S. 925 (1978).

The California Court of Appeal stated that "[t]he Supreme Court [of California] did not hold that Nevada had waived sovereign immunity or had given its implied consent to be sued in California. It held simply that Nevada's sovereign protection does not extend beyond its own borders." Hall v. University of Nev., 74 Cal. App. 3d at 284, 141 Cal. Rptr. at 440. However, a review of the context in which the California Supreme Court concluded that "state sovereignty ends at the state boundary" suggests that the question was not so closed-ended as interpreted on remand. When the court made that statement, it supported it with discussion of cases dealing with states' waiver of immunity based on the nature of their activities in the foreign states. Hall v. University of Nev., 8 Cal. 3d at 524-25, 503 P.2d at 1365, 105 Cal. Rptr. at 356-57 (1972). See note 14 and accompanying text supra. See also note 35 and accompanying text supra.

however, was relegated to a footnote. It would have been preferable for the Court to have included a discussion of why restrictive rather than absolute immunity is preferable in interstate transactions. In the same footnote the Court observed that states have begun to waive immunity in their own courts. Indeed, the majority noted that these trends should have made the outcome in Nevada v. Hall foreseeable. Thus, the Court should have addressed these policy considerations in the text of its decision. A more direct statement was needed that states cannot expect to be shielded from liability for their tortious acts and that an individual's right to redress is paramount.

Although the majority's decision involved these broad considerations, the court attempted to limit its holding to the circumstances of the instant case, i.e., traffic accidents occurring outside the borders of the defendant state. The majority did so inadequately, however, by once again relegating salient material to a footnote. It provided no explanation to justify limiting its holding to traffic accidents. Therefore, despite its proper ruling, the Court's failure to delineate the intended scope of its holding may effectuate the chaos feared by the dissent. The resulting uncertainty for

133. Id.
134. See note 34 and accompanying text supra.
136. See note 89 supra.
137. The Nevada v. Hall Court stated:
California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result. 440 U.S. at 424 n.24.
138. Justice Blackmun called the attempt "a fragile footnote disclaimer" and noted that although the Court "purports to confine its holding...[s]uch facts, however, play absolutely no part in the reasoning by which the Court reaches its conclusion." Id. at 429 (Blackmun, J., dissenting).
139. Id. at 424 n.24. See note 137 supra. Justice Rehnquist stated:
I join my Brother BLACKMUN's doubts about footnote 24 of the majority opinion. Where will the Court find its principles of "cooperative federalism"... Having shunned the obvious, the Court is truly adrift on unchartered waters; the ultimate balance struck in the name of "cooperative federalism" can be only a series of unsatisfactory bailing operations in fact.
Id. at 442-43 (Rehnquist, J., dissenting).
140. Justice Blackmun observed that "[t]here is no suggestion in this language that, if California had adopted some other policy in some other area of the law, the result would be any different." Id. at 429 (Blackmun, J., dissenting).
141. Justice Blackmun asserted that
the Court's basic and undeniable ruling is that what we have always thought of as a "sovereign State" is now to be treated in the courts of a sister State, once jurisdiction is obtained, just as any other litigant. I fear the ultimate consequences of that
the states may be no less than had the fiction of implied consent been employed. 142

IMPACT OF THE DECISION

The breadth of the Court's decision will adversely affect uniformity of law and will give rise to problems regarding the enforcement of judgments. Future courts will have difficulty applying the holding of Nevada v. Hall because the Court failed to delineate adequately the intended scope of its decision. 143 As a result, in an effort to avoid suit in a sister state's court, states may enact laws outlining their positions on comity. In addition, states may refuse to interact with other states that do not accord them reciprocal immunity. As the dissent noted, this may result in "Balkanization." 144 States may hastily withdraw all of their seizable assets from sister states in an attempt to avoid foreign judgments.

The holding may also lead to forum-shopping. Since there is no uniform system of immunity, plaintiffs wishing to bring an action against a state may bring suit where the law of a particular state appears most favorable to their positions. Furthermore, as Justice Rehnquist observed, the Court's decision may have the anomalous consequence of ushering a foreign plaintiff into the courts of the sister state. 145 For example, in those instances where a foreign plaintiff brings an action against a state that has not waived immunity in its own court, the only forum available to that plaintiff may be the courts of the sister state.

The major impact of this decision, however, may arise from attempts to enforce rendered judgments. 146 Currently the plaintiff-respondent can collect on the judgment in California because Nevada holds sizable assets
there. Even if Nevada withdrew all of its assets from California and forced the plaintiff-respondent to seek enforcement in Nevada, Nevada would still be required to enforce the California judgment pursuant to the full faith and credit clause. What would be the result, however, if Nevada insulated its assets in its own state funds? Recent case law would lead to the conclusion that although the United States Supreme Court would have grounds for review, the eleventh amendment would bar the Court from forcing Nevada to make payments out of state funds. Thus, the redress *Nevada v. Hall* sought to provide for the respondent might be unobtainable.

If the Court had incorporated clearer guidelines for the appropriate treatment of actions brought against sovereign states, some of these concerns would remain unresolved. On the other hand, such articulated judicial directions coupled with an invitation for Congress to address these concerns would have served to lessen the negative impact of the decision. Congress could enact legislation aimed at reducing uncertainty in interstate actions by molding appropriate interstate compact agreements. These desirable measures could provide uniformity of law and insure greater chance for recovery for individuals in neutral forums.

## Conclusion

Based on *Nevada v. Hall*, a sovereign may be sued without its consent, by a citizen of another state, in the courts of a sister sovereign. In its decision, the United States Supreme Court departed from the tradition of absolute sovereign immunity by limiting the extraterritorial effect of that doctrine. This approach parallels changing policies in federal and international immu-

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148. See note 69 and accompanying text supra.

149. See note 70 and accompanying text supra.

150. See, e.g., *Quern v. Jordan*, 99 S. Ct. 1139 (1979) (reaffirmed *Edelman*; allowed prospective injunctive relief information to class members); *Edelman v. Jordan*, 415 U.S. 651 (1974) (suit by private parties seeking to impose liability from public monies is barred by eleventh amendment, absent state's consent). *But see Hutto v. Finney*, 437 U.S. 678 (1978) (attorney's fees ordered to be paid out of public funds did not violate eleventh amendment since it was classed as other penalties imposed to enforce a prospective injunction).

Since the Court has upheld prospective injunctions against government officials and has upheld penalties stemming from such injunctions to be paid from state monies, it is not impossible that the Court will order the payment of a judgment such as in *Nevada v. Hall* to be made from state funds. The gap between granting injunctive relief and monetary awards when states are defendants may be closed in the near future.

151. The need for enactment was expressed earlier. *Ehrenzweig*, supra note 61, at 17. Indeed, recently some states on their own initiative have begun to limit or waive immunity in their courts. In addition, the state legislatures have shown support for unification efforts made by the Commission on Uniform Laws. See *Jackson*, supra note 58, at 17 n.69. Finally, it has
nity. The majority holding that extraterritorial immunity is a common law doctrine rather than a constitutional mandate enables Congress to enact a national, unified approach to immunity. Further, by limiting the absolute sovereign power of a state to within its own borders, *Nevada v. Hall* makes reparation possible from a defendant state that, under the outmoded doctrine of sovereign immunity, would have been insulated unjustly against such a claim.

*Rebecca Block*

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been observed that governmental operations have not been encumbered as governmental immunity has been constricted through legislation and case law. *Jacobs, supra* note 43, at 153.