

CASE COMMENTS

ELEVENTH AMENDMENT DOES NOT PRECLUDE SUIT AGAINST ONE STATE IN THE COURTS OF A SISTER STATE *NEVADA V. HALL*, 440 U.S. 410 (1979)

In *Nevada v. Hall*¹ the United States Supreme Court further limited the scope of the already waning doctrine of sovereign immunity in holding that a state is not constitutionally immune from suit in the courts of a sister state.

Respondents, California residents, brought suit in a California state court for damages against the State of Nevada for injuries sustained in an automobile accident. Respondents' vehicle collided on a California highway with a vehicle owned by the University of Nevada and operated on official business.² Nevada unsuccessfully appealed to the United States Supreme Court from a decision of the California Supreme Court holding it amenable to suit in the California courts.³

The trial court awarded respondents \$1,500,000 in damages, the California Court of Appeals affirmed,⁴ and the California Supreme Court denied review. Nevada again appealed to the United States Supreme Court, which held: The eleventh amendment⁵ to the United States Constitution does not preclude suit against a state in the courts of another state, nor does the full faith and credit clause⁶ require limitation of any judgment rendered against the defendant-state to an amount fixed by its statutes⁷ if the limit is incompatible with the forum state's

1. 440 U.S. 410 (1979).

2. *Id.* at 411-12.

3. *Hall v. University of Nev.*, 8 Cal. 3d 522, 503 P.2d 1363, 105 Cal. Rptr. 355 (1972), *cert. denied*, 414 U.S. 820 (1973).

4. *Hall v. University of Nev.*, 74 Cal. App. 3d 280, 141 Cal. Rptr. 439 (1977).

5. The eleventh amendment states: "The judicial power of the United States shall not be construed to extend to any suit or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." U.S. CONST. amend. XI.

6. The full faith and credit clause provides: "Full faith and credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

7. Nevada's statute waiving immunity, at the time respondents' cause of action accrued, limited recovery against the state to \$25,000.

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

public policy.⁸

The American doctrine of sovereign immunity originated in the English common-law theory⁹ that the King had absolute personal immunity from suit in his courts by his subjects.¹⁰ In practice, however, the King often "endorsed on petitions 'let justice be done', thus empowering his courts to proceed."¹¹

Shortly before the American Constitutional Convention, in *Nathan v.*

applied to civil actions against individuals and corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, provided 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, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive. An action may be brought under this section 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 shall be served upon the secretary of state.

NEV. REV. STAT. § 41.031 (1965) (amended 1975 & 1977).

Nevada's statute limiting liability, as it existed in 1968, provided: "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." NEV. REV. STAT. § 41.035 (1965) (amended 1968, 1973 & 1977).

8. *Nevada v. Hall*, 440 U.S. 410, 424 (1979).

9. See generally *United States v. Lee*, 106 U.S. 196, 226 (1882) (Gray, J., dissenting); C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 4-7 (1972); Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207-10 (1968); Nagata, *Federal Powers and the Eleventh Amendment: Attorney's Fees in Private Suits Against the State*, 63 CALIF. L. REV. 1167, 1173 (1975); Rippe, *State Sovereignty—A Polished But Slippery Crown*, 54 NOTRE DAME LAW. 465 (1979); Shaw, *Sovereign Immunity and the English Courts*, 126 NEW L. J. 632 (1976); Comment, *The State as a Party Defendant: Abrogation of Sovereign Immunity in Tort in Maryland*, 36 MD. L. REV. 653 (1977).

10. See Nagata, *supra* note 9, at 1173.

11. Jaffe, *supra* note 9, at 4. Legal redress against the Crown or its officers generally was available through the remedies of petition of right, *monstrans de droit*, or traverse of office. *Id.* at 19 n.56. These remedies were not merely discretionary: "[T]he King, as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects." *Id.* at 3 (quoting 9 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 8 (3d ed. 1944)). "The King can do no wrong" actually meant that "The King must not, was not allowed, not entitled, to do wrong. . . ." *Id.* at 4 (quoting Ehrlich, *No. XII: Proceedings Against the Crown* (1216-1377) at 42, in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (Vinogradoff ed. 1921)). See generally 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 518 (2d ed. 1923); 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 462 (3d ed. 1922); R. WATKINS, *THE STATE AS A PARTY LITIGANT* 7 (1927); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924); Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. REV. 141, 149-50 (1922).

Virginia,¹² the Virginia delegates to the Confederation Congress applied to the Supreme Executive Council of Pennsylvania for relief from the Philadelphia sheriff's attachment of personal property belonging to Virginia. The Council held that Virginia was immune from suit in the courts of sister states.¹³ At the Constitutional Convention, delegates expressed concern over the states' susceptibility to suits;¹⁴ Hamilton, Madison, and Marshall, for example, argued that the individual states, as sovereign, were immune from suits of citizens of another state.¹⁵ Article three of the Constitution, however, extended the judicial power of the United States to controversies "between a State and Citizens of another State."¹⁶

Interpreting article three literally, the Supreme Court in *Chisholm v. Georgia*¹⁷ held in favor of a South Carolina citizen seeking assumpsit against Georgia for repayment of a debt incurred by Georgia during the Revolutionary War.¹⁸ Within a year and one-half, however, passage of the eleventh amendment¹⁹ prevented a citizen of one state or a

12. 1 U.S. (1 Dall.) 77 (1781).

13. See Martiniak, *Hall v. Nevada: State Court Jurisdiction Over Sister States v. American State Sovereign Immunity*, 63 CALIF. L. REV. 1144, 1152 (1975). This decision reflected principles of international law as they existed at that time. See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (American court refused to assert jurisdiction over French government owned sailing vessel).

14. See Martiniak, *supra* note 13, at 1152-54.

15. Alexander Hamilton, in replying to the contention that a citizen of one state could sue another state in a federal court, wrote:

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.

A. HAMILTON, *THE FEDERALIST* No. 81, at 487 (Mentor ed. 1961) (emphasis in original). See Martiniak, *supra* note 13, at 1144 n.1 and accompanying text. James Madison argued: "[Federal] jurisdiction in controversies between a state and citizens [of] another state is much objected, and perhaps without reason. It is not in the power of individuals to call any state into court." *Quoted in J. ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTIONS OF THE FEDERAL CONSTITUTION* 533 (2d ed. 1881). See Martiniak, *supra* note 13, at 1144 n.2 and accompanying text.

"Jacobs discounts these statements as political concessions" to help gain support for adoption of the Constitution. Martiniak, *supra* note 13, at 1153 n.47 (citing C. JACOBS, *supra* note 9, at 12).

16. Section 2, clause 1, states: "The judicial power shall extend to . . . controversies between two or more states;—between a state and citizens of another state;—between Citizens of different states; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1.

17. 2 U.S. (2 Dall.) 419 (1793).

18. *Id.* at 449-50.

19. See note 5 *supra*. The swift passage of the eleventh amendment can be viewed as rein-

foreign country from bringing suit in federal court against another state. In *Hans v. Louisiana*,²⁰ moreover, the Court interpreted the eleventh amendment to preclude a citizen from suing his own state in federal court, even though the language of the amendment literally prohibits only suits by citizens of one state against another state.²¹ The courts have not held that the amendment bars suits in federal court against a state by its sister states²² or the United States.²³

In accordance with common-law tradition, the individual states have asserted immunity from suit in their own state courts.²⁴ Recently, some states have waived their sovereign immunity by statute²⁵ and others

forcing the idea that the states had assumed all along that immunity from suit was implicit in the Constitution. See Martiniak, *supra* note 13, at 1154. Other commentators disagree, pointing out the pendency during that time of suits in federal court against several states for collection of war debts. Thus, debt avoidance may have been the major factor motivating enactment of the eleventh amendment: "Under what must be considered the better view . . . the eleventh amendment was a reaction to fears that suits by Tories to recover property taken by the colonies during the Revolutionary War would force States to raise taxes to intolerable levels." Comment, *Avoiding the Eleventh Amendment: A Survey of Escape Devices*, 1977 ARIZ. ST. L.J. 625, 626. See J. ELLIOT, *supra* note 15, at 479; M. IRISH & J. PROTHRO, *THE POLITICS OF AMERICAN DEMOCRACY* 114-15 (5th ed. 1971); C. JACOBS, *supra* note 9, at 57, 69-70; I S. MORISON & H. COMMANGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 336 (4th ed. 1952); C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 99 (1922). In fact, the Supreme Court held that the eleventh amendment applied retroactively and dismissed suits pending against states, even though the suits had been instituted prior to passage of the amendment. *E.g.*, *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). The early American cases provided little justification for invoking the sovereign immunity doctrine beyond protecting the public coffers from further drain. *E.g.*, *Commonwealth v. Colquhoun*, 12 Va. (2 Hen. & M.) 213 (1808); *Black v. Republicam*, 6 Pa. (1 Yeates) 39 (1792); see W. PROSSER, *LAW OF TORTS* 971 (4th ed. 1971); Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L.F. 795, 801.

20. 134 U.S. 1 (1890).

21. *Id.* at 15. Subsequent cases have found that the eleventh amendment precludes other types of suits not expressly covered by the language of the amendment. See, *e.g.*, *Monaco v. Mississippi*, 292 U.S. 313 (1934) (foreign state may not bring suit against a state); *Ex parte New York*, 256 U.S. 490 (1921) (eleventh amendment precludes admiralty case against a state, even though admiralty is not a "suit in law or equity"); *Smith v. Reeves*, 178 U.S. 436 (1900) (federal corporation may not bring suit against a state); *In re Ayers*, 123 U.S. 443 (1887) (aliens may not bring suit against a state).

22. *E.g.*, *Nebraska v. Iowa*, 409 U.S. 285 (1972); *Illinois v. Michigan*, 409 U.S. 36 (1972); *North Dakota v. Minnesota*, 263 U.S. 365 (1923). But see *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972) (action by one state against another violates eleventh amendment if plaintiff-state actually sues to recover damages to designated individuals).

23. *E.g.*, *United States v. Mississippi*, 380 U.S. 128 (1965); *United States v. Nevada Tax Comm'n*, 439 F.2d 435 (9th Cir. 1971).

24. See generally Comment, *supra* note 19; Comment, *supra* note 9; 43 MO. L. REV. 387 (1978); 57 OR. L. REV. 478 (1978).

25. The statutes range from complete waiver of immunity in the State of Washington, where the state is liable to the same extent as if it were a private person or corporation, WASH. REV.

have abrogated it judicially.²⁶ The California Supreme Court, in *Muskopf v. Corning Hospital District*,²⁷ abolished the California sovereign immunity doctrine, and Nevada waived immunity by statute but placed a limit on its liability.²⁸

CODE ANN. § 4.92.090 (1978), to the more limited approaches of Utah, UTAH CODE ANN. §§ 63-30-1 to -10 (Supp. 1979), and California, CAL. GOV'T CODE §§ 810-996.6 (Deering 1973). Many states have exceptions to liability similar to those in the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1976). *Edelman v. Jordan*, 415 U.S. 651 (1974) (state may condition its consent to be sued as it sees fit); 43 MO. L. REV. 387, 388-90 (1978). See generally White, *The State Immunity Act 1978*, 1979 J. BUS. L. 105; 40 U. PITT. L. REV. 487 (1979); 16 URB. L. ANN. 306 (1979).

26. See *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970); *Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597 (1975); *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977) (en banc); *Willis v. Dep't of Conservation & Econ. Dev.*, 55 N.J. 534, 264 A.2d 34 (1970); *Kitto v. Minto Park Dist.*, 224 N.W.2d 795 (N.D. 1974).

Since the decision in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), which upheld the theory of "absolute" sovereign immunity, the nations of the world have gradually abandoned that theory in favor of a "restrictive" theory of governmental immunity. See generally N. LEECH, C. OLIVER & J. SWEENEY, *THE INTERNATIONAL LEGAL SYSTEM* 306-458 (1973); Note, *International Law—Sovereign Immunity—The Last Straw in Judicial Abdication*, 46 TUL. L. REV. 841 (1972). Belgium adopted the restrictive theory in 1903, see *Société Anonyme de Chemins de Fer Liègeois Luxembourgeois v. The Netherlands*, [1903] *Pasicrisie* I, 294, Switzerland in 1918, see *Ministry of Fin. of Austria v. Dreyfus*, [1918] *Journal des Tribunaux* 594, and Italy in 1925, see *Trade Delegation of the USSR v. Ditta Tesini e Malvezzi*, [1925] *Giur. Ital.* I, 204. France, Greece, the German Federal Republic, the Netherlands, and Austria have applied the restrictive theory for many years. See N. LEECH, C. OLIVER & J. SWEENEY, *supra*, at 317. "Socialist" nations generally adhere to the absolute theory, probably to protect the conduct of their trade abroad through state owned enterprises. *Id.* at 308.

Generally, the restrictive theory draws a distinction between public acts and private acts and permits the nation to be sued as a result of the latter, acts "which might have been done just as well by any individual." *State of Rumania v. Trutta*, 26 AM. J. INT'L L. SUPP. 629 (1932). See N. LEECH, C. OLIVER & J. SWEENEY, *supra*, at 322. In *Collision With Foreign Government Owned Motor Car*, 40 I.L.R. 73 (1970) (Austria, Supreme Court, 1961), the court permitted plaintiff, an Austrian citizen, to recover damages for injuries suffered in a collision with a United States government owned vehicle that was being used to carry mail to the United States embassy. In deciding whether to grant a foreign state immunity the forum nation may consider whether the defendant foreign nation would grant immunity in the same situation. *Aldona S. v. United Kingdom*, 90 *Journal du Droit Int'l* 191 (1963) (Poland, Supreme Court, 1948).

Congress recently enacted a statute that embodies most of the principles of the restrictive immunity theory and permits foreign nations to be sued in the United States' courts for certain activities. Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1602-1611 (Supp. 1979).

27. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). See 38 CAL. ST. B.J. 177 (1963). See also Note, *Overcoming Barriers in California Highway Litigation*, 11 U.S.F. L. REV. 379 (1977).

The *Muskopf* rationale has been challenged but upheld in the California courts. See *Ramos v. County of Madera*, 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971); *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); *Johnson v. City of Pacifica*, 4 Cal. App. 3d 82, 84 Cal. Rptr. 246 (1970).

28. NEV. REV. STAT. §§ 41.035-039 (1977); see note 7 *supra*.

Although never having before it the precise issue present in *Nevada v. Hall*, the Supreme Court on several occasions has suggested that a state is not amenable to suit in another state's courts.²⁹ In *Paulus v. South Dakota*³⁰ the North Dakota Supreme Court held that South Dakota was immune from suit in North Dakota's state courts.³¹ At that time neither North Dakota nor South Dakota permitted itself to be sued in its courts.

Even if a state that retains sovereign immunity can be sued by one of its citizens in the courts of another state, the defendant-state may still look to the full faith and credit clause for a potential defense. This clause requires each state to recognize and give effect to the "public Acts, Records and judicial Proceedings of every other State,"³² which presumably would include any limits that the defendant-state placed

29. *See, e.g.*, *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944) ("A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment."); *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883) ("It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent . . ."); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (It "is an established principle of jurisprudence . . . that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission."). *But see* *Langford v. United States*, 101 U.S. 341, 343 (1879):

It is not easy to see how [the maxim "the King can do no wrong"] can have any place in our system of government.

.
We do not understand that either in reference to the government of the United States, or of the several States, or of any of their officers, the English maxim has an existence in this country.

Id.

At other times, dissenting justices have suggested that sovereign immunity should not be the rule. *See, e.g.*, *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682 (1949):

The Course of decisions concerning sovereign immunity is a good illustration of the conflicting considerations that often struggle for mastery in the judicial process, at least implicitly. In varying degrees, at different times, the momentum of the historic doctrine is arrested or deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice. Legal concepts are then found available to give effect to this feeling

Id. at 709 (Frankfurter, J., dissenting). *See also* *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973): "In a nation whose ultimate sovereign is the people and not government, a doctrine premised upon Kingship . . . is indefensible 'if it represents . . . an unfortunate acquiescence of a political and legal order which no longer enlists support . . .'" *Id.* at 311 (Brennan, J., dissenting) (quoting C. JACOBS, *supra* note 9, at 160).

30. 52 N.D. 84, 201 N.W. 867 (1924). Plaintiff alleged that he was a citizen of South Dakota. Subsequently, he amended his complaint to allege that he was a citizen of Poland and a resident of North Dakota. The North Dakota Supreme Court nevertheless held that South Dakota was immune from suit. *Paulus v. South Dakota*, 58 N.D. 643, 227 N.W. 52 (1929).

31. 52 N.D. at 90, 201 N.W. at 869; 58 N.D. at 647, 227 N.W. at 54.

32. *See* note 6 *supra*.

on its tort liability. The Supreme Court has acknowledged, however, that the forum state need not accord full faith and credit in situations in which application of the law of a sister state would frustrate the public policy of the forum state.³³

In *Alaska Packers Association v. Industrial Accident Commission*,³⁴ the Court used a balancing approach to determine whether to grant full faith and credit. Under this approach, a court weighs the relevant competing interests of each state and gives effect to the law of the state having the greater interests.³⁵ In subsequent cases, however, the Supreme Court's analyses and conclusions generally adhered to a "substantial interest" test³⁶ and infrequently used "balancing" language.³⁷ In *Pacific Employers Insurance Co. v. Industrial Accident Commission*, for example, the Court applied the substantial interest test³⁸ to permit California to apply its worker's compensation law to a Massachusetts resident. The worker was employed by a Massachusetts company but was injured while temporarily in California in the course of his work. The Court found that California had a substantial interest in ensuring that every worker within its borders was covered by its worker's compensation law and that application of Massachusetts law would have been in conflict with California's compensation scheme.³⁹

In *Nevada v. Hall*⁴⁰ the Supreme Court held that Nevada could not claim sovereign immunity as a shield from a suit by a California resident in the California courts,⁴¹ and that the full faith and credit clause

33. *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Carroll v. Lanza*, 349 U.S. 408 (1955); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954); *Pacific Employers Ins. Co. Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935). Compare *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943) (Texas workmen compensation award held to bar recovery in Louisiana proceeding), with *Carroll v. Lanza*, 349 U.S. 408 (1955) (Missouri Workmen's Compensation statute held not to bar Arkansas common-law remedy).

34. 294 U.S. 532 (1935).

35. See Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 So. CAL. L. REV. 61, 63 (1978). See generally B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

36. Simson, *supra* note 35, at 64; see B. CURRIE, *supra* note 35, at 193-94.

37. See, e.g., *Watson v. Employees Liab. Assurance Corp.*, 348 U.S. 66, 73 (1954).

38. 306 U.S. 493 (1939).

39. "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." *Id.* at 504-05.

40. 440 U.S. 410 (1979).

41. *Id.* at 421.

did not require California's courts to limit the damage award against Nevada in accordance with Nevada's statutory limit.⁴²

Writing for the majority, Justice Stevens began his analysis with an exploration of the origins of the sovereign immunity doctrine. He concluded that the early Americans had rejected the doctrine's underlying fiction, that "the King could do no wrong,"⁴³ but acknowledged that many American cases recognize the idea of sovereign immunity from suit in the state's own courts.⁴⁴ Justice Stevens argued that, in contrast to immunity in the state's own courts, immunity in another sovereign's courts could rest only on agreement, express or implied, between the two sovereigns or a voluntary decision by one to respect the immunity of the other.⁴⁵

After analyzing the Constitution, Justice Stevens determined that nothing in the express language of the Constitution or in contemporaneous events and discussions precluded suit against one state in the courts of another state.⁴⁶ He considered inconclusive the adoption of the eleventh amendment after *Chisholm* because the amendment concerned only suits against a state in *federal* courts.⁴⁷

Justice Stevens then determined that the full faith and credit clause did not require California to apply Nevada's statutes on waiver of immunity and limit of liability because the result would be "obnoxious" to the public policy of California in an area in which California has a substantial interest.⁴⁸

42. *Id.* at 425. For the text of Nevada's statute, see note 7 *supra*.

43. *Id.* at 415.

44. *Id.* at 416. Justice Stevens noted Chief Justice Jay's reasoning in *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907), to support the conclusion that "[n]o sovereign may be sued in its own courts without its consent," but then observed that Jay's reasoning "affords no support for a claim of immunity in another sovereign's courts." 440 U.S. at 416.

45. 440 U.S. at 416-17. In support of this argument, Justice Stevens referred to *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812); see note 26 *supra*. Justice Stevens hypothesized that had this case come before the California courts in 1812, California probably would have granted Nevada immunity because, at that time, California also held itself immune. This interpretation of *The Schooner Exchange* asserts that the opinion is grounded on principles of comity and not on a theory of "absolute" sovereign immunity. See note 26 *supra*.

46. 440 U.S. at 421.

47. *Id.*

48. "In this case, California's interest is the . . . substantial one of providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents.'" *Id.* at 424.

The Court cited *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939), and *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935), as ample prece-

Justice Stevens concluded the majority opinion with a list of various constitutional provisions that limit a state's sovereignty⁴⁹ to bolster his argument that the states never were intended to be wholly independent sovereigns.⁵⁰ Stevens suggested, however, that states might be advised to voluntarily grant immunity to each other or respect statutory liability limits to maintain cordial interstate relations, even though the Constitution does not compel such comity.⁵¹

Justice Blackmun, in his dissenting opinion,⁵² felt that the majority's approach, although "plausible,"⁵³ was much too broad.⁵⁴ The Court's holding would be disruptive to the federal system because its reasoning warranted the conclusion that states were not to be treated "just as any other litigant in the courts of a sister state."⁵⁵ Blackmun expressed particular concern over footnote twenty-four⁵⁶ of the majority opinion, in

dent for denying full faith and credit to Nevada's statutes. *See* notes 33-39 and accompanying text *supra*.

In addition, the majority distinguished *Bradford Electric Co. v. Clapper*, 286 U.S. 145 (1932), because the application of Vermont law in that case did not frustrate any public policy of New Hampshire. The action arose out of a contract made in Vermont between a Vermont based employer and a Vermont employee who died as a result of injuries he suffered while working in New Hampshire. Administratrix-plaintiff, a New Hampshire resident, brought suit in New Hampshire federal court on the basis of diversity of citizenship with the employer-defendant, a Vermont resident. Justice Stone believed that New Hampshire's choice of law rules, on the facts, dictated the application of Vermont law and, therefore, full faith and credit was not necessarily implicated in the decision. *Id.* at 163-65 (Stone, J., concurring).

49. Stevens specifically noted: (1) the states are not free to levy discriminating taxes on each other's goods because of article I, § 8; (2) the states are not free to deny extradition of a fugitive because of article IV, § 2; and (3) the privileges and immunities of citizens in each state are applicable to citizens of other states. 440 U.S. at 424.

50. *Id.* at 425.

51. *Id.* at 426. The Supreme Court defined comity in an early case:

"Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. It is rather the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (denying conclusive effect to French judgment in light of French courts' treatment of American judgments).

This definition of comity expresses the notion that a balancing-of-interests analysis is appropriate when considering whether to extend comity. For analogy to the full faith and credit determination, see notes 34-37 *supra* and accompanying text.

52. Chief Justice Burger and Justice Rehnquist joined in Justice Blackmun's dissent. 440 U.S. at 427 (Blackmun, J., dissenting).

53. *Id.*

54. The "Court paints with a very broad brush." *Id.*

55. *Id.*

56. Footnote 24 to the Court's opinion stated:

which Justice Stevens discounted the idea that the majority holding poses a threat to federalism. Interpreting the footnote as a weak attempt to limit the scope of the Court's holding to traffic accident torts committed outside the borders of the defendant-state, he argued that reliance on this limiting fact pattern played "absolutely no part in the reasoning by which the Court reaches its conclusion."⁵⁷

Justice Blackmun also asserted that sovereign immunity, at the time of the Constitution's adoption, was an established and accepted fact, and contended that the *Chisholm* decision and the eleventh amendment's subsequent prompt passage were evidence of the implicit and obvious understanding that the states retained sovereign immunity.⁵⁸ Furthermore, Blackmun maintained that the Court could infer the states' sovereign immunity from the constitutional "guaranty that is implied as an essential component of federalism,"⁵⁹ using the same analytical method it used in its freedom-of-association⁶⁰ and interstate travel⁶¹ decisions.⁶²

Justice Rehnquist, in a separate dissenting opinion,⁶³ argued that sovereign immunity not only is an "assumption" the courts have embraced for 200 years, but also has support in "the logic of the constitutional plan itself."⁶⁴ Rehnquist then focused on *Hans v. Louisiana*⁶⁵ and

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 Nevada could hardly interfere with Nevada's capability 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.

Id. at 424 n.24.

57. *Id.* at 429.

58. *Id.* at 431-32. Justice Blackmun considered *Paulus v. South Dakota*, 58 N.D. 643, 227 N.W. 52 (1929), to be the only case directly on point. In *Paulus* the North Dakota Supreme Court held that South Dakota was immune from suit in North Dakota's state courts; at that time, neither North Dakota nor South Dakota permitted itself to be sued in its own courts. *Id.* at 647-48, 227 N.W. at 54. Justice Blackmun interpreted this case as being contrary to the majority's holding.

59. *Id.* at 430.

60. *See, e.g., Kasper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *NAACP v. Button*, 371 U.S. 415, 430-31 (1963).

61. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966).

62. 440 U.S. at 430.

63. *Id.* at 432 (Rehnquist, J., dissenting). Chief Justice Burger joined in Justice Rehnquist's dissent.

64. *Id.* at 433. Justice Rehnquist viewed *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1781), *see* notes 12-13 *supra* and accompanying text, and the writings of Madison, Marshall, and Hamilton, *see* note 16 *supra*, as supporting the notion that sovereign immunity was commonly understood to

Monaco v. Mississippi,⁶⁶ and concluded that both cases construed the eleventh amendment to preclude more types of suits than its literal terms appear to describe.⁶⁷ He argued that a similarly liberal interpretation of the amendment should prevail to preclude suits against a state in another state's courts even though the amendment's wording does not expressly cover that situation.⁶⁸

Justice Rehnquist reinforced Justice Blackmun's analogy to the Court's method of finding an implicit right to travel⁶⁹ and shared Blackmun's doubt about footnote twenty-four⁷⁰ of the majority opinion. In addition, Justice Rehnquist expressed concern over suits of this type because of the possibility of bias by the forum state against the defendant-state.⁷¹ Finally, he discussed the practical difficulties of implementing the majority's decision, particularly the problems involved in enforcement and collection of judgments in the defendant-state's

be implicit in the constitutional plan. Justice Rehnquist cited a number of cases that spoke in broad language and purport to hold a state immune from suits in another state's courts. He conceded the statements to be dicta, but offered them as supporting the notion that sovereign immunity was the assumed and generally accepted rule. 440 U.S. at 436, 439. Cases cited by Justice Rehnquist include *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961); *Great N. Ins. Co. v. Read*, 322 U.S. 47 (1944); *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446 (1883); *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1858). See note 29 *supra*.

65. 134 U.S. 1 (1890) (eleventh amendment prohibits individual from suing his own state in federal court).

66. 292 U.S. 313 (1934). In holding that the eleventh amendment prevents a foreign country from suing a state in federal court, the *Monaco* Court explained its rationale: "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'" *Id.* at 321.

67. For the text of the eleventh amendment, see note 5 *supra*.

68. Other cases have expanded the eleventh amendment beyond its literal terms. See *Ex parte New York*, 256 U.S. 490 (1921) (admiralty case against a state precluded by eleventh amendment even though amendment speaks only of suits "in law or equity"); *Smith v. Reeves*, 178 U.S. 436 (1900) (eleventh amendment precludes suit against a state by a federal corporation); *In re Ayers*, 123 U.S. 443 (1887) (eleventh amendment precludes suit by aliens against a state).

In determining whether the states yielded a portion of their sovereign immunity when they ratified the commerce clause, see U.S. CONST. art. I, § 8, cl. 3, as part of the Constitution, the Supreme Court has reached inconsistent results. Compare *Parden v. Terminal R.R.*, 377 U.S. 184 (1964) (state submits itself to suit under Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, when it operates railroad in interstate commerce), with *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973) (employee may not sue a state under Fair Labor Standards Act, 29 U.S.C. §§ 201-219).

69. See note 61 *supra* and accompanying text.

70. 440 U.S. at 424 n.24; see note *supra*.

71. 440 U.S. at 439.

own courts.⁷²

The Supreme Court's decision to reject Nevada's claim of sovereign immunity in this case is analogous to the King stamping "let justice be done" on a petition of right against the Crown.⁷³ Although the intentions of the Constitution's framers may be debatable, the Court's conclusion that state immunity from suit in another state's courts is only a matter of comity certainly is defensible and leads to a just result in *Nevada v. Hall*.

The *Nathan v. Virginia*⁷⁴ decision can be analyzed as based on comity rather than absolute state sovereignty.⁷⁵ International law in the eighteenth century generally recognized that a nation was not amenable to suit by a foreign nation or foreign individuals.⁷⁶ This principle derives from the refusal of most nations at that time to permit their own citizens to sue them.⁷⁷ Reciprocal treatment between nations was a logical extension: one sovereign would grant other sovereigns immunity from suit in its courts and expect that favor in return. This reciprocity was not recognition of absolute immunity, but instead a display of comity—the willingness to grant a privilege not as a matter of right, but out of deference and good will, with due regard to the rights of its citizens.⁷⁸ One reasonably can argue, therefore, that this comitous treatment of sovereign immunity in the eighteenth century was a principle incorporated into the "constitutional plan" of the United States.

Many nations have since shed their immunity and now allow their citizens to bring suit against their government. International law has evolved concurrently and now generally permits, on comity principles, suits between nations and by a foreign citizen against a nation.⁷⁹ Nu-

72. *Id.* at 443.

73. See notes 9-11 *supra* and accompanying text.

74. 1 U.S. (1 Dall.) 77 (1781). See notes 12-14 *supra* and accompanying text.

75. *But see* Martiniak, *supra* note 13, at 1152-54 (Nathan assumes that a state is absolutely immune from suit without its consent).

76. *Id.* at 1154; see note 26 *supra* and accompanying text.

77. See Martiniak, *supra* note 13, at 1154-57.

78. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), defined and illustrated comity in this manner. See note 51 *supra* and accompanying text. For similar definitions of comity, see *Brown v. Babbit Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689 (1977); *Nowell v. Nowell*, 408 S.W.2d 550, 553 (Tex. Civ. App. 1966).

79. *E.g.*, *The Beaton Park*, 65 F. Supp. 211, 212 (W.D. Wash. 1946) ("In the absence of statute or treaty, no sound principal of law or of international comity requires that the courts of this country treat a foreign government more favorably as to sovereign immunity than our own government is treated by the courts."). See note 26 *supra*.

merous American states also have waived their immunity from various types of suits,⁸⁰ and, analogous to the developments in international affairs, comity principles provide little incentive to grant other states immunity in their courts from such suits.

Justice Blackmun's appraisal of *Paulus v. South Dakota*⁸¹ overstates its holding. *Paulus* simply may demonstrate comity: North Dakota claimed immunity from suit by its own citizens and chose to extend the same protection to other states.⁸² If a North Dakota resident could not sue other states in North Dakota courts, other states might extend the same protection to North Dakota in their courts.

In addition, the dissenters' analogies to the implied rights in the freedom-of-association and right-to-travel⁸³ cases are unconvincing. To infer a constitutional right to individual freedoms is reasonable in light of the high value Americans historically have placed on personal rights. To use a similar analysis, however, to infer that the Constitution gives a state the "right" to avoid tort liability is much less compatible with traditional notions of justice.⁸⁴

Because the cases the dissenters cite in regard to the eleventh amendment all deal with suits in *federal* court, they have been explained as reflecting the desire to avoid expansion of federal power.⁸⁵ The passages cited in support of the proposition that states are immune from suit in another state's courts may be discounted as dictum.

One problem with the decision may be that because specific facts play an important role in determining whether full faith and credit applies,⁸⁶ it may be difficult at times to determine which state possesses

80. See notes 24-28 *supra* and accompanying text.

81. 58 N.D. 643, 227 N.W. 52 (1929); 52 N.D. 84, 201 N.W. 867 (1924). See note 67 *supra* and accompanying text.

82. "[I]n the absence of allegations as to the law of the sister state showing a consent to be sued, the courts of this state must necessarily regard a sovereign sister state as immune to the same extent that this state would be immune . . ." 58 N.D. 643, 647, 227 N.W. 52, 54 (1929).

83. See notes 60-61 *supra*.

84. The California Supreme Court stated: "[I]n 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." *Hall v. Nevada*, 8 Cal. 3d 522, 526, 503 P.2d 1363, 1366, 105 Cal. Rptr. 355, 358 (1972), *cert. denied*, 414 U.S. 820 (1973).

85. Martiniak, *supra* note 13, at 1154.

86. It should not have been surprising, however, that the Court found a substantial interest in traffic tort liability. California's long-arm statute, under which it obtained jurisdiction, provides: 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,

the substantial interest.⁸⁷ In addition, the defendant-state Nevada can argue that it has a substantial interest in protecting its funds, and, therefore, should not be required to give full faith and credit to the forum state's judgment.⁸⁸ Under the balancing of interests approach,⁸⁹ however, the Supreme Court could determine that the forum state's substantial interest outweighs those interests of the defendant-state and order the courts of the defendant-state to enforce the judgment.

Finally, the minority's concern about bias and lack of a neutral fo-

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 this state by himself or agent, which appointment shall be irrevocable and binding upon his executor or administrator.

CAL. VEHICLE CODE § 17451 (1971).

The Supreme Court upheld a similar nonresident motorist statute on the ground that the state possessed a substantial interest in traffic safety on its highways. *Hess v. Pawloski*, 274 U.S. 352 (1927). Similarly, the Nevada Supreme Court has upheld its nonresident motorist statute. *Kroll v. Nevada Indus. Corp.*, 65 Nev. 174, 191 P.2d 889 (1948).

Justice Blackmun's concern with footnote 24 is unfounded and his assertion that the specific facts of the case played "absolutely no part" in the Court's reasoning is manifestly false. The substantial interest analysis took full consideration of those facts. The Court described California's substantial interest as "providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents.'" 440 U.S. at 424 (quoting *Hall v. Nevada*, 8 Cal. 3d 522, 526, 503 P.2d 1363, 1366, 105 Cal. Rptr. 355, 358 (1972), *cert. denied*, 414 U.S. 820 (1973)). Clearly, the substantial interest test enables the Court to exercise considerable discretion in future cases on whether the particular facts warrant extending full faith and credit to a statute limiting a defendant-state's liability.

87. Two recent California cases involving California's choice of law rules illustrate why Nevada may be concerned about the reach of California law. The California Supreme Court, applying California's dramshop act, held defendant liable when a California resident driving on a California highway was struck by another California resident who had been served alcohol, although obviously intoxicated, on defendant's Nevada premises. *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976). The court imposed liability on the ground that Harrah's advertised in California, even though the Nevada Supreme Court had ruled in *Hamm v. Carson City Nugget*, 85 Nev. 99, 450 P.2d 358 (1969), that Nevada tavern keepers were not subject to dramshop liability and the Nevada legislature had removed all criminal penalties for serving intoxicated customers. In *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976), the California Supreme Court held that California could exercise jurisdiction over an action arising out of a motor vehicle accident that had occurred in Nevada, because defendant, a Nebraska resident, routinely engaged in interstate commerce in California and "the accident happened not far from the California border, while defendant was bound for this state." *Id.* at 149, 545 P.2d at 267, 127 Cal. Rptr. at 355.

88. 440 U.S. at 443 (Rehnquist, J., dissenting).

89. *See, e.g.*, *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935). *See* notes 33-38 *supra*.

rum⁹⁰ is plausible but not persuasive.⁹¹ Excessive jury judgments may be appealed, and it would be overly cynical to maintain that state judges would not give fair consideration to a sister state's claims.⁹²

The Court in *Nevada v. Hall* reached a just conclusion the significance of which will increase as more states waive sovereign immunity.⁹³ Even when a forum state chooses waiver, comity still may give a defendant-state extraterritorial immunity, and the full faith and credit clause still may limit a defendant-state's liability, although there may be some uncertainty over what specific factual situations warrant it. In most situations, however, the decision may confine the scope of state sovereign immunity to the state's own borders.⁹⁴

90. 440 U.S. at 442.

91. States, for example, could obtain insurance coverage for their activities in neighboring states that have waived sovereign immunity. See 4 CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION RELATING TO SOVEREIGN IMMUNITY 811 (1963); Note, *State as a Party Defendant: Abrogation of Sovereign Immunity in Maryland*, 36 MD. L. REV. 653, 662 (1977); Note, *Economic Analysis of Sovereign Immunity in Tort*, 50 SO. CAL. L. REV. 515 (1977). This action could easily prevent the need for a "balkanization" in state relationships as Rehnquist suggests. See 440 U.S. at 443 (Rehnquist, J., dissenting).

92. See *Broussard v. Columbia Gulf Transmission*, 398 F.2d 885 (5th Cir. 1968) (because of modern modes of rapid transportation and communication, people are citizens of the nation and not simply of one locale).

93. See notes 25-29 *supra* and accompanying text.

94. See 440 U.S. at 427 (Blackmun, J., dissenting).

