IS THE SUPREME COURT REALLY GOING TO REGULATE CHOICE OF LAW INVOLVING STATES?

PATRICK J. BORCHERS†

It started with the most ordinary of fact patterns—an auto accident. In 1968, an employee of the state of Nevada, driving a state car while on official business, was involved in an automobile wreck in California.[1] The California plaintiffs sued the state of Nevada in a California state court on a respondeat superior theory and won a verdict of a bit over $1 million.[2] Nevada protested on a variety of grounds—sovereign immunity, comity, and the Full Faith and Credit Clause[3]—and alternatively argued that if it were liable it should be liable only to the amount allowed in the Nevada Tort Claims Act,[4] which was $25,000.[5]

In *Nevada v. Hall*,[6] the United States Supreme Court said to Nevada: "Tough luck." Because the case was in state court, the Eleventh Amendment immunity—that the Supreme Court had developed in several implausibly reasoned cases[7] limiting suits against states in federal courts—did not apply. As to common law doctrines such as sovereign immunity and comity, the Supreme Court stated those were matters of state law and not constitutional guarantees.[8] Finally, as to the Full Faith and Credit Clause, which had at times been a significant regulator of state choice-of-law doctrine,[9] the Court held that full-faith-and-credit principles did not force California to recognize Nevada's tort claims laws, including its damage limitations.[10]

A worried dissent by Justice Blackmun suggested all manner of evils might come about.[11] In particular, he preferred the rationale of

---

† Lillis Family Distinguished Professor of Law, Creighton University School of Law. Thanks to Tyler Masterson for his research assistance.

1. Nevada v. Hall, 440 U.S. 410 (1979).
2. *Hall*, 440 U.S. at 413.
3. U.S CONST. art. IV, § 1.
4. NEV. REV. STAT. § 41.035 (2015).
5. *Hall*, 440 U.S. at 412 n.2.
6. *Id.* at 410.
7. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890) (ruling that the immunity applies to suits by citizens against their own states even though the Amendment refers to suits against "another State"); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).
8. *Hall*, 440 U.S. at 425.
9. Hughes v. Fetter, 341 U.S. 609 (1951).
10. *Hall*, 440 U.S. at 424.
11. *Id.* at 427 (Blackmun, J., dissenting).

the California Court of Appeals (the California court of last resort as the California Supreme Court declined to hear the case),[12] which rested its decision on the fact that the Nevada activities had physically intruded into California.[13] That, argued Blackmun, was a reasonable limiting principle.[14] But, Blackmun's dissent only garnered three votes (including his own).

Thus, the Supreme Court slammed the door on Nevada. Two years later, at least as to the choice-of-law rationale, it seemed to superglue it shut in *Allstate Insurance Co. v. Hague*.[15] The fact pattern in *Hague* was only slightly more exotic. This one involved a motorcycle-auto accident.[16] Ralph Hague, a Wisconsinite, was killed when an auto struck his motorcycle.[17] The accident was in Wisconsin.[18]

Ralph Hague's widow brought suit against their insurer to recover uninsured motorist benefits in the Minnesota state courts.[19] The case had tangential connections to Minnesota. Mr. Hague, though he lived in Wisconsin, worked across the state border at a Red Wing Boot factory in Minnesota.[20] Allstate Insurance Company, his insurer, did business in Minnesota.[21] After Mr. Hague's death, his widow re-married and moved to Minnesota.[22] That was it.

The difference between Wisconsin and Minnesota law was perceived to be that of "stacking" of insurance policies. The Hague family had three vehicles, each of which carried $15,000 in uninsured/underinsured coverage.[23] As the Minnesota courts perceived it, Minnesota law would allow Mrs. Hague to "stack" the policies (thus, allowing a maximum recovery of $45,000) while Wisconsin law would limit her to $15,000.[24] The Minnesota courts were wrong about this. While Minnesota had a *per se* rule of refusing to enforce "anti-stacking" clauses and Wisconsin did not, the policies at issue in *Hague* were not written to forbid stacking. Wisconsin law surely would have construed the policies in the Hagues' favor and stacked them. Thus, the result would have been the same under either Minnesota or Wisconsin

12. *Id.* at 413.
13. *Id.* at 428.
14. *Id.*
15. Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).
16. *Hague*, 449 U.S. at 305.
17. *Id.*
18. *Id.*
19. *Id.* at 305-06.
20. *Id.* at 305.
21. *Id.* at 317.
22. *Id.* at 305.
23. *Id.*
24. *Id.* at 305-06.

law.[25] The *Hague* case thus joined the ranks of entirely unnecessary Supreme Court decisions.[26]

But that does not diminish the significance of the Court's decision in *Hague*. Until the *Hague* case reached the Supreme Court, the Court regulated choice-of-law doctrine fairly closely through two clauses of the Constitution. The Full Faith and Credit Clause acted as a sword by requiring states to sometimes recognize out-of-state laws.[27] The Due Process Clause of the Fourteenth Amendment sometimes acted as a shield and barred states from applying their own law if the connection to the forum was too skimpy.[28]

Undoubtedly, the most significant aspect of the Supreme Court's decision in *Hague* was the near-unanimous agreement among the Justices that the Full Faith and Credit and Due Process Clauses (the sword and the shield) met at the same point.[29] The plurality opinion's test (for practical purposes the majority test, because neither the concurrence nor the dissent took much issue with it) concluded that application of forum law (here Minnesota) was constitutional because Minnesota had "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[30] The plurality opined that Ralph Hague's employment in Minnesota, Allstate's business presence in Minnesota, and his widow's relocation to Minnesota were enough to apply Minnesota law.[31] Justice Stevens's concurrence in the judgment took the position that a state court's application of forum law never violated the Due Process Clause.[32] The dissent took little issue with the plurality's test, but contended that the contacts were too insignificant to pass the test.[33]

While *Hague* might seem to be a universal declaration of the constitutionality of the application of forum law, this turned out to be not quite true. The Kansas Supreme Court managed the feat of flunking

25. Russell Weintruab, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 20-23 (1981).

26. *Id.* at 23-24.

27. *See Hughes*, 341 U.S. at 612. The Court determined "that Wisconsin's statutory policy which excludes this Illinois cause of action is forbidden by the national policy of the Full Faith and Credit Clause." *Id.*

28. *See, e.g.*, Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (noting nominal forum residence of the plaintiff was not sufficient to allow application of forum law). *But see* Jeffrey Rensberger, *Who was Dick?*, 1998 UTAH L. REV. 37 (1998) (showing that the connection with Texas was more substantial than the Supreme Court thought).

29. *Hague*, 449 U.S. at 320.

30. *Id.* at 313.

31. *Id.* at 320.

32. *Id.* at 331-32 (Stevens, J., concurring).

33. *Id.* at 332 (Powell, J., dissenting).

the *Hague* test. In *Shutts v. Phillips Petroleum*,[34] the Kansas Supreme Court held that Kansas law applied to all claims in a class action as to the interest rate on delinquent payments on royalties from natural gas wells, even though the vast majority of the claims arose in other states and had no connection to Kansas other than it was the forum.[35] The Supreme Court ruled that this went too far in terms of a naked preference for forum law.[36] However, in a reprise of *Shutts*, the Supreme Court ruled in *Sun Oil v. Wortman*[37] that Kansas could apply its own statute of limitations to all of the class's royalty claims because application of forum law to limitation periods was a well-recognized rule at the time of the enactment of the Full Faith and Credit Clause.[38] In any event, it seemed clear that the Supreme Court had little interest in prohibiting state courts from applying their own law except in the most extreme of circumstances.

To return to Nevada and California, allowing application of forum law was the order of the day in 2003. *Franchise Tax Bd. v. Hyatt*[39] was factually exotic by the modest standards set thus far. In that case (hereinafter "*Hyatt I*") the Supreme Court considered the tax domicile of Gilbert Hyatt, who had made a considerable sum of money on intellectual property rights.[40] Hyatt contended that he had moved from California and was a Nevada domiciliary as of 1991, which would reduce his state income tax liability to California by several millions of dollars.[41] The California Franchise Tax Board (California's equivalent of the IRS) determined Mr. Hyatt had not actually moved by then, and thus owed a significant amount of money.[42]

In what would prove to be an epic battle, Mr. Hyatt sued the California Franchise Tax Board in Nevada state courts on negligence and intentional tort theories for its aggressive efforts to establish that Mr. Hyatt had not moved to Nevada at the time he claimed. After some waffling, the Nevada Supreme Court ruled that Mr. Hyatt could proceed against the California agency on intentional tort (but not negligence) theories because Nevada would permit such a claim against its own agencies.[43] In what seemed to be an innocuous unanimous opin-

34. 240 Kan. 764 (1987).
35. Shutts v. Phillips Petroleum, 240 Kan. 764, 768 (1987).
36. *Shutts*, 240 Kan. at 767.
37. 486 U.S. 717 (1988).
38. Sun Oil v. Wortman, 486 U.S. 717, 722-23 (1988).
39. 538 U.S. 488 (2003).
40. Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 490-91 (2003) [hereinafter *Hyatt I*].
41. *Hyatt I*, 538 U.S. at 490-91.
42. *Id.* at 491.
43. *Id.* at 492-93.

ion, the Supreme Court ruled that the suit could proceed.[44] Mr. Hyatt's suit clearly met the *Hague* standard for application of forum (Nevada) law, and if Nevada allowed intentional tort suits against its own agencies then California did not have anything about which to complain.[45] Conflicts professors—me included—exhaled with relief because there was no need to teach yet another weird exception to standard full-faith-and-credit principles.[46]

Then came *Hyatt II*.[47] It was the encore of *Hyatt I* after the case had gone to trial. Mr. Hyatt won big before a Nevada jury, which returned a verdict of more than $500 million.[48] The Nevada Supreme Court cut the award to $1 million and remanded for a new trial on the non-fraud causes of action.[49] The Supreme Court took the case and it went from bad to worse for Mr. Hyatt and his attorneys. First, the Supreme Court took up the question of whether *Nevada v. Hall* should be overruled. This was a stunner. In 2003, the Supreme Court unanimously accepted *Nevada v. Hall* as good law. The 2015-16 Court (at this point with eight members due to Justice Scalia's death) was equally divided on the question of overruling the central holding of *Hall*.[50] Justice Breyer's statement of the issue was maddeningly muddy. As he phrased it, the question was whether "to overrule *Hall* and hold that the Nevada courts lack jurisdiction to hear this lawsuit."[51]

To what sort of jurisdiction is Justice Breyer referring? It clearly cannot be personal jurisdiction, because the California Franchise Tax Board's actions relative to Mr. Hyatt were clearly directed toward Nevada.[52] It cannot be subject matter jurisdiction in any conventional sense of that term, because as to a state the competence of its own state courts (such as whether a case based on the amount in controversy belongs in a lower trial court or a court of general jurisdiction) is an issue of state law over which the Supreme Court has no appellate

---

44. *Id.* at 499.

45. *Id.* at 493-94.

46. *See, e.g.*, William Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994) (discussing basic rules of the Full Faith and Credit Clause and its limited exceptions).

47. Franchise Tax Bd. of Cal. v. Hyatt, 136 S. Ct. 1277 (2016) [hereinafter *Hyatt II*].

48. *Hyatt II*, 136 S. Ct. at 1280.

49. *Id.*

50. *Id.* at 1279.

51. *Id.*

52. *See, e.g.*, Calder v. Jones, 465 U.S. 783 (1984) (noting how a libelous article about a California actress rendered the writer and editor of the article subject to personal jurisdiction in California because of the predictable effect on her reputation in the forum state).

jurisdiction.[53] Perhaps he means "prescriptive jurisdiction," a term used in the Restatement (Third) of Foreign Relations for extraterritorial application of a nation's law,[54] but that is at best an awkward fit because it is an international law concept. Really, California wanted immunity, which it did not receive in *Hyatt I*. Because the Nevada Supreme Court had (unsurprisingly) followed *Hall*, the basic principle of state courts being able to adjudicate cases involving sister states was affirmed on an equally divided vote.[55]

But, as to the issue on which the *Hyatt II* Court was *not* equally divided, we are confronted with a six-two holding of the Supreme Court, which is that—as a matter of full-faith-and-credit principles—Mr. Hyatt is limited to the $50,000 maximum recovery that he would have been allowed against a similarly situated Nevada agency.[56] Let us pause to ask a simple question: What exactly is it that the Nevada courts failed to give full faith and credit to? Completely immunizing California from liability would have at least rested on a rule of California law because California law immunizes its agencies from liability in the collection of taxes.[57] True enough, it would be a vast departure from the *Hague* test to hold that Nevada is compelled, as a matter of full-faith-and-credit principles, to apply that California law, but at least one can point to a particular law that must be applied.

But this is not so with regard to the damage limitation. Nevada's Tort Claims Act (and thus its damage limitations) only purports to apply to Nevada agencies.[58] Thus, part of *Nevada v. Hall* was overruled, because in that case, Nevada wanted to limit its liability to $25,000 (the Nevada cap at the time) and was turned down because California had no applicable cap.[59] In *Hyatt II*, Nevada's constitutional failing, according to the majority, was that it "applied a special rule of law that evinces a 'policy of hostility' toward California" by allowing the damages to exceed what Nevada would allow against its own agencies.[60]

The "policy of hostility" quote comes from an old Full Faith and Credit case, *Carroll v. Lanza*.[61] That case involved a Missouri worker

53. *See* Martin v. Hunter's Lessee, 14 U.S. 304 (1816) (holding that the Supreme Court has appellate jurisdiction over state court determinations of federal law and thus by implication not over state law).

54. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 401 (AM. LAW INST. 1987).

55. *Hyatt II*, 136 S. Ct. at 1281.

56. *Id.* at 1281-82.

57. *Id.* at 1280.

58. NEV. REV. STAT. § 41.031 (2015).

59. *Hall*, 440 U.S. at 424.

60. *Hyatt II*, 136 S. Ct. at 1281.

61. 349 U.S. 408 (1955).

injured on a job in Arkansas.[62] He returned home to Missouri and obtained workers' compensation benefits.[63] Under Missouri law, this would have cut off his right to seek redress against any other party, but in Arkansas he was allowed to sue the general contractor on the job (the worker was employed by a subcontractor, which made the general contractor a third party and thus not protected from Arkansas tort liability) and the Arkansas courts allowed the case to proceed.[64] Here is the full quote from which the language in *Hyatt II* is drawn: "Arkansas, the State of the forum, is not adopting any policy of hostility to the public Acts of Missouri. It is choosing to apply its own rule of law to give affirmative relief for an action arising within its borders."[65] Of course, that is exactly what Nevada was doing in *Hyatt II*. Therefore, *Carroll* held that there was no full faith and credit violation in giving redress to one of its citizens in its courts and under its laws for events in the forum state. Thus, *Carroll* stands for exactly the opposite proposition for which *Hyatt II* cited it. *Carroll* held that applying forum law to allow recovery for an in-state injury does *not* evince hostility toward another state.

Nevada was not singling out California for bad treatment. It treated California in the same fashion it would treat any of the other forty-nine states if an arm of the other state committed a tort in Nevada. But even if California had a damage limitation, the intentional torts (laid out in some detail below[66]) clearly occurred in Nevada against a Nevada domiciliary. It defies credulity to say Nevada lacked enough forum contacts to apply its own law under the *Hague* standard.

Chief Justice Roberts had it right in his dissent. He said of the majority's decision to limit Mr. Hyatt's recovery to the $50,000 maximum allowed against Nevada agencies: "That seems fair. But, for better or worse, the word 'fair' does not appear in the Full Faith and Credit Clause."[67] There you have it. The Full Faith and Credit Clause does not guarantee fair results. It prioritizes finality over individual fairness in limiting the review of state actions by another state, in particular state court judgments. In *Fauntleroy v. Lum*,[68] the Supreme Court ruled that a judgment based upon an erroneous interpretation of the recognizing state's law must be recognized.[69] In *Milliken*

62. Carroll v. Lanza, 349 U.S. 408, 409 (1955).
63. *Carroll*, 349 U.S. at 408-09.
64. *Id.* at 410.
65. *Id.* at 413.
66. *See infra* note 101 and accompanying text.
67. *Hyatt II*, 136 S. Ct. at 1284.
68. 210 U.S. 230 (1908).
69. Fauntleroy v. Lum, 210 U.S. 230 (1908).

v. Meyer,[70] the Supreme Court required enforcement of a judgment against a defendant over whom the court had jurisdiction, even though the judgment probably was based on a mathematical error.[71] There was nothing fair about those decisions to the losing litigant, but the constitutional command held sway.

Hyatt II may leave us with a modern analog to the odd-duck case of *Hughes v. Fetter*.[72] The plaintiff in *Hughes* was the personal representative of a Wisconsinite fatally injured in an accident in Illinois.[73] The plaintiff brought a wrongful death action in Wisconsin.[74] The Wisconsin courts dismissed the case on the pleadings because the Wisconsin wrongful death statute only extended to deaths in Wisconsin.[75] Illinois had a wrongful death statute that appeared to differ in no material respects from the Wisconsin statute, but Wisconsin had a strange "negative policy" of refusing to enforce out-of-state wrongful death statutes, even if one of its residents was killed in that other state.[76]

The Supreme Court ruled that Wisconsin's failure to allow a wrongful death cause of action was unconstitutional[77]—but why? The Court held that it violated Full Faith and Credit to not allow the decedent's plaintiff a wrongful death action. But Full Faith and Credit as to what particular law? Clearly, the Court had in mind the Illinois statute, but even under the Supreme Court precedents of that era[78] there was easily enough contact to apply Wisconsin law, including its "negative policy" of refusing to entertain wrongful death suits in deaths outside of Wisconsin.

Although the late conflicts giant Brainerd Currie and I do not agree on much, we agree on this. *Hughes* really must be an Equal Protection Clause case, not a Full Faith and Credit Clause case.[79] If

70. 311 U.S. 457 (1940).

71. Milliken v. Meyer, 311 U.S. 457, 463-64 (1940).

72. *See* Hughes v. Fetter, 341 U.S. 609 (1951) (stating that refusal to allow wrongful death cause of action to proceed based upon an out-of-state accident violates Full Faith and Credit Clause); *see also* Patrick J. Borchers, *Baker v. General Motors: Implications for Inter-Jurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 167-69 (1998) (arguing that *Hughes* is better understood as an equal protection case).

73. *Hughes*, 341 U.S. at 610.

74. *Id.*

75. *Id.* at 613.

76. *See* Borchers, *supra* note 72, at 168.

77. *Hughes*, 341 U.S. at 613-14.

78. *See, e.g.*, Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532 (1935) (determining that plaintiff's residence in the forum is constitutionally sufficient to allow application of forum state's workers' compensation law as to injuries suffered outside the forum state).

79. *See* Borchers, *supra* note 72, at 168 (citing Brainerd Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 60 (1959)).

anything is irrational, surely allowing recovery to a person with the "good luck" to be killed on the Wisconsin side of the state line and denying it to a Wisconsin resident killed on the other side of the state line is irrational.[80]

So now what to make of *Hyatt II* and the fate of *Nevada v. Hall*? *Hyatt II* cannot be reconciled with current full-faith-and-credit law. It is strange beyond words that the Court would profess to be equally divided on whether to overrule *Hall* and then proceed to overrule it with regard to the damage cap. But, odder still is the majority's insistence that Nevada violated the Full Faith and Credit Clause by refusing to rewrite its state tort liability laws to extend its damage limits to other states; essentially, the Court determined Nevada failed to give full faith and credit to a rule of law that *does not exist*.

It is hard to count the votes. Chief Justice Roberts, who voted not to protect California, is usually on the side of protecting states, and was joined by Justice Thomas, putting them opposite the side one might think they would take. It is a relatively safe bet that Justices Kennedy and Alito were on California's side because they (particularly Kennedy) have great reverence for the sovereignty of states, and Alito merely concurred in the judgment without offering any further explanation. The critical vote for immunizing California completely would likely be that of Justice Breyer as he was assigned to write the *Hyatt II* opinion, so the odds are that he favors overruling *Hall*.

On the side of not overruling *Nevada v. Hall*'s central holding that states are not immunized from suits in sister state courts, this would leave Justices Roberts and Thomas, and presumably two of the three of Justices Ginsburg, Sotomayor, and Kagan. Of course, this is nothing but a guess, except as to Justice Roberts, who made his views known in his dissent, Justice Thomas by joining him, and probably Justice Breyer on the other side. Presumably that bloc of four is Justices Kennedy, Breyer, Alito, and one of Justices Ginsburg, Sotomayor, and Kagan.

So what is next? Obviously, much will depend on the views of whoever takes the seat vacated by Justice Scalia's death. But, if the Supreme Court is determined to immunize states from suit in sister state courts without their consent, it ought to abandon the Full Faith and Credit Clause as an instrument for doing so. It is the classic square peg in a round hole. To hold that a forum state, no matter how

80. The Supreme Court's efforts to explain away *Hughes* as "laying an uneven hand" on a foreign cause of action could be understood as a nod to the irrational result produced by the Wisconsin Supreme Court's interpretation of its wrongful death statute. *See* Wells v. Simonds Abrasive Co., 345 U.S. 514, 521 (1953) (distinguishing *Hughes* and allowing application of forum law).

abundant the contacts with it, always must grant immunity in its state courts to another state as a matter of full-faith-and-credit principles would require pounding on the peg until it splinters.

A more plausible route might be to extend the rationale of *Alden v. Maine*.[81] *Alden* is itself a bit of an odd duck. In a five-four split along ideological lines, Justice Kennedy's majority opinion held essentially that the Eleventh Amendment sovereign immunity concepts also apply in state court, even though the Amendment refers only to federal court jurisdiction.[82]

Alden got its start in federal court when a group of Maine probation officers filed an action against the state of Maine under the federal Fair Labor Standards Act[83] (hereinafter "FLSA").[84] They claimed they were wrongfully being denied overtime pay.[85] However, as the case was pending, the Supreme Court decided *Seminole Tribe v. Florida*.[86] In *Seminole Tribe*, the Court ruled that Congress did not have the power, when legislating under the Commerce Clause, to override a state's Eleventh Amendment immunity without the state's consent.[87] Because the only plausible source of authority for the FLSA was the Commerce Clause, the district court dismissed on Eleventh Amendment grounds and the United States Court of Appeals for the First Circuit affirmed.[88]

The probation officers then re-filed in Maine state courts.[89] They were able to do so because the FLSA provides for concurrent jurisdiction in state and federal court and an Eleventh Amendment dismissal is a dismissal for lack of subject matter jurisdiction,[90] and thus not a merits dismissal that would present a res judicata bar to re-litigation in state courts.[91] Maine defended on sovereign immunity grounds and the Maine Supreme Court upheld the defense.[92]

81. Alden v. Maine, 527 U.S. 706 (1999).
82. *Alden*, 527 U.S. at 712-13.
83. 29 U.S.C.A. § 201 (West 2012).
84. *Alden*, 527 U.S. at 711.
85. *Id.* at 711-12.
86. Seminole Tribe v. Florida, 517 U.S. 44 (1996).
87. *Seminole Tribe*, 517 U.S. at 47. The rationale roughly was that because the Commerce Clause pre-dated the Eleventh Amendment, it could not be used to justify Congress imposing obligations on states that violate their sovereign immunity. However, if Congress legislates pursuant to a later amendment—principally the Fourteenth Amendment—it can impose obligations on states. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (stating that section five of the Fourteenth Amendment gives Congress special powers to override the Eleventh Amendment).
88. *Alden*, 527 U.S. at 712.
89. *Id.*
90. U.S. CONST. amend. XI.
91. *Cf.* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 502 (2001).
92. *Alden*, 527 U.S. at 712.

The Supreme Court agreed and affirmed.[93] The majority opinion was decidedly a-textual. Unlike the Eleventh Amendment cases in which the Court had a provision in the Constitution to invoke, the *Alden* opinion depended on pre-constitutional history.[94] At the risk of drastic simplification, the majority's rationale was that in ratifying the Constitution the states did not give away sovereign immunity to the federal government; thus, they could be sued on a federal law theory as states (even in their own state courts) only if they consented. Maine's sovereign immunity defense was upheld because it had not consented with regard to the FLSA.[95] *Alden* has been met with scholarly skepticism,[96] but unless it is overruled it remains the law.

So what does this have to do with *Hall* and the *Hyatt* decisions? Potentially quite a lot. Although the *Hyatt II* opinion did not mention *Alden*, it figured prominently in California's briefs.[97] One of California's arguments, which makes a fair amount of sense if one accepts the premises of *Alden*, is that if states are shielded from the federal government by pre-existing sovereign immunity then *a fortiori* another state cannot override California's immunity.[98]

This also makes some sense of the four-to-four split on whether to overrule the central holding of *Hall*. The five-vote bloc that formed the majority in *Alden* included that of the late Justice Scalia.[99] Although the Court's membership has changed some since *Alden* was decided in 1999, its ideological balance has changed only slightly, moving the fulcrum from Justice O'Connor to Justice Kennedy. The fact that Justices Breyer, Roberts, and Thomas all showed most of their cards means that Justices Roberts and Thomas are inclined to vote with the Court's "liberals" and Justice Breyer with the "conservatives." To some extent, that is not a shock as Justice Roberts usually grades out as the most centrist member of the conservative bloc and Justice Breyer the most centrist of the liberal bloc, but Justice Thomas's vote is more surprising, though his general commitment to textualism may explain his position.[100]

---

93. *Id.*

94. *Id.* at 713.

95. *Id.*

96. *See, e.g.*, Daan Braveman, *Enforcement of Federal Rights Against States: Alden and Federalism Non-sense*, 49 AM. U.L. REV. 611 (2000) (arguing that *Alden* is not supported either by constitutional history or precedent).

97. Eleven briefs make reference to *Alden*. *See, e.g.*, Brief for Petitioner-Appellant, Franchise Tax Bd. of Cal. v. Hyatt, 136 S. Ct. 1277 (2003) (No. 14-1175).

98. Brief for Petitioner, Franchise Tax Bd. of Cal. v. Hyatt, 136 S. Ct. 1277 (2003) (No. 14-1175).

99. *Alden*, 527 U.S. 706 (1999).

100. *The Supreme Court 2014 Term The Statistics*, 129 HARV. L. REV. 381 (2015); *The Supreme Court 2013 Term The Statistics*, 128 HARV. L. REV. 401 (2014). *See also*

None of this is to endorse an extension of *Alden*. The dominant themes of state sovereignty and territoriality that animate *Alden* can be turned around easily. If one harkens back to the era in which states were more like independent nations with only a weak federal government to bind them, then one might well take the position that California, by making a physical incursion into Nevada (including California employees rifling through Mr. Hyatt's mail and so on[101]), waived its immunity by violating Nevada's territorial integrity. Recall that Justice Blackmun in his dissent from *Hall* preferred the rationale that the defendant state (there, Nevada) was acting outside its territory.[102] Moreover, as established by the Civil War and the resulting amendments to the Constitution, states are not free to leave the union the way that, for instance, Great Britain is apparently leaving the European Union.[103]

Perhaps all will be well and *Hyatt II* will be remembered as a full-faith-and-credit oddity in the same way *Hughes v. Fetter* is now. But, if the Court is determined to overrule *Hall* and create essentially an interstate immunity rule, let us hope it does so without laying waste to its full-faith-and-credit jurisprudence.

Kedar Bhatia, *Final October Term 2015 Stat Pack*, SCOTUSBLOG (Jun. 29, 2016, 11:25 PM), http://www.scotusblog.com/2016/06/final-october-term-2015-stat-pack/.

101. *Hyatt II*, 136 S. Ct. at 1280.

102. *Hall*, 440 U.S. at 428-29 (Blackmun, J., dissenting).

103. *See, e.g.*, J.P., *The Economist explains How to Leave the European Union*, THE ECONOMIST (Jun. 26, 2015, 23:30 PM), http://www.economist.com/blogs/economist-explains/2016/06/economist-explains-24.