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Franchise Tax Board of California v. Hyatt: A Split Court, Full Faith and Credit, and Federal Common Law

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On first glance, a case involving a longstanding state tax dispute is probably not one to excite much interest for a general audience. And indeed, *Franchise Tax Board of California v. Hyatt*[1] did not attract much attention in the general news media. Nonetheless, the case contains, if not something for everyone, a lot more than tax issues. The case involves issues of state sovereign immunity, the consequence of the death of Justice Scalia and an evenly split Supreme Court, and relations among the States, and, properly understood, the law making power of the Supreme Court.

I. THE CASE

The case saw the second trip of Gilbert P. Hyatt to the Supreme Court as a respondent on a grant of certiorari to the Supreme Court of Nevada,[2] though his second time there undoubtedly left him less satisfied than his first.[3] Sometime in

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1. (*Hyatt II)*, 136 S. Ct. 1277 (2016).

2. *See* Franchise Tax Bd. of Cal. v. Hyatt (*Hyatt I*), 538 U.S. 488, 490 (2003).

3. California statutes provide complete immunity from suit to its tax

the early 1990's, Hyatt moved from California to Nevada. While Hyatt claimed he moved in September of 1991,[4] after performing an investigation and audit the Franchise Tax Board determined that he had only left California in April of 1992, and, as a result, Hyatt owed California over $10,000,000 in taxes, interest, and penalties.[5] It was not the determination of owed taxes, however, that brought Hyatt's dispute with California to the United States Supreme Court, but the process of the investigation and audit.[6]

Hyatt claimed that the Franchise Tax Board's investigation, much of which occurred in Nevada, was tortious and sued in Nevada state court.[7] As I will discuss further below, in a 1979 case, *Nevada v. Hall,* the Court held that states are not immune from suits in the courts of other states.[8] Nonetheless, as a result of the Eleventh Amendment[9] and a series of decisions from the late 1990's and the first decade of this century, save for actions granted by Congress to enforce the Fourteenth Amendment[10] and the Bankruptcy Clause,[11] states have a constitutional immunity from suits by private parties in the federal courts,[12] federal administrative agencies,[13] and in their own courts.[14] In the first trip of the Franchise Tax Board and Hyatt to the Supreme

agency for torts committed by its employees, but Nevada does not allow its own agencies to be immune from suit for intentional torts of its employees. The United States Supreme Court held that the Nevada courts did not have to give full faith and credit to California's laws, and thus did not have to substitute California law for its own laws, because Hyatt's Nevada residence, and the fact that the tortious conduct at issue occurred in Nevada, established significant contacts such that Nevada's interest in the matter did not make it unfair to apply Nevada law. *Id.* at 493–95.

4. *Hyatt II,* 136 S. Ct. at 1279.
5. *Id.* at 1279–80.
6. *Hyatt I,* 538 U.S. at 488.
7. *Hyatt II,* 136 S. Ct. at 1280.
8. 440 U.S. 410, 410 (1979).
9. U.S. CONST. amend. XI.
10. U.S. CONST. amend. XIV, § 5 (granting Congress "the power to enforce by appropriate legislation the provisions" of the Fourteenth Amendment); *see* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).
11. U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States."); *see* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 375, 377 (2006).
12. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).
13. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002).
14. *See* Alden v. Maine, 527 U.S. 706, 745 (1999).

Court,[15] California claimed that the Full Faith and Credit Clause[16] required that Nevada apply the statutory immunity granted by California to its officers and agencies in Nevada state court.[17] The Supreme Court of Nevada rejected California's argument, and the United States Supreme Court affirmed.[18] According to the Court, so long as one state's statutes did not display "'a policy of hostility to the public Acts' of a sister [s]tate," a state was free to apply its own laws to suits against other states in its own courts.[19]

On remand, a Nevada jury awarded Hyatt nearly $500,000,000 in compensatory damages, punitive damages, and fees.[20] The Nevada Supreme Court reduced the award to $1,000,000, but upheld the finding of liability and remanded for consideration of damages for intentional infliction of emotional distress.[21] The California Franchise Tax Board petitioned for certiorari, arguing that California should be immune as result of Nevada's adoption of the discretionary-function exception to sovereign immunity found in the Federal Tort Claims Act; that *Nevada v. Hall* should be overruled; and argued that, even if it were amenable to suit in Nevada courts, Nevada was obligated to provide California agencies the same level of immunity—a damage cap of $50,000—as it provided to its own.[22] The Supreme Court granted certiorari on the second and third questions.[23] The Court split evenly on whether to overrule *Hall,* and affirmed without opinion.[24] As to California's immunity, the Court agreed with California, but not without dissent, and reversed and remanded for Nevada courts to give California's Franchise Tax Board the same immunity.[25]

In light of the death of Justice Scalia in February of 2016[26]

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15. *Hyatt I*, 538 U.S. 488 (2003).
16. U.S. CONST. art. IV, § 1.
17. *Hyatt I,* 538 U.S. at 491–92.
18. *Id.* at 493–94.
19. *See id.* at 499 (quoting Carroll v. Lanza, 349 U.S. 408, 413 (1955)).
20. *Hyatt II*, 136 S. Ct. 1277, 1280 (2016).
21. *Id.*
22. *See* Petition for Writ of Certiorari at i, *Hyatt II*, 136 S. Ct. 1277 (2015) (No. 14–1175).
23. Cal. Franchise Tax Bd. v Hyatt, 135 S. Ct. 2940, 2940 (2015).
24. *Hyatt II*, 136 S. Ct. at 1279.
25. *See id.* at 1283.
26. *See, e.g.*, Adam Litpak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/

the even split on the Court was hardly surprising; however, it reveals something not only about the dynamics of an evenly split Court, but also about the current state of sovereign immunity doctrine. The ruling on the extent to which Nevada had to treat the California Franchise Tax Board as it would a Nevada agency may not be of widespread importance, but it is the way in which the discussion was framed that is instructive on the Court's attitude toward federal common law. I will briefly consider both aspects of the case.

II. SOVEREIGN IMMUNITY OF A STATE

A. *In Federal Court and Its Own Courts*

1. What Does Article III Say?

The second section of Article III of the Constitution lays out the limits of jurisdiction of the United States courts. One of the nine heads of jurisdiction, the types of cases and controversies to which the federal judicial power extends, is "[c]ontroversies . . . between a [s]tate and a Citizen of another [s]tate."[27] In the Judiciary Act of 1789, Congress exercised that power by giving the Supreme Court and the Circuit Courts, then the federal trial courts for diversity cases, concurrent jurisdiction over those suits.[28] In *Chisolm v. Georgia* the Supreme Court considered a case brought by a creditor of Georgia to collect a debt as an original action in the Supreme Court.[29] Claiming that a state, as a sovereign, could not be sued without its consent, Georgia refused to appear.[30] By a vote of four to one, the Court disagreed.[31] The majority of the Court reasoned that Article III section 2 had removed the States' sovereign immunity in federal court.[32]

2. What Does the Eleventh Amendment Say?

About two years after *Chisolm*, the States ratified the

2016/02/14/us/antonin-scalia-death.html.

27. U.S. CONST. art. III, § 2, cl. 1.

28. An Act to Establish Judicial Courts of the United States, ch. 20, sec. 11, 1 Stat. 73, 78 (1789).

29. 2 U.S. 419, 420 (1793).

30. *Id.* at 469.

31. *Id.* at 476.

32. There is no opinion of the Court. The justices issued their opinions *seriatim*.

Eleventh Amendment, which 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."[33] The language of the Eleventh Amendment appears to strip federal courts of the power to hear diversity actions where a state is a defendant, or, perhaps, any action, whatever its basis, where a state is a defendant in a suit brought by a citizen of a different state. In *Hans v. Louisiana,* however, the Court announced that the extent of state sovereign immunity was not limited to the text of the Eleventh Amendment.[34]

3. The Nature of Constitutional Sovereign Immunity Outside the Eleventh Amendment

In *Hans*, a citizen of Louisiana brought an action against the State to recover for the State's default on its bonds.[35] Hans brought his action in federal trial court pursuant to the fairly recent grant of federal question jurisdiction to the federal trial courts,[36] and the Constitution's prohibition against states impairing contracts.[37] Because the case involved a state being sued by one of its own citizens, the text of the Eleventh Amendment did not prohibit Hans' action. However, the Supreme Court decided that underlying the Eleventh Amendment is a form of state sovereign immunity, which was not abrogated by Article III, and which Congress did not abrogate by granting federal question jurisdiction.[38] After *Hans*, the question remained whether Congress, pursuant to any of the powers the Constitution grants, could enact a law that would abrogate sovereign immunity.

In 1989, a fractured Court upheld the assertion of jurisdiction under an act of Congress[39] in *Union Gas v. Pennsylvania*.[40] Writing for three other members of the Court, Justice Brennan concluded that state sovereign immunity was simply a creature of

33. U.S. CONST. amend. XI.
34. 134 U.S. 1, 15 (1890).
35. *Id.* at 1.
36. 28 U.S.C.A. § 1331 (Westlaw through Pub. L. No. 114–244).
37. U.S. CONST. art. I, § 10, cl. 1.
38. *Hans*, 134 U.S. at 15.
39. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499, § 113, 100 Stat. 1613 (1986).
40. 491 U.S. 1, 7 (1989).

federal common law, which Congress could abrogate pursuant to any of its powers.[41] Justice Scalia, also writing for three other members of the Court, disagreed,[42] and Justice White joined the in the result of affirming jurisdiction over Pennsylvania, but wrote separately to explain that he would not have found the Congressional intent in the statute clear enough to abrogate state immunity.[43] Whatever confusion caused by the fractured Court in *Union Gas* would last less than a decade.

In *Seminole Tribe of Florida v. Florida,*[44] an action brought by the Tribe against Florida for Florida's alleged failure to negotiate with the Tribe over the establishment of casinos as required by the Indian Gaming Act,[45] the Court overruled *Union Gas*. By a vote of five to four, it held that the state sovereign immunity set out in *Hans* was of constitutional dimension, and Congress had no power under the Commerce Clause[46] to abrogate that immunity in federal court.[47] Following *Seminole Tribe*, in *Alden v. Maine,*[48] the Court considered a case brought by a state employee in state court for alleged violations of the Fair Labor Standards Act.[49] Again, by a five to four vote, the Court concluded that, pursuant to the Commerce Clause, Congress had no power to force states to answer for federal suits in their own courts.[50] And this is where the matter stands today. The Eleventh Amendment gives states immunity from suits in federal court, and states cannot be sued in their own courts without their consent.[51] This leaves the question of what happens when a state is sued in the court of another state.

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41. *Id.* at 15.
42. *Id.* at 33 (Scalia, J., dissenting).
43. *Id.* at 45 (White, J., concurring).
44. 517 U.S. 44, 66 (1996).
45. *See* 25 U.S.C.A § 2710(d)(3)(A) (Westlaw through Pub. L. No. 114–244).
46. *Seminole Tribe*, 517 U.S. at 65 (focused on Congress' power under the Indian Commerce Clause, but the Court's holding applies equally to Congress' power to regulate interstate and international commerce).
47. *Id.* at 64.
48. 527 U.S. 706, 711–12 (1999).
49. 29 U.S.C.A §§ 201–219 (Westlaw through Pub. L. No. 114–244).
50. *Alden*, 527 U.S. at 732–33.
51. *See* U.S. CONST. amend. XI; *Seminole Tribe*, 517 U.S. at 54, 64.

B. *Actions Against States in the Courts of Other States*

1. Rarity of States as Private Defendants

The Constitution does contemplate states being sued by other states, but such actions are part of the Supreme Court's original jurisdiction.[52] The question as to what should happen when a private plaintiff sues a state in the courts of the plaintiff's state has not called for a lot of resolution. Prior to the expansion of personal jurisdiction in *International Shoe Co. v. Washington Office of Unemployment Compensation and Placement*[53] a party would only be subject to a state's jurisdiction where the party was present in the state, where the party had property in the state, or where the defendant consented to suit.[54] It is not very often that a defendant state would have found itself in this predicament.

2. The Court Allows States to be Sued in the Courts of Other States

The issue eventually came before the Court in *Nevada v. Hall*[55] in the context of a car crash. There, the Court considered whether Nevada could claim immunity from a California state-court alleging damages caused by a Nevada bus in California.[56] The Court concluded that the Eleventh Amendment and the cases discussing inherent state sovereign immunity were concerned only with the jurisdiction of the federal courts, and that the level of comity to be granted to Nevada was purely a matter of California law.[57]

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52. *See* U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C.A. § 1251(a) (Westlaw through Pub. L. No. 114–244) (endowing the Supreme Court with exclusive and original jurisdiction); *see* David Hatton & Jay Wexler, *The First Ever (Maybe) Original Jurisdiction Standings*, 1 J. OF LEGAL METRICS 19, 21–23 (2012) (reviewing the Supreme Court's original jurisdiction and providing the standings of how various states have done against each other; fans of the Big Ten will be pleased to learn that, according to the authors, Minnesota (5-0), Michigan (6-1), Ohio (4-1) and Wisconsin (5-2) top the standings. Those who prefer the SEC might be disappointed by the fact the last two places are held by Louisiana (2-7), Arkansas (1-5) and Tennessee (0-5)).

53. 326 U.S. 310, 316–17 (1945).

54. *See* Pennoyer v. Neff, 95 U.S. 714, 723–24, 733 (1877).

55. *See* 440 U.S. 410, 411 (1979).

56. *Id.* at 411, 414.

57. *See id.* at 420–21, 426–27.

3. The Arguably Anomalous Position of Hall

Hall was decided well before *Seminole Tribe* and its numerous progeny explained that state sovereign immunity was part of the constitutional structure.[58] In addition, after *Seminole Tribe* and *Alden*, it leads to an odd situation given Article III's efforts to protect states and state interests from local prejudice by providing a federal forum. The Eleventh Amendment, *Seminole Tribe*, and *Alden* mean that, although a state is not subject to suit in federal court or its own courts without its consent, it may be subject to suit, at least under state law, in the courts of another state.[59] Moreover, an action against a state in the courts of another state could not be removed, because, as a result of the Eleventh Amendment, such an action would not be one over which the district courts would have original jurisdiction.[60]

4. Justice Scalia Exits—Hall Stays

It was the anomalous position of *Hall* that led California to ask that it be overruled. *Seminole Tribe* and its progeny have been supported by a constant five to four majority of the court, including Justice Kennedy.[61] Indeed, there is reason to believe that soon *Hall* is headed for the scrap heap of judicial history. The case we concern ourselves with here was argued on December 7, 2015 and would have gone into conference the following Friday, December 11th. Justice Scalia died on February 13, 2016. The decision in *Hyatt* was handed down on April 19, 2016. Writing for the Court, Justice Breyer explained that, because the Court was equally divided, the decision of the Nevada Supreme Court to follow *Hall* was affirmed.[62] However, as Bloomberg BNA's sharp-eyed Nicholas Datlowe has reported, when the opinion was first released, Justice Breyer's opinion was labeled with the header "Opinion of Justice Breyer."[63] The next day a corrected version

58. *E.g.,* Alden v. Maine, 527 U.S. 706, 714 (1999).

59. *See* U.S. CONST. amend. XI; *Alden*, 527 U.S. at 712, 732–33 (1999); Seminole Tribe of Fla. v. Florida*,* 517 U.S. 44, 64, 67–68 (1996).

60. *See* 28 U.S.C.A. § 1441(a) (Westlaw through Pub. L. No. 114–244).

61. *E.g.,* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 745–46 (2002); *Alden,* 527 U.S. at 706; Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1381 (2015).

62. *Hyatt II*, 136 S. Ct. 1277, 1279 (2016).

63. Nicholas Datlowe, *Minor Error, Major Effect,* US LAW WEEK BLOG (Apr. 21, 2016), http://www.bna.com/minor-error-major-b57982070195/.

was issued with the Breyer's opinion headed "Opinion of the Court."[64] As Datlowe explained, had Justice Breyer been assigned to write the majority, his opinion would have always been headed "Opinion of the Court."[65] Moreover, had the majority decided to overrule *Hall*, which is a good guess as to what would have happened had Justice Scalia lived to take part in the final decision of the case, there would have been no need for the "opinion of the court" to have reached the question of the extent to which Nevada was obligated to apply its own immunity law to California.[66] The case would have simply been reversed and remanded with the instruction to dismiss the action. Therefore, it is a good guess that Justice Breyer's opinion was originally written not as a concurrence in part with the decision to reverse the judgment and remand the case back to Nevada, but a dissent from the part of the decision to overrule *Hall*.[67]

In any case, *Hall* remains. To the extent a plaintiff can gain personal jurisdiction over a state in the courts of another state, the defendant state is not constitutionally immune from the suit.[68] Of course, the evenly split Court cannot last forever. As such, either *Hall* or other aspects of the Court's state sovereign immunity jurisprudence will be up for consideration when Justice Scalia's replacement is seated. On the other hand, whatever happens to the composition of the Court, the law of state sovereign immunity will not change right away and state courts may continue to be faced with the issue of what law to apply when another state is sued.

III. THE LAWS APPLIED TO SUITS AGAINST OTHER STATES: A FEDERAL COMMON LAW OF INTERSTATE RELATIONS

A. *The Full Faith and Credit Clause and the Application of the Defendant State's Law of Immunity to Out of State Agencies*

In its opinion in *Hall*, the Court not only allowed Nevada to be sued in the California state court, but also considered whether California courts had to apply Nevada's limitation on damages to

64. *Id.*
65. *Id.*
66. *Id.*
67. *See id.*
68. *See Hyatt II*, 136 S. Ct. 1277, 1279–80 (2016).

state agencies, then set at $25,000.[69] Nevada argued that the Full Faith and Credit Clause of the Constitution[70] required California to do so.[71]

Most lawyers encounter the Full Faith and Credit Clause as first-year students in the context of judicial proceedings, and learn, if anything, that states are required to give the same effect to out of state judgments as the rendering state would.[72] However, the text of the Full Faith and Credit Clause applies to more than judgments. As such, states are required to give full faith and credit to "the public Acts, Records, and judicial Proceedings of every other [s]tate."[73] In *Hall*, the Court rejected the view that the Full Faith and Credit Clause required California to apply Nevada's limit on liability, concluding that, in contrast to giving effect to another state's judgments, a state could take its own public policy into account.[74]

On the first trip of the California Franchise Tax Board and Hyatt to the Supreme Court, California argued that the Full Faith and Credit Clause required Nevada to apply California statutory law exempting the Franchise Tax Board from liability.[75] California lost. Citing *Hall* the Court explained that "[t]here is no principled distinction between Nevada's interests in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and California's interests in the tort claims here arising out of its tax collection agency's residency audit."[76] The Court concluded that Nevada was free to substitute its own public policy—that of compensating tort victims.[77]

On his next trip to the Court, Hyatt's winning streak stopped at one. The Court concluded that while Nevada courts did not have to apply California's statutory immunity to California and its agencies, it did have to apply Nevada's own form of immunity, which limits recovery against the state and its agencies to $50,000.[78]

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69. Nevada v. Hall, 440 U.S. 410, 416, 420–21 (1979).
70. U.S. CONST. art. IV, § 1.
71. *Hall*, 440 U.S. at 421.
72. *See id.*
73. U.S. CONST. art. IV, § 1.
74. *Hall*, 440 U.S. at 422–23.
75. *See Hyatt I,* 538 U.S. 488, 498 (2003).
76. *Id.*
77. *Id.* at 494.
78. *Hyatt II*, 136 S. Ct. 1277, 1283 (2015).

The Court explained that by failing to give California agencies the same level of immunity it would give to its own agencies, Nevada was showing a constitutionally impermissible "policy of hostility" toward other states.[79] That is, it was okay for Nevada to say "our policy of compensating tort victims is more important than California's policy of protecting its agencies from private suits," but Nevada could not say "protecting Nevada agencies is more important than protecting California agencies." According to the Court, discriminating against California state agencies would be unfair, and therefore contrary to the demands of the Full Faith and Credit Clause.[80]

B. *Textualism and the Full Faith and Credit Clause*

In his dissent, Chief Justice Roberts complained that while the majority's resolution "seem[ed] fair," the Full Faith and Credit Clause does not mention "fairness."[81] It has only to do with how states are to treat the public acts and records of *other* states.[82] Once the Court had concluded that a Nevada court could proceed to judgment against a California agency (as the Court concluded in *Hall*) and that Nevada did not have to apply California's grant of immunity from suit to its agencies (as the Court concluded in *Hyatt I*), the Full Faith and Credit Clause did not require Nevada to do anything else in particular with application of its own law to California.[83]

Of course, the Chief Justice was right; the *text* of the Full Faith and Credit Clause does not say anything about fairness or any other standard beyond "full faith and credit." However, as the majority explained, since the Court has concluded that the Full Faith and Credit Clause does not always require one state to apply the law of another state where a party for another state may be involved, the Court has developed a jurisprudence to determine what a court should do when faced with another party.[84] In addition, there are many areas of constitutional law, notably the law of state sovereign immunity, that lack firm textual grounding.

79. *Id.* at 1281 (citations omitted).
80. *Id.* at 1281, 1283.
81. *Id.* at 1284 (Roberts, C.J., dissenting).
82. *Id.* at 1285–86.
83. *Id.* at 1286–87.
84. *Id.* at 1282–83 (majority opinion).

C. Hyatt *as an Example of the Federal Common Law of Interstate Relations*

More importantly, the dissent and the majority's response miss the point. The requirements of "fairness" are not found in the Full Faith and Credit Clause, but rather in the constitutional requirement that the Supreme Court formulate a law of interstate relations. The first clause of Article III, section 2, brings "[c]ontroversies between two or more [s]tates" within the federal judicial power,"[85] and the second clause puts those controversies within the original jurisdiction of the Supreme Court.[86] While it is arguable from the text of Article III that Congress can strip the Supreme Court of original jurisdiction in matters between states,[87] Congress has put such suits within the original jurisdiction of the Supreme Court since 1789.[88]

In determining state against state actions, the Supreme Court has come up with a common law of interstate relations that mostly deals with the law of property boundaries. [89] This has been uncontroversial, as it would not make sense for the Court in adjudicating disputes between states to be bound by the law of one state or another. Moreover, the formulation of a federal common law based on a jurisdictional grant is not unique to state against state controversies. It is found in labor management relations[90] pursuant to the Labor Management Relations Act's grant of federal jurisdiction over labor management contracts;[91] international humanitarian law[92] pursuant to the Alien Tort Statute's grant of federal jurisdiction over "torts only in violation of the law of nations;"[93] and maritime law[94] pursuant to the

85. U.S. CONST. art. III, § 2, cl. 1.
86. *Id.* § 2, cl. 2.
87. *Id.* It is at least arguable that the Exceptions and Regulation Clause in U.S. CONST. art. III, § 2, cl. 2, which allows Congress to regulate the jurisdiction of the Supreme Court, applies only to the appellate jurisdiction of the Court.
88. 28 U.S.C.A. § 1251(a) (Westlaw through Pub. L. No. 114–244); Hatton & Wexler, *supra* note 52, at 20.
89. *See, e.g.*, New Jersey v. New York, 523 U.S. 767, 784 (1998).
90. *See, e.g.*, Textile Workers of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456–57 (1957).
91. *See* 29 U.S.C.A. § 185(a) (Westlaw through Pub. L. No. 114–244).
92. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 694–95 (2004).
93. 28 U.S.C.A. § 1350 (Westlaw through Pub. L. No. 114–244).
94. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 501–02 (2008).

Constitutional and statutory grant of jurisdiction over "cases of admiralty and maritime jurisdiction."[95] The law formulated by the Supreme Court in those cases is federal law, and, pursuant to the Supremacy Clause, it is binding on state and federal courts in any dispute in which it may apply.[96] Thus, for example, to the extent it applies, the federal law of state boundaries will apply in a private action between two landholders in a private action concerning property rights.[97] Therefore, to the extent that the application of a forum state's law granting immunity to out-of-state agencies involves an issue that could give rise to a state against state action, the law that would apply in that action is federal common law subject to formulation by the Supreme Court. Counsel for Hyatt recognized this possibility during oral argument:

> If . . . let's assume, hypothetically, that . . . California brought an original action in this Court, and it said we want an injunction ordering . . . Nevada to apply its damages cap to all suits against California in Nevada courts . . . . What would the basis in Federal law be for that lawsuit? . . . [E]ven if the Court had the power, some Federal law, generally—maybe Federal common law, which is always something the Court, I guess, can create if necessary—why would they particularly choose this rule?[98]

Of course, Hyatt argued that there was no need to formulate a federal common law of comity between states, especially one that would require Nevada to treat California agencies as Nevada would treat its own.[99]

Once, however, one recognizes that the Court would have jurisdiction to determine the hypothetical action by California against Nevada, it is apparent that the Court has to come up with *some* rule of decision. That rule might be "Nevada courts can treat California and its agencies as a private litigant," or, "Nevada

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95. U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C.A. § 1331(1) (Westlaw through Pub. L. No. 114–244).

96. *See* Garrett v. Moore-McCormack Lines, 317 U.S. 239, 245 (1942).

97. *See* Potomac Shores, Inc. v. River Riders, Inc., 219 Md. App. 29 (Md. 2013).

98. Transcript of Oral Argument at 47–48, *Hyatt II*, 136 S. Ct. 1277 (2015) (No. 14-1175).

99. *Id.*

courts have to treat California and it its agencies as it would treat Nevada and its agencies," or, perhaps, some other rule. Nevertheless, there needs to be a basis for the decision. Once it is acknowledged that the Supreme Court needs to formulate a basis for the decision in the hypothetical action brought by California, then "fairness" becomes a perfectly good basis for formulating a rule decision. Of course, there may be other considerations, such as Nevada's dignity as a sovereign state, in formulating a rule of decision. One can imagine the Court having decided this case the other way, but in that case the Court would have announced a rule of decision that state courts are free to treat other states and their agencies as private parties. One would hope that the Court would have at least considered "fairness" in whatever rule of decision it formulated. To claim that "fairness" has nothing to do with the Court's decision is to ignore that the Supreme Court has an affirmative role in the formation of the law of interstate disputes, and federal common law in general.

CONCLUSION

After *Hyatt*, we know a couple of things. States are still liable to be sued in the courts of other states, and, when a state is sued, the court hearing the action will have to treat the defendant state and its agencies as it would treat its own state and agencies.[100]

This brief summary has brought into focus things that were true before *Hyatt*: the Supreme Court is equally divided on, among other issues, state sovereign immunity. The law's development in that area, as well as others, will depend on the next appointment to the Court, and the Supreme Court will continue to come up with rules of decisions that involve interstate disputes. What role "fairness" will play in those rules remains to be seen.

100. *See Hyatt II*, 136 S. Ct. 1277, 1281 (2015).