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## The State as an Unwilling Defendant: Reflections on *Nevada v. Hall*

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By Margaret G. Stewart\*

# The State as an Unwilling Defendant: Reflections on *Nevada v. Hall*

## I. INTRODUCTION

The doctrine of sovereign immunity provides an absolute defense to any claim brought against a sovereign without its consent. It is an old doctrine<sup>1</sup> which, although modified<sup>2</sup> and attacked,<sup>3</sup> con-

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1. Originally, the doctrine of sovereign immunity was an outgrowth of the medieval fiction that the king could do no wrong and was thus immune from any such allegations as a matter of law. See generally 1 W. BLACKSTONE, COMMENTARIES \*239; Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924). Although unpopular in the United States, the theory was adopted early by the courts, see, e.g., *United States v. Lee*, 106 U.S. 196 (1882), *The Siren*, 74 U.S. (7 Wall.) 152 (1869), *Nichols v. United States*, 74 U.S. (7 Wall.) 122 (1869), *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and persisted as a function of practicality:

Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c.26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

*Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

2. The sovereign immunity of both the United States and the states does not extend to certain suits against governmental officers for relief which does not require the expenditure of funds of the government. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 686 (1949) (allegation that federal official acted either in excess of statutory authority or that authority itself was unconstitutional removes any bar immunity might otherwise provide); *Ex Parte Young*, 209 U.S. 123, 155-56, 159-60 (1908) (allegation that state official acted or will act unconstitutionally removes any bar immunity might otherwise provide). Prospective, rather than retrospective relief, and expenses which are ancillary, rather than primary, are the only types of relief available when immunity is denied under this rationale. See *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974). The primary distinction between the exceptions relates to the officer acting constitutionally but without statutory authority. A federal officer may not claim immunity; whether a state officer is protected depends solely on state law. See Field, *The Eleventh Amendment*

tinues to reflect a legal truism. Legislation carving out exceptions to the doctrine presupposes that the immunity exists.<sup>4</sup> Nowhere, however, does the Constitution of the United States specifically confer such immunity on either the federal or state governments.<sup>5</sup> Whatever the source of the protection, sovereign immunity is sufficient to shield the United States from suits to which it does not consent.<sup>6</sup> However, if the defendant is a state, the source of the immunity will determine its scope. If the Constitution implicitly cloaks the states in all situations with such immunity, their protection is as complete as that of the federal government. If the doctrine has no source other than the common law, then the protection it affords to the states depends upon the extent to which the common law was changed by ratification of the Constitution. In turn, the extent of the change depends upon where the state is being sued and thus differs when the state is called upon to defend in federal court, in its own courts, or in the courts of another state.

The United States Supreme Court's decision in *Nevada v. Hall*<sup>7</sup>

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*and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 520 n.24 (1978).

3. See generally 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 551-72 (1976); Wall & Childres, *The Law of Restitution and the Federal Government*, 66 NW. L. REV. 587 (1971); Note, 61 GEO. L.J. 1535 (1973). The feeling of discomfort with the doctrine is not of recent vintage. It was seen as an anomaly as early as 1793 in *Chisholm v. Georgia*, 1 U.S. (2 Dall.) 419, 471-72 (1793), criticized in *United States v. Lee*, 106 U.S. 196 (1882), and has recently been completely abolished in one state as an obvious contradiction to the American theory of government. *Mayle v. Pennsylvania Dep't of Highways*, 479 Pa. 384, 388 A.2d 709 (1978). Whether the amenability of the state to suit in its own courts also constituted waiver of immunity to suit in the federal courts was at first unclear. Compare *Greenfield v. Vesella*, 457 F. Supp. 316 (W.D. Pa. 1978) with *Hernandez v. Whitesell*, 462 F. Supp. 569 (E.D. Pa. 1978). The issue was resolved by legislation denying such waiver. 1978 PA. LEGIS. SERV. 629-36.
4. See, e.g., NEB. REV. STAT. § 24-319 (Reissue 1975); ILL. CONST. art. 13, § 4; note 6 *infra*.
5. Prior to union, the immunity of each state was that of a nation. *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Ct. of Common Pleas, Philadelphia County, 1781). See also THE FEDERALIST No. 81, 548 (A. Hamilton) (J. Cooke ed. 1961).
6. The United States has waived much of its immunity pursuant to three statutes: Act of Oct. 21, 1976, PUB. L. No. 96-574, § 1, 90 Stat. 2721 (amending 5 U.S.C. §§ 702, 703 (1976)); Tucker Act, 28 U.S.C. §§ 1346, 1491 (1970); and Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1970).
7. 440 U.S. 410 (1979). Although the Supreme Court had never decided the issue, the assumption prior to *Hall* was that such a suit could not be maintained. Indeed, the assumption was clearly shared by the Court. In determining that an attempt by a state to escheat certain funds was invalid when, because of the nature of the funds, it could not prevent other such actions by other states and hence double liability of the defendant, the Court stated that the other states could not have been made parties to the action. Only in the Supreme Court could all interested states be forced to appear and be subject to a binding determination. *Western Union Co. v. Pennsylvania*,

determined the source and extent of the immunity of a state sued in the courts of a sister state. California residents, injured in a car accident in California, brought suit in California against the administrator of the estate of the allegedly negligent driver (an employee of the University of Nevada), the University, and the State of Nevada. The latter two defendants sought to quash service of the summons and complaint, arguing that the California courts lacked jurisdiction in the absence of Nevada's waiver of immunity. Although Nevada had statutorily consented to suits based on such tort claims, the waiver only applied to suits brought in the Nevada state courts and the statute placed a \$25,000 limit on any recovery against the state.<sup>8</sup> The California Supreme Court upheld the service without determining whether Nevada's statutory waiver en-

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368 U.S. 71 (1961). See also *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, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.

In only one instance had a state supreme court confronted such a request for jurisdiction prior to *Hall*. North Dakota was asked to permit a plaintiff to sue the state of South Dakota, his employer, for damages sustained in North Dakota—and refused. The plaintiff claimed to be a resident of South Dakota in his initial attempt to hold South Dakota liable. *Paulus v. South Dakota*, 52 N.D. 84, 201 N.W. 867 (1924). The California Supreme Court distinguished this case from *Hall* because California's interest in protecting its residents differed from whatever interest North Dakota might have had in protecting persons who worked in the state but were not residents. The plaintiff in *Paulus* alleged that he was a resident of North Dakota in his second attempt to recover, and his suit was again dismissed. The court reasoned:

Should the judicial branch of the government of one state undertake to define the legal obligations of a nonconsenting sister state, it would, in effect, be denying sovereignty of the latter. A state cannot remain the supreme master of its own affairs if it must yield to external conceptions in matters of justice and right. . . .

Thus, so carefully have the sovereign prerogatives of a state been safeguarded in the Federal Constitution that no state could be brought into the courts of the United States at the suit of a citizen of another state. Much less would it be consistent with any sound conception of sovereignty that a state might be haled into the courts of a sister sovereign state at the will or behest of citizens or residents of the latter. He who would thus seek recourse should therefore be required to clearly show by his pleadings the unqualified consent of the defendant.

*Paulus v. South Dakota*, 58 N.D. 643, 649, 227 N.W. 52, 54-55 (1929). Until *Hall*, no one disputed either this rationale or result.

8. NEV. REV. STAT. § 41.035(1) (1965).

compassed the California suit,<sup>9</sup> holding that when Nevada, through its agents, acted in another state, it did not and could not act in a sovereign capacity since "state sovereignty ends at the state boundary."<sup>10</sup> Therefore, the defendants could not claim immunity as a matter of right, and jurisdiction would fail only if California agreed as a matter of comity to extend immunity. The Court reasoned that the potential embarrassment to Nevada resulting from being sued without its consent was outweighed by California's substantial interest in providing a convenient forum for its injured residents. This interest was bolstered by California's waiver of its

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9. *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).

10. *Id.* at 525, 503 P.2d at 1365, 105 Cal. Rptr. at 357. In support of this proposition, the court relied on cases which permitted suit against a sister state when the dispute involved real property owned by the sister state which was located in the forum state. Even though such suits traditionally proceeded in rem, the court reasoned that the sovereign status of the defendant was not affected by the basis for jurisdiction. *Id.* See, e.g., *Georgia v. Chattanooga*, 264 U.S. 472 (1924) (the holding seems to rest as much upon notions of consent implied by the purchase of property subject to the authority of the state as it does upon theoretical distinctions as to sovereign status, *id.* at 479-80). See note 12 *infra*.

If one state is to obtain in personam jurisdiction over another state on a transitory cause of action, the forum state must possess the authority to force the other state to reenter the forum to defend the merits of its claim or to suffer a default judgment. Irrespective of its status at the time the cause of action arose, when the other state is served with process, it is served within its own borders and hence as a sovereign. In contrast, when land belonging to a state is attached in an in rem proceeding, the status of that state as the owner of property remains constant. Since the forum state is never called upon to act vis-a-vis the defendant state anywhere but within the forum (as jurisdiction is obtained by attachment of the property), it is theoretically not necessary to accord the other state recognition as a sovereign.

To assert jurisdiction over a state which is acting outside its borders, on the theory that such activity cannot constitute sovereign activity, may, however, lead to a result similar to that currently espoused by international law. See Martiniak, *Hall v. Nevada: State Court Jurisdiction Over Sister States v. American State Sovereign Immunity*, 63 CALIF. L. REV. 1144 (1975). International immunity may protect sovereigns from suit in foreign courts only when the activity giving rise to the plaintiff's claim was undertaken in the sovereign, rather than the commercial, capacity of the defendant. If a sovereign state, which is acting outside its boundaries by definition can act only in a commercial capacity, see, e.g., *Hall v. University of Nev.*, 8 Cal. 3d at 525, 503 P.2d at 1365, 105 Cal. Rptr. at 357, then the restriction imposed by both theories is identical. Unfortunately, this restriction does not necessarily follow from the Supreme Court's opinion in *Hall*. See notes 19-23 & accompanying text *infra*. See also Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203, 1232-86 (1978) (discussion of the difficulties raised by attempting to distinguish governmental from commercial activities in a different context).

own immunity from like suits.<sup>11</sup> Since the California jurisdictional statute<sup>12</sup> had been otherwise properly invoked, the motion to quash was dismissed. The United States Supreme Court denied certiorari,<sup>13</sup> but later agreed to review<sup>14</sup> a subsequent California appellate court determination which permitted an award of damages in excess of the Nevada limitation as well as upholding gener-

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11. 8 Cal. 3d at 525-26, 503 P.2d at 1365-66, 105 Cal. Rptr. at 357-58; compare *id.* with *Paulus v. South Dakota*, *supra* note 8.

12. The California statute which was interpreted as permitting service on Nevada treated the operation of a motor vehicle in California as implied consent by the owner or driver of the vehicle to suit in California on a cause of action arising out of the operation of the vehicle. The activity within the state constituted the appointment of a state official as an agent of the defendant for service of process. CAL. VEH. CODE § 17451 (West 1971). A similar statute was upheld by the Supreme Court in *Hess v. Pawloski*, 274 U.S. 352 (1927), and there is no doubt today that such jurisdiction over a nonresident driver comports with due process. If the requirements of due process are met because the defendant is considered to have consented to the suit, then the activity of Nevada would be equivalent to consent and any defense of sovereign immunity would already have been waived. However, *Hess* was decided prior to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and was rendered when *Pennoyer v. Neff*, 95 U.S. 714 (1877) constituted the cornerstone of jurisdictional law. Due process under *Pennoyer* required that a state have power over a nonresident defendant in some physical sense before it exercised personal jurisdiction over the nonresident defendant. Thus, the only acceptable bases of jurisdiction were the presence of the defendant at the time process was served, attachment of his property (which provided quasi in rem jurisdiction), the defendant's consent, his domicile, or status under the law of the forum.

In attempting to fit the *Hess* facts into one of the preceding categories, the Court there accepted the "consent" of the defendant as sufficient, although under these circumstances it can by no means be actual and is undoubtedly unknowing as well. Compare *Hess v. Pawloski*, 274 U.S. 352 (1927) with *Kane v. New Jersey*, 242 U.S. 160 (1916). Under *International Shoe*, due process was redefined to require certain contacts between the defendant and the state. It might have been possible to read the *International Shoe* standard as an expansion of *Pennoyer*, rather than a replacement of it. But *Shaffer v. Heitner*, 433 U.S. 186 (1977), rejects this possibility. In broad language, *Shaffer* requires minimum contacts between the defendant and the forum state prior to the exercise of any jurisdiction. The majority opinion, in determining that the contacts between defendant directors of a Delaware corporation and Delaware were insufficient to support jurisdiction, did refer to the lack of any Delaware statute equating acceptance of a directorship of a state corporation with consent to the state's jurisdiction. However, the logic of the primary holding precludes recourse to such "forced consent," as well as to any other traditional *Pennoyer* bases of jurisdiction, such as the presence of property. Since the California statute in *Hall* was not drafted to compel waiver of immunity, and since, after *Shaffer*, it is no longer constitutionally sufficient to compel jurisdiction, the statute ought not alone sustain the *Hall* result. See Note, *Quasi in Rem Jurisdiction: A New Era*, 57 NEB. L. REV. 523 (1978).

13. 414 U.S. 820 (1973).

14. 436 U.S. 925 (1978).

ally the exercise of jurisdiction.<sup>15</sup>

If it were to reverse the California judgment, the Supreme Court would have had to find that the Constitution prohibited the exercise of unlimited jurisdiction over Nevada, absent its consent.<sup>16</sup> Unless Nevada's status as a state created constitutional constraints on California's assumption of such jurisdiction, ordinary jurisdictional rules would not preclude the suit. Nevada, acting through its agent, allegedly committed a tort in California, and the plaintiffs' claim was directly related to that activity in the forum. Therefore, minimum contacts sufficient to satisfy traditional notions of fair play and substantial justice existed between the defendant and the forum; due process was not offended by forcing the defendant either to enter the state and defend or to suffer the entry of a default judgment against it.<sup>17</sup> The Supreme Court did not follow the logic of the California holding, which resolved the issue by stripping Nevada of any distinguishing characteristics when it acts outside its own boundaries. Rather, the Court searched in vain for a general constitutional command that one state recognize another's sovereign immunity. Three possible sources for such a command were suggested. First, Nevada argued that the immunity is implicit in the Constitution. While three Justices agreed with this interpretation,<sup>18</sup> the majority held that no constitutional provision either granted such immunity or supported its inference.<sup>19</sup> Possible implications drawn from provi-

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

16. U.S. CONST. art. III, which defines and to some extent vests the judicial power of the United States, also provides the limitations on that power. Only those cases and controversies delineated by article III may be heard by a federal court. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). State law questions arising in the context of a claim otherwise properly before the Court (*e.g.*, diversity actions, pendent or ancillary claims) may, of course, be reviewed there in the exercise of the Court's appellate jurisdiction. However, even in that context the Court may only determine what the state law is, not what it should be. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). A recent and clear pronouncement by the highest court of the state is, therefore, binding. Thus, California's holding that comity would not compel it to recognize Nevada's sovereign immunity must stand unless the result so reached violates federal law. Absent such a violation, the state's determination not to extend comity is the equivalent of a determination by a sovereign nation and is completely within its discretion. See *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

17. *International Shoe Co. v. Washington*, 326 U.S. 310, 317-20 (1945).

18. 440 U.S. 410 (1979) (Blackmun, J., dissenting) (joined by Burger, C.J. & Rehnquist, J.).

19. 440 U.S. at 418-21. The majority opinion recognized that the failure to provide immunity from a suit against one state in another's court may well have been an oversight, resulting from the assumption of the framers of the Constitution that such protection would be adequately provided by "prevailing notions of comity" and from their overriding concern with the immunity of the

sions defining the federal judicial power were insufficient to create a presumption of immunity from suit in a state system.<sup>20</sup> Second, Nevada argued that the full faith and credit clause<sup>21</sup> specifically required other states to recognize its statutory definition of its own immunity. However, the Court held that the full faith and credit clause did not compel California to subordinate its strong and legitimate public policy of providing a forum for its residents to the conflicting policy of another state.<sup>22</sup> Finally, Nevada urged that

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states from suit in the federal system. *Id.* at 418-19. However, there was no reason to read such an assumption into the Constitution. The dissenting Justices in *Hall* argued:

If the Framers were indeed concerned lest the States be haled before the federal courts, . . . how much more must they have reprehended the notion of a State's being haled before the courts of a sister State. The concept of sovereign immunity prevailed at the time of the Constitutional Convention. It is, for me, sufficiently fundamental to our federal structure to have implicit constitutional dimension.

*Id.* at 431 (Blackman, J., dissenting) (joined by Burger, C.J. & Rehnquist, J.). Furthermore, to imply a constitutional right of immunity as an "essential component of federalism" is only to utilize the same logic which supports a constitutional right to travel. *Id.* at 430.

20. *Id.* at 419-21.

21. U.S. CONST. art. IV, § 1: "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." Congress has provided for the method of authenticating legislative acts and records and judicial proceedings of a state court and has prescribed their effect:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (1976). The congressional command that state court judgments be afforded full faith and credit in federal courts as well as state courts has led one commentator to argue that in the context of claims under 42 U.S.C. § 1983 (1976), *res judicata* to some degree provides a federally mandated defense. See Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 326-27 (1978). See also *Chicago, R.I. & P. Ry. v. Schendel*, 270 U.S. 611 (1926) (barring in a different context a federal claim because of a prior state judgment).

22. 440 U.S. at 421-24.

In the context of the discussion of full faith and credit, the majority did indicate that perhaps not all fact situations would be encompassed by its decision:

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 capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result.

*Id.* at 424 n.24. This caveat leaves a good deal to be desired. It intimates that



there are implicit constitutional constraints on a state's exercise of comity, which prevent one state from treating another as an unfriendly sovereign. Again, the Court disagreed, finding that the granting of comity is nowhere controlled and remains entirely within the forum's discretion.<sup>23</sup>

Standing alone, the majority opinion in *Nevada v. Hall* is both clear and logical. It does, however, contrast oddly with the Court's approach to the issue of state sovereign immunity in other contexts. It may well create a dual doctrine of immunity—one that determines its source in reliance upon the system, federal or state, in which a claim is brought. Furthermore, to the extent that the opinion rests upon an analysis of the full faith and credit clause, it raises more issues than it resolves.

## II. SOVEREIGN IMMUNITY

The Supreme Court has previously considered the issue of state sovereign immunity in the context of suits brought against a

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a limitation on California's jurisdiction might exist because of the character of the defendant, but it fails to indicate either the source or scope of that limitation. Given the Court's refusal to elevate state-state immunity to a constitutional level, the full faith and credit clause must support any restriction; yet its analysis of that clause rested solely upon a description of California's interest in providing a remedy without monetary limitation for its injured residents. Why that interest would change depending upon the cause of action is unclear.

The Court's footnote may indicate that if Nevada's activity had either been characterized as governmental or occurred within its own borders, California would not have been free to disregard the defendant's traditional immunity. See note 10 *supra*. To justify such a restriction, however, it would be necessary either to consider Nevada's interest in the dispute (which the Court failed to do in *Hall*) or to determine that there is a limitation on the discretionary exercise of comity which is implicit in the Constitution.

If there is such a restriction on the exercise of comity, its source would almost surely be the full faith and credit clause, which was an attempt to formalize notions of comity in the situations to which the clause applied. See *Fauntleroy v. Lum*, 210 U.S. 230 (1908). Even if those notions of comity were not to be frozen by the clause, see note 23 & accompanying text *infra*, at the least the clause may provide some restraint on the development of notions of comity by the individual states. Yet Justices White, Harlan, McKenna and Day, dissenting in *Fauntleroy*, made this argument in a different context and lost. Maintaining that comity had never been thought to place any moral obligation on a sovereign to enforce a judgment based on what the forum considered to be an illegal contract, the four dissenting justices denied that the now-constitutional obligation could be invoked to require such enforcement. The majority disagreed. In any event, nowhere in the *Hall* opinion does the Court indicate that the formulation of California's policy is subject to constitutional restraint. Indeed, the majority recognizes that the Court will presume "policies of broad comity," but states bluntly that such a presumption is rebuttable by the states without limitation. 440 U.S. at 425-26.

23. *Id.* at 425-27.

state in federal rather than state courts. The earlier treatment of the issue differs in two respects from *Hall*. First, with one early and discredited exception,<sup>24</sup> those opinions do not focus upon express constitutional language to determine that immunity exists, nor do they automatically conclude that the lack of such language precludes a claim of immunity.<sup>25</sup> Second, the Court has never clearly defined the source of a state's immunity in the federal system; the opinions support arguments that it is constitutionally compelled and that its existence is based solely upon the common law.<sup>26</sup>

States may be sued without their consent in two well-recognized instances.<sup>27</sup> A state may sue another state in the Supreme

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24. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). See notes 26-29 & accompanying text *infra*.

25. See generally notes 27-40 & accompanying text *infra*. In one instance, the Court also has not felt bound by specific language forbidding suits against a state to be heard in the federal system. The Constitution states that "[t]he 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." U.S. CONST. amend. XI. The amendment thus modifies article III, section 2, which expressly included such controversies within the judicial power. However, should a state consent to the described suit, subject matter jurisdiction is properly invoked, although the eleventh amendment contains no exception to its prohibition. See *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279 (1973). While immunity has always been seen as a defense which the sovereign may assert in its discretion, ordinarily consent to the exercise of subject matter jurisdiction is irrelevant to its existence. See, e.g., *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

Of course, the determination of what constitutes consent of a state to be sued must be made before jurisdiction is found. Actual waivers of immunity occur most frequently by statute and are construed narrowly. Only the expressly stated immunity is waived, and it is waived only in accordance with the terms of the legislation. See, e.g., *Smith v. Reeves*, 178 U.S. 436 (1900); *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1857); *Skrbina v. Pennsylvania Dep't of Highways*, 468 F. Supp. 215 (W.D. Pa. 1979). Activity by the state may also constitute consent to the suit and hence waiver of immunity, but it is more difficult to define what is sufficient here. See *Clark v. Barnard*, 108 U.S. 436, 448 (1883) (claim by state for funds held by court pursuant to interlocutory decree made the state a party "to the full extent required for its [the litigation's] complete determination"). Compare *Parden v. Terminal Ry.*, 377 U.S. 184 (1964) (conducting railroad subject to congressional legislation constitutes consent to suit under that legislation) with *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279 (1973) (operation of hospital does not constitute consent to suit under applicable federal legislation). See note 56 *infra*.

26. See generally notes 42-69 & accompanying text *infra*.

27. A state may also be made an unwilling appellee, if it instituted the suit in the first instance and won, provided that the subject matter of the dispute is encompassed by article III. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). Certain language in the opinion indicates that, because the plaintiff's claim was one under federal law, the state had waived its immunity by adopting a Constitution which generally placed such claims within the judicial power of

Court,<sup>28</sup> and the United States may sue a state there or elsewhere.<sup>29</sup> Both types of suits fall within the judicial power of the United States as defined by article III, which extends that power to "Controversies between two or more States" and "Controversies to which the United States shall be a Party."<sup>30</sup> Article III could certainly be read to constitute consent by the signatories to the cases confided by it to the federal judiciary. Under this interpretation, the states would have specifically waived any prior immunity. Although this approach most closely parallels that utilized in *Hall*, as it depends upon express rather than implicit constitutional commands, it nonetheless presupposes the existence of immunity which, absent waiver, would bar the suit. If that immunity is grounded in the common law, immunity could not protect a state from suit in the courts of another state. The common law recognized immunity of the sovereign in its own courts; it did not protect the sovereign in another's courts. In the latter instance, immunity is a function of comity or of constitutional law. Yet if states' immunity is grounded in the Constitution, *Hall* limited this immunity to suits commenced in a federal court.

Reliance upon the express language of article III, however, is misplaced. In *Chisholm v. Georgia*,<sup>31</sup> the Supreme Court permitted a South Carolina plaintiff to sue Georgia to recover upon a debt, quoting article III's extension of the judicial power to controversies between a state and citizens of another state. Justification for the abandonment of immunity was found in the abandonment of the distinction between sovereign and subject. *Chisolm* was overruled by the eleventh amendment,<sup>32</sup> and the Court no longer

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the federal government. U.S. CONST. art. III, § 2. Furthermore, the Court stated that the eleventh amendment failed to bar the claim, since that amendment was to be confined to its language. Only at the end of the opinion did the Court indicate the difference between a suit commenced against a state and one in which the state is only the appellee. To allow review of a decision in favor of the state is not to permit a demand to be brought against that state. Nonetheless, it is clearly this last distinction which continues to justify the result in *Cohens*; courts later rejected the general immunity language as unnecessary in light of the availability of such relief in England, where it is not thought to indicate any concomitant ability to initiate suit against the sovereign. *Hans v. Louisiana*, 134 U.S. 1 (1890).

28. *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Virginia v. West Virginia*, 246 U.S. 565 (1918); *Kansas v. Colorado*, 185 U.S. 125 (1902); *Missouri v. Illinois & Chicago Dist.*, 180 U.S. 208 (1901).

29. See *United States v. Mississippi*, 380 U.S. 128 (1965). The jurisdiction of the Supreme Court over controversies between two states is original and exclusive; over controversies between the United States and a state, its jurisdiction is original but not exclusive. 28 U.S.C. §§ 1251(a)(1) & (b)(2) (1976).

30. U.S. CONST. art. III, § 2.

31. 2 U.S. (2 Dall.) 419 (1793).

32. See note 25 *supra*.

attempts to read article III as a grant of jurisdiction over claims not traditionally justiciable.<sup>33</sup> Therefore, recourse is had to the "plan of Convention" to permit a state or the United States to bring suit against an unconsenting state.<sup>34</sup> Although the language of article III does not constitute a waiver of immunity, such a waiver can, and must, in these two instances, be inferred from the constitutional structure. To disallow suits between states would leave them without a remedy against each other: force being obviously inconsistent with union. Jurisdiction over claims against a state brought by the United States must be implied from the constitutional plan, which postulates a federal authority supreme in its sphere and necessarily capable of enforcing that supremacy.<sup>35</sup> To the extent the Court continues to discuss the language of article III in these contexts, it is expressing concern not with the immunity of the defendant and its waiver, but with other issues of justiciability presented by the claim.<sup>36</sup>

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33. *Monaco v. Mississippi*, 292 U.S. 313 (1934).

34. *Id.* at 322-23 (quoting *THE FEDERALIST* No. 81 (A. Hamilton) (J. Cooke ed. 1961)).

35. *Id.* The plan of union, however, did not involve a waiver of the states' immunity to suits by foreign nations, even though such claims are also recited in article III as being within the federal judicial power. The fabric of government does not demand that such claims be cognizable in any court, and indeed such jurisdiction might conflict with the foreign relations authority of the federal government. *Id.*

36. Although article III places no express restraint on the type of claims between the states which may be heard by it, the Court, focusing on the implications of the "controversy" requirement of article III, has continually refused to hear any claim which does not arise directly between the states. Boundary disputes are one obvious example of claims which do arise directly between the states, *see, e.g.*, *Ohio v. Kentucky*, 100 S. Ct. 558 (1980); *Michigan v. Wisconsin*, 272 U.S. 398 (1926); *Oklahoma v. Texas*, 272 U.S. 21 (1926); *Georgia v. South Carolina*, 257 U.S. 516 (1922); *Arkansas v. Tennessee*, 246 U.S. 158 (1918), but jurisdiction is not confined to such situations. *Louisiana v. Texas*, 176 U.S. 1 (1900). If the suit is for an injury to one state by another state in its quasi-sovereign capacity, it represents an interest of the state independent of that of individual citizens, and may be pursued. *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Missouri v. Illinois & Chicago Dist.*, 180 U.S. 208 (1901). Provided that the state is seeking to represent a "considerable portion" of its citizenry, its own interest exists, but the assignment to it of individual grievances is insufficient. *See* notes 102-05 & accompanying text *infra*. *Compare Kansas v. Colorado*, 185 U.S. 125 (1902) with *New Hampshire v. Louisiana*, 108 U.S. 76 (1883). Note that the same argument was made in the context of a suit brought by the United States; the Court agreed without comment that if the federal government had no real and direct interest in the suit, it could not be maintained, but found, on the facts of the case, that such an interest did exist. *United States v. Minnesota*, 270 U.S. 181 (1926). In both situations, the fact that the individuals represented could not sue is irrelevant to jurisdiction. Finally, once such jurisdiction attaches, it carries with it all the normal incidents of jurisdiction. For example, the Court has the power to enforce its orders, *Virginia v. West Virginia*, 246 U.S. 565 (1918), and can consider claims

The Court rejected waivers of immunity based upon specific constitutional language at the same time it was refusing to confine successful claims of immunity to such language. For example, the eleventh amendment by its terms only protects states from suits brought in law or equity by citizens of other states or of foreign countries,<sup>37</sup> though suits brought in federal court by their own citizens are barred,<sup>38</sup> as are those brought by a federal corporation<sup>39</sup> and those which invoke the admiralty jurisdiction.<sup>40</sup>

The Court does not rest its conclusion upon constitutional language when it finds jurisdiction over a state in the federal courts or when it denies jurisdiction. Yet the Court concentrated on the lack of such language rather than on the "plan of Convention" when it denied immunity in *Hall*. It also restricted what constitutional language there is to the situations therein expressly covered. Both article III and the eleventh amendment address federal rather than state judicial power and were thus irrelevant to the *Hall* issue.<sup>41</sup>

It is clear after *Hall* that states are not constitutionally immune from suit in the courts of other states; extension of protection to them is discretionary with the forum. Whether states are constitutionally immune from suits in the federal courts, however, or whether their protection there too is only that protection granted by the common law, is still in dispute. The logic of an immunity constitutionally commanded in only one system depends upon the rationale given for its existence in that system.<sup>42</sup> However, even if parallel rules are used in both systems, parallel results need not necessarily follow. Unless its efficacy is destroyed or modified by the Constitution, the common law may shield a state from suit in the federal courts, though it is insufficient to shield the state from suit in another state.

Ratification of the Constitution deprived the states of their prior status as sovereign nations.<sup>43</sup> It is possible that the document did

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of individuals to property exclusively under the Court's control, although such claims would ordinarily be precluded by sovereign immunity. *Oklahoma v. Texas*, 258 U.S. 574 (1922).

37. See note 25 *supra*.

38. *Duhne v. New Jersey*, 251 U.S. 311 (1920) (requesting injunctive relief); *Hans v. Louisiana*, 134 U.S. 1 (1890) (requesting damages).

39. *Smith v. Reeves*, 178 U.S. 436 (1900).

40. *Ex Parte New York*, 256 U.S. 490 (1921).

41. 440 U.S. at 421-23.

42. See notes 65-69 & accompanying text *infra*.

43. "All the rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality." *New Hampshire v. Louisiana*, 108 U.S. 76, 90 (1883).

not cloak them with any new immunity. Indeed, it may have affected the common law immunity which they previously enjoyed as nations.<sup>44</sup> Under this theory, neither article III nor the eleventh amendment addresses the issue of immunity; article III does not codify or deny it, and the eleventh amendment simply restores the status quo as of the time the Constitution was adopted.<sup>45</sup> Other constitutional provisions, however, are cited as containing agreed-to waivers of common law immunity. Article I, section 8 enumerates areas in which Congress may legislate, and the grant of authority is read to encompass also the federal authority to legislatively subject a state to suit.<sup>46</sup> The states consented to suits on congressionally created causes of action by their adoption of the Constitution and, therefore, cannot be heard to claim an immunity properly "lifted" by Congress.<sup>47</sup> Note, however, that this theory would support jurisdiction over a state on a claim based on a congressionally created cause of action even if the plaintiff were from a different state and the suit was, therefore, within the precise language of the eleventh amendment. That amendment only precludes the federal courts from exercising jurisdiction over a state in reliance upon a waiver contained in article III, by denying the existence of such a waiver. It does not affect the waiver of immunity culled from article I. The case is within the federal judicial power because it "arises under the . . . laws . . . of the United States;"<sup>48</sup> it is justiciable because of the state's consent derived from ratification of article I.

The theory permits suits to be brought against states in both federal and state courts. In the one, common law immunity was waived; in the other, it is irrelevant. However, even if sovereign immunity is derived solely from the common law, it does not necessarily follow that article I, any more than article III, constitutes an irrevocable waiver of that immunity. Just as article III has been interpreted to allow certain claims to be heard if such claims are

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44. Field, *supra* note 2, at 520.

45. Under this theory, the refusal of the Court in *Hans v. Louisiana*, 134 U.S. 1 (1890), to permit a citizen to sue his own state for its alleged impairment of contract in violation of the Constitution was based not on any constitutional infirmity but rather on the retained common law immunity of the state, which had not been changed by either the contract clause or congressional legislation. See Field, *supra* note 10, at 1218-80.

46. *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070 (5th Cir. 1979); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979); Field, *supra* note 10.

47. Apparently Justice Brennan would take this logic one step further and hold that article I abolishes immunity in the situations to which it applies. While Congress needs to act to create a cause of action, it need not act again to "lift" immunity. *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279, 300 (1973) (Brennan, J., dissenting).

48. U.S. CONST. art. I, § 2.

otherwise known to the law, so could article I be interpreted to allow certain causes of action to be congressionally created if such causes of action are otherwise proper. The question in each case would be twofold: does the federal legislation attempt to create a right of action against the state, and, if so, has the state in some way waived its common law immunity. Only if both questions are answered affirmatively could a suit proceed, even though the state's immunity is not constitutionally based. The Court adopted a similar rationale to explain the United States' ability to seek to overturn a state plan which allegedly precluded persons from voting on the ground of race in the context of the fifteenth amendment.<sup>49</sup> Congressional legislation authorizing such a suit was a valid exercise of its power under the second section of the amendment, and, since the suit was prosecuted by the United States, the state was unprotected by immunity.<sup>50</sup>

It is true the Court subsequently indicated that, when a Civil War amendment is involved, a state's immunity cannot prevent a suit against it pursuant to congressional legislation, even if the suit is brought by an individual. The thirteenth, fourteenth and fifteenth amendments provide that Congress shall have power to enforce their provisions by appropriate legislation, and all contain specific restrictions on state action. In *Fitzpatrick v. Bitzer*,<sup>51</sup> the

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49. *United States v. Mississippi*, 380 U.S. 128 (1965). While the legislation involved specifically authorized such a suit, the opinion made it clear that it was the nature of the plaintiff and not the congressional act which justified the suit. *Id.* at 140-41.

50. *See also United States v. California*, 297 U.S. 175 (1936). The suit was an attempt to recover a statutory penalty for violations of the Federal Safety Appliance Act by a state-owned railroad. The Act, the Court found, did cover the railroad, and the coverage was upheld:

[W]e think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.

*Id.* at 183-84 (citations omitted). Since the plaintiff was the United States, it was unnecessary to determine whether the state's immunity was likewise diminished. The same logic bolstered the majority's holding in *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279 (1973). Although an employee was barred by immunity from suing the state under the Fair Labor Standards Act (Fair Labor Standards Act of 1938, June 23, 1972, Pub. L. No. 92-318, title IV, § 906(b), 86 Stat. 375 (codified in scattered sections of 29 U.S.C.)), the legislative provision permitting such suits by the Secretary of Labor provided a remedy for violations of the Act while at the same time raising no problem of immunity.

51. 427 U.S. 445 (1976).

Court held that the fourteenth amendment constituted a limitation on state sovereign immunity as expressed in the eleventh amendment; its adoption signified consent to suits congressionally created pursuant to it.<sup>52</sup> However, it does not necessarily follow that a waiver of immunity in article I ought to be found simply because the Court found a waiver of immunity in *Fitzpatrick*. The restrictions upon state action in the fourteenth amendment are expressly stated, as is the congressional power of enforcement. Article I, section 8, however, only grants Congress the power to legislate in designated areas. Although the supremacy clause makes state activity in those areas subject to congressional legislation,<sup>53</sup> section 8 does not forbid any kind of activity by the states absent such legislation. It is section 10 of article I which speaks in language similar to that of the fourteenth amendment:<sup>54</sup> to the extent that the restrictions there imposed make no reference to congressional authority, even they may be insufficient to constitute a waiver of common law immunity.<sup>55</sup> Only when clauses prohibit state activ-

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52. The Court, however, has been reluctant to hold that Congress intended to permit private suits under other fourteenth amendment legislation. Thus, 42 U.S.C. § 1983 (1976) was recently found not to be intended to overturn traditional immunity, even though the same section does permit suits to be brought against municipalities. Compare *Quern v. Jordan*, 440 U.S. 332 (1979) with *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978). This reluctance is similar to that expressed by the Court in the context of legislation pursuant to article I, where the authority to "lift" immunity is less clear. See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279 (1973).

53. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

54. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. CONST., art. I, § 10, cl. 1.

55. Justice Brennan argued that only this conclusion logically supports the Court's opinion in *Hans v. Louisiana*, 134 U.S. 1 (1890). *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279, 319-20 (1973) (Brennan, J., dissenting). He was opposed by Justices Marshall and Stewart, who assumed that a self-executing clause, such as the contract clause, must imply at least the same power of enforcement as do other clauses, such as those contained in section 8 of article I, which are not self-executing. In their view, the adoption of the contract clause, as well as section 8, constituted a waiver of common law immunity; therefore, contrary to Justice Brennan, the refusal of jurisdiction in *Hans* must have rested upon constitutionally compelled immunity.



ity without congressional approval<sup>56</sup> is it clear that Congress may condition the state's activity upon waiver of its immunity from related suits.<sup>57</sup> If both restrictive language and congressional authority are necessary to imply waiver of immunity, section 8 does not support the implication but provides only the authority.

If article I only constitutes an agreement by the states that Congress may legislate in the listed areas, the Supreme Court's continuing concern with the existence of a state's consent is understandable.<sup>58</sup> So too is the Court's apparently growing concern with the nature of the activity which Congress has attempted to regulate.<sup>59</sup> If a state could reasonably decide not to operate in a regulated area, it may be assumed that activity constitutes consent to the regulation and, therefore, waiver of immunity. However, if the nature of the activity is such that a state either could not easily discontinue it or is under a quasi-governmental requirement to maintain it, then continued activity can hardly be equated with any actual waiver.<sup>60</sup>

Even if the common law is the only source of a state's immunity in federal court, as it is the source of immunity in the courts of another state, that immunity is not necessarily functionally use-

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56. For example, "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in Time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War . . . ." U.S. CONST., art. I, § 10, cl. 2.

57. Thus, states may not compact with each other absent the agreement of Congress, *id.*, and Congress may, therefore, condition its consent on the waiver of immunity. *Petty v. Tennessee-Missouri Comm'n*, 359 U.S. 275 (1959). It should be noted that Justices Frankfurter, Harlan and Whittaker, dissenting, indicated some doubt about not the power of Congress to impose such a restriction but its propriety. Since the required consent was designed to protect national interests, waiver of traditional tort immunity was a condition not geared to the purpose of the provision and ought not, therefore, be assumed to have been intended.

58. *See Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279, 281 (1973). Unfortunately, this case, as did *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), substantially confuses the issue by discussing whether congressional action has "lifted" what the Court refers to as "constitutional immunity." 411 U.S. at 285. The question is a contradiction in terms. Professor Field has suggested that the Court may be willing to equate continued activity in a regulated area with consent, once congressional intent to force such a choice on the states is found. Field, *supra* note 10, at 1214 *passim*. This admittedly avoids the otherwise difficult issue of what constitutes consent, but unless the legislation confers some benefit, it is equally difficult to find authority to impose the condition of waiver. *Id.*

59. *See* Field, *supra* note 10, at 1218-80.

60. *Compare Parden v. Terminal Ry.*, 377 U.S. 184 (1964) (operation of railroad begun after passage of regulatory legislation) *with* *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279 (1973) (operation of hospital continued but not begun after passage of regulatory legislation).

less in the federal system.<sup>61</sup> However, it is likely that a majority of the Supreme Court would hold in the federal context that state immunity is a constitutionally compelled doctrine.<sup>62</sup> The Court agrees that the eleventh amendment places some constitutional restraint on the assumption of unconsented-to jurisdiction.<sup>63</sup> If a case falls within the specific language of the amendment, consent is a precondition for a justiciable controversy. Only one member of the Court, Justice Brennan, clearly rejects such a restraint in all other cases.<sup>64</sup> His view is opposed by Justice Marshall, for whom the immunity of the states is a constitutional right within the federal system.<sup>65</sup> Justice Marshall, however, did join with the majority in *Hall*, thus indicating that he takes the opposite view if litigation is commenced in the state. This duality is a result of his belief in the dual source of the doctrine. To the extent that the

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61. To confine the source of a state's immunity to the common law does resolve three problems. The language of the eleventh amendment is extraordinarily narrow if it was intended to codify immunity. If, on the other hand, it only denies an assumption of jurisdiction based upon an implied waiver of immunity in article III, it addresses properly the only issue presented. Other cases brought within the judicial power by that article depend for their characterization on the nature of the dispute, not of the parties, and so contain no implication of waiver of immunity. Second, the theory explains why consent of a state is sufficient to permit suit to be brought against it in the federal court, even when the suit precisely fits the prohibitory language of the amendment. The subject matter jurisdiction of the federal system is limited by the Constitution and generally cannot be expanded by consent—yet no one doubts the efficacy of such consent here. If the amendment, however, only precludes courts from removing common law immunity pursuant to article III, then consent places the suit within that article as a justiciable claim. Finally, the theory justifies language in various cases, *supra* note 58, concerning whether Congress has "lifted" a state's immunity. Field, *supra* note 2, at 544-45.

62. Of course, if there is a constitutional guarantee of immunity, the argument of an implied waiver of that immunity in article I becomes difficult to sustain. The waiver could logically be implied from one of the Civil War amendments because, to the extent the eleventh amendment is the source or at least the expression of the constitutional guarantee, it could have been modified by the passage of the subsequent amendments. It does, however, postdate article I, which could, therefore, not reasonably modify whatever immunity the eleventh amendment exemplifies.

Thus far, only one circuit has expressly held that, in accord with the Field theory, action by Congress pursuant to one of the article I enumerated powers is sufficient to preclude an immunity defense, even if the state has not consented to be sued (except through implication by ratification of the Constitution). *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979). See *Peal v. Florida Dep't of Transp.*, 600 F.2d 1070 (5th Cir. 1979).

63. *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279, 285 (1973); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945); *Ex parte Young*, 209 U.S. 123, 150 (1908); *Chandler v. Dix*, 194 U.S. 590, 591 (1904).

64. *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279, 299-324 (1973) (Brennan, J., dissenting).

65. *Id.* at 290-93 (Marshall, J., concurring) (joined by Stewart, J.).

state claims immunity as a common law right, Justice Marshall argues that article I constitutes a waiver of the immunity such that Congress may "lift" it by legislation. Thus, for example, he maintains that it is possible to compel a state to open its own courts to a congressionally created claim against it; in the state systems, the only source of the doctrine of sovereign immunity is the common law.<sup>66</sup> However, article III elevates sovereign immunity in the federal system to a constitutional level and thus there precludes claims against unconsenting states.<sup>67</sup> The eleventh amendment is considered merely a narrow and clarifying expression of a much broader doctrine implicit in article III. Since three members of the Court (the Chief Justice and Justices Blackmun and Rehnquist) dissented in *Hall* upon an express finding that immunity is a constitutional doctrine even in the state systems, at least four members of the Court would presumably hold that consent is necessary before a state may be forced to defend or default in a federal court. If another justice joins these four,<sup>68</sup> the result will be precisely the kind of dual immunity which Justice Marshall has sought.

If the Constitution grants the states immunity from suits against them only when such suits are commenced in the federal courts, it is logically necessary to focus upon article III as Justice Marshall does. Article III and the eleventh amendment address only the judicial power of the United States. Any implicit restrictions which they contain, therefore, can apply only to that power,

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66. *Id.* See also *Douglas v. New Haven R.R.*, 279 U.S. 377, 387-88 (1929).

67. Reading article III as affecting, by implication, the common law powers of the states is not without precedent. In *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), the Court held that the article had deprived the states of at least one previously existing right of a sovereign: to sue on behalf of its individual citizens. New Hampshire law, in an attempt to circumvent the eleventh amendment, permitted the Attorney General to sue on behalf of the state's citizens to collect debts owed them by other states. The litigation was paid for and controlled by the individual claimants, the state acting as a collecting agent but authorized to bring suit in its own name. When suit was brought against Louisiana, the Court found that it was barred by article III, though not by sovereign immunity. Reasoning that the article originally contemplated a direct remedy for an aggrieved citizen, permitting him to sue another state directly, the Court held that the grant of that remedy "was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of nations." *Id.* at 91. Even though the eleventh amendment deprived the individual of his special remedy, it did not re-vest the traditional one; the "controversy" created by state law was not, therefore, one within the scope of article III. See note 36 *supra*.

Although Justice Marshall's theory entails an implicit verification of a traditional right rather than an implicit deprivation of one, the same reasoning which supported the *New Hampshire* result would support his theory.

68. Justice Stewart, who joined Justice Marshall's concurrence in *Employees*, is the obvious choice. See note 55 *supra*.

leaving untouched the authority of a state court to entertain a claim against another state. However, if, as the *Hall* dissenters argued, state immunity is an unarticulated but binding assumption drawn from the Constitution as a whole, the distinction between suits in federal and state courts is not justifiable. While it is likely that a majority of the Court would hold immunity to be a constitutional right in the federal system, it is also likely that they would not agree on the means of reaching that result.

### III. FULL FAITH AND CREDIT

As Nevada, sued in the California courts against its will, could thus not assert sovereign immunity as an implicit constitutional right, it was necessary for the Court to find some specific constitutional clause which compelled recognition of the doctrine. The full faith and credit clause<sup>69</sup> was, therefore, claimed to require California to utilize Nevada law.<sup>70</sup> That law did permit the state to be made a defendant on certain causes of action, including the one brought by Hall, but only in the state courts of Nevada and only for damages not in excess of \$25,000. The California court found the Nevada waiver irrelevant in light of its own policy, interests and statutes<sup>71</sup> and the Supreme Court agreed. Citing prior decisions<sup>72</sup> for the proposition that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy,"<sup>73</sup> the Court found that California had a legitimate interest in providing its residents with a forum and refused constitutionally to limit California's choice of applicable law.<sup>74</sup>

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69. See note 21 *supra*.

70. See note 8 *supra*.

71. *Hall v. University of Nev.*, 8 Cal. 3d 522, 526, 503 P.2d 1363, 1366, 105 Cal. Rptr. 355, 358 (1972).

72. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Commission*, 294 U.S. 532 (1935); *Bonaparte v. Tax Court*, 104 U.S. 592 (1881).

73. *Nevada v. Hall*, 440 U.S. at 422.

74. Recently, one commentator has argued forcefully that due process as well as the full faith and credit clause limits the choice of law options of a state. Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976). Beginning with the idea that due process expresses concern not only with fundamental fairness but also with territorial limitations on the state, see *Hanson v. Denckla*, 357 U.S. 235, 251 (1958), Kirgis maintains that both elements of the concept restrain the forum's choice of law. Thus, "[i]f the rule the state seeks to impose applies to an event within the state's territory, or to a person who has some relatively stable relationship with the state (such as residence, domicile, or place of business), an observable link exists to justify the exercise of power" by the forum necessary to the use of its own laws. Kirgis, *supra*, at 97. Such use then accords with due process unless it would be "manifestly unfair to the party resisting

## A. The Constitution

The validity of the Court's holding depends in part upon how

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it." *Id.* at 103. Activity in the forum related to the cause of action precludes that unfairness; absent such activity, the unfairness results if either (1) no benefit is derived, (2) no benefit was expected to be derived and the defendant's contact with the state was not foreseeable, or (3) the severity of the forum law is out of proportion to an expected benefit actually derived. *Id.* at 103-04. Governmental interests of the forum are irrelevant here; the key is a nexus between the state and the party resisting its law sufficient to make application of that law fair.

The logic of the restriction thus imposed on a state's choice of law is remarkably parallel to that restricting its exercise of personal jurisdiction over a nonresident defendant. In *Hanson*, as a result of the territorial limitation which the Court found inherent in due process, the Court also held that, in order to satisfy the clause, jurisdiction had to be based on "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. at 253. The test is easy enough to apply to a defendant who actually comes into the state and acts there, either in person or through an agent, in such a manner as to give rise to the claim brought against him. Many states have codified the jurisdictional results of such activity in their "long-arm" statutes. See, e.g., N.Y. [CIV. PRAC.] LAW § 302(a) (1972). However, even as to a nonresident who never enters the state, jurisdiction may be taken if he, in effect, complies with Kirgis' above analysis. For example, a product which causes injury in the forum, although not manufactured there or sold directly by the defendant to anyone in the state, may expose the manufacturer to jurisdiction if he obtained benefits indirectly from the state and the presence of the product in the state was foreseeable. See *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Of course, "stable relationships" with the state have long been sufficient to satisfy jurisdictional requirements.

The Court in *Hall* made no mention of due process, and, on the facts, had no need to do so. See note 17 & accompanying text *supra*. All parties agreed that the employee-driver had been acting in the scope of his employment and, therefore, as an agent of Nevada when the accident occurred. Absent the unique status of the defendant, there would have been no jurisdictional dispute, and due process could have placed no restriction on California's choice of law. If an attempt is made to exert that jurisdiction over another state in a different context, however, due process might well become relevant. Assume that activity in State *X* by State *X* causes damage to privately-owned property in State *Y*. State *Y* cannot maintain suit on behalf of its citizens to redress their individual injuries, see note 36 *supra*, but after *Hall*, it is possible that the citizens themselves could sue in State *Y*. But once a determination is made that jurisdiction over the defendant comports with due process, it is inevitable that the law of State *Y* will apply. The utility of due process as a constraint on choice of law is most apparent when, as in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), jurisdiction over the defendant is quasi-in-rem, based upon the presence of its property in the forum rather than on any contacts between the defendant and the forum related to the cause of action. However, subsequent to *Shaffer v. Heitner*, 433 U.S. 186 (1977), such jurisdiction no longer meets the requirements of due process. All jurisdiction must be based upon contacts (or, presumably, stable relationships), and so Kirgis'

the Nevada statute is interpreted. To the extent that it provides for and limits the personal jurisdiction which the state courts may exercise, it is irrelevant to a defendant sued in another state. So long as jurisdiction comports with due process, it may be exercised in the discretion of the forum state.<sup>75</sup> To the extent that the statute attempts to confine causes of action there created to a single court, the general efficacy of such an attempt has previously been denied by the Court:

The courts of the sister State trying the case would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depend. But venue is no part of the right, and a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action.<sup>76</sup>

However, when waiver of immunity is necessary to the creation of a cause of action, precisely such confinement has been upheld. A waiver with respect to claims brought against a state in its own courts does not necessarily encompass, and may properly exclude, jurisdiction over the same claims in federal court.<sup>77</sup> Of course, to the extent immunity from suit in the federal system is a constitutional right,<sup>78</sup> a denial of consent by the defendant prevents the claim from becoming constitutionally justiciable. A state is free in that context to deny consent for whatever reason it chooses; similar freedom may not necessarily be granted to the states on the *Hall* facts. Nonetheless, the fact that such limitations are treated differently when they arise in a statute waiving immunity indicates

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analysis will necessarily be used in the jurisdictional context. *Cf.* note 12 *supra* (analysis of non-resident motorist statutes).

75. See note 74 *supra*.

76. *Tennessee Coal Co. v. George*, 233 U.S. 354, 360 (1914). See also *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55, 71 (1909) (Holmes, J., dissenting; McKenna, J., concurring in dissent) (arguing that any conditions placed by the creating state on a cause of action, made absolute and precedent to recovery, must be complied with before a right to that recovery exists). *Cf.* *Galveston, H. & S.A. Ry. v. Wallace*, 223 U.S. 481, 490 (1912) ("[w]here the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right." (emphasis added)). Since the *Galveston* holding caused the Court no qualms in *George* and postdated *Sowers*, perhaps the Court meant its language to address claims confided to tribunals other than courts of general jurisdiction.

77. See *Great N. Ins. Co. v. Read*, 322 U.S. 47 (1944) (expressly distinguishing cases such as those discussed in note 72 *supra*); *Smith v. Reeves*, 178 U.S. 436 (1900) (same).

78. See notes 61-65 & accompanying text *supra*.

that reliance ought not to be placed automatically upon case law generated by claims arising between individuals.

In any event, the Nevada statute, as it was attempted to be used in *Hall*, is best characterized not as imposing jurisdictional restrictions, but as providing two defenses to the plaintiffs' claim: sovereign immunity would continue to preclude any suit not within the literal terms of the statute, and a verdict on the claim could in no event exceed \$25,000. The policies of California and Nevada were clearly opposed with respect to the second defense. Nevada restricted recoveries against it, California did not.<sup>79</sup> It is not surprising that the Court found no impediment to the use of California's policy. Assuming that an action could be maintained in California at all, there would be no basis to hold that a foreign state's limitation on such actions in that state governs California's own definition of its cause of action.<sup>80</sup> Even when the plaintiff's claim is based upon the foreign law which contains the limitation, at least one state refuses to recognize that limit in its damage awards.<sup>81</sup>

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79. 440 U.S. at 424.

80. The situation is somewhat analogous to that presented in three cases involving fraternal benefit societies. *Order of Travelers v. Wolfe*, 331 U.S. 586 (1947); *Modern Woodmen v. Mixer*, 267 U.S. 544 (1925); *Royal Arcanum v. Green*, 237 U.S. 531 (1915). In each, forum beneficiaries claimed against the company, relying on an aspect of forum law; each was met by a defense based on contradictory rules of the foreign society permitted under its incorporating laws; each was resolved in favor of the society. Thus, limitations on the claim could not be changed by reference to a separate body of law. See Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 186-230 (1976). See also *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924). But see *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). Of course, in all these cases only one state could provide the cause of action.

The Supreme Court has permitted reference to the forum's statute of limitations, even when the forum is asked to enforce a foreign cause of action and the foreign statute has not yet run. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). It has been suggested that the forum ought not be permitted to "revive" a foreign cause of action by using its own longer statute of limitations at least unless the forum could apply its own substantive law to the claim. Martin, *supra*, at 223. The broad language of the Court in *Wells* does not support this distinction, 345 U.S. at 517, nor does the opinion of the Court in *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964). In *Clay*, a Florida resident was permitted to sue in Florida for an insured loss which occurred in Florida more than one year after the cause of action arose, even though the contract, valid where made, precluded suit after one year. Compare *Clay with Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (court refused to permit a similar suit when the insured-against loss did not occur in the forum). Cf. Martin, *supra*, at 215 (explaining the two holdings as consistent). It is a much different thing to compel the forum to borrow foreign law to change a claim created by its own properly applicable substantive law than it is to permit the forum's statute to govern a foreign claim, whatever the rationale for permitting the latter.

81. *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973); *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962); *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902 (1962); *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d

Whether the action could be maintained in California or rather whether the Nevada statute created an exclusive cause of action, is the more basic and more confusing issue. Prior decisions of the Court in the area of workmen's compensation have made it clear that more than one state may have connections with a single transaction sufficient to permit them to apply their own law. If an employment contract, for example, is entered into in State *X* and a related injury occurs in State *Y*, the employee may claim against his employer in either state under the law of the forum.<sup>82</sup> Thus, setting aside the issue of sovereign immunity, the fact of injury in California to California residents by activity in that state would certainly be sufficient to permit the application of California law in California.<sup>83</sup> Indeed, putting aside the question of immunity, it could be argued that if the plaintiff sued in Nevada, Nevada would have been compelled to refer to California law. Nevada's only contact with the claim is the citizenship of the defendant; California's strong interest in the protection of its citizens remains the same.<sup>84</sup>

Sovereign immunity, however, does distinguish the preceding hypothetical from other full faith and credit cases. California's interest is admittedly unchanged by the nature of the defendant, but Nevada's is *not*. The interest of Nevada is not in the substantive law of negligence to be applied to determine liability; it is in the availability of a defense based upon its sovereign status. It is diffi-

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526 (1961). All four suits involved the death in Massachusetts of a New York citizen and a subsequent claim in New York courts under the Massachusetts wrongful death act. Massachusetts limited recovery pursuant to its wrongful death act; New York law contained no such limitation on claims it created. The strength of New York's policy overrode the limit, aided in *Kilberg* by a definition of the limit as "procedural," and in *Pearson* by the rationale that, since New York could have itself created a cause of action for the plaintiff, it could judicially borrow as much or as little of Massachusetts law as it chose. See *Martin*, *supra* note 76, at 223-27. Compare *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904) (disallowing a lump sum award for wrongful death on claim brought in Texas pursuant to Mexican statute creating a civil remedy but confining it to damages in the nature of alimony, which the Texas court could not give at common law) with *Stewart v. Baltimore & O. R.R.*, 168 U.S. 445, 448 (1897).

82. See *Carroll v. Lanza*, 349 U.S. 408 (1955); *Cardillo v. Liberty Mut. Co.*, 330 U.S. 469 (1947); *Pacific Employers Ins. Co. v. Commission*, 306 U.S. 493 (1939) (state where injury occurred may apply its law); *Alaska Packers Ass'n v. Commission*, 294 U.S. 532 (1935) (same). Compare *id.* with *Bradford Elec. Co. v. Clapper*, 286 U.S. 145 (1932).

83. See also *Watson v. Employers Liab. Corp.*, 348 U.S. 66 (1954).

84. On the other hand, the Court is demonstrably reluctant to forbid reference to forum law, and Nevada might well claim an interest in protecting its treasury, one which is sufficient to justify use of its own law. See, e.g., *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964) (voiding the contract of an Oregon spendthrift which was validly entered into and to be performed in California).



cult to conceive of any other state with a comparable interest in Nevada's immunity. If the claim had been brought in Nevada, the state courts surely would have followed the requirements of Nevada law with respect to waiver of immunity, whether or not they applied California's law to determine negligence. According to state law, they would have lacked jurisdiction to do anything else. Since the claim involved was one based on common law, no federal authority would be sufficient to "lift" immunity, and the full faith and credit clause would be inapplicable: no California statute does, or could logically, speak to the immunity of another state in that state's courts. The *Hall* majority, however, reached its conclusion with no reference to the interests of either California or Nevada in Nevada's sovereign immunity.

The extent to which either prior case law or the purpose of the full faith and credit clause compels a consideration of Nevada's interest is unclear. It is not disputed that the clause embodies concepts of mutual respect among sovereigns and some degree of deference to their legitimate interests.<sup>85</sup> Although early language of the Court indicated that only by balancing conflicting interests could a determination be made,<sup>86</sup> subsequent opinions severely weakened that indication, focusing only on the legitimacy of the forum's interest.<sup>87</sup> But it is possible that that legitimacy may itself be affected by the interests of another state. Thus, while rejecting

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85. See Martin, *supra* note 80, at 186; Kirgis, *supra* note 74, at 110-11.

86. [T]he conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.

Alaska Packers Ass'n v. Commission, 294 U.S. 532, 547 (1935). See also State Farm Ins. Co. v. Duel, 324 U.S. 154 (1945).

87. See, e.g., Pacific Employers Ins. Co. v. Commission, 306 U.S. 493 (1939). Professor Martin has suggested that this focus on the legitimacy of the forum's interest ought to be "confined to cases in which there is a clear critical event within the state whose law is being applied." Martin, *supra* note 80, at 201. Otherwise, there is a need to weigh the strengths and legitimacy of that interest against those of other states. Thus, a forum

may apply its law to a case whenever (a) the party resisting application of that law has acted in the state or derived relatively direct benefits from the forum, or (b) there is some weaker connection between the defendant and the forum, and the forum's interests are relatively strong compared to the interests of other states that would be disserved by the application of forum law.

*Id.* at 211. However, even using this approach it would not be necessary to consider Nevada's interest on the *Hall* facts, the defendant had acted in California through an agent and therefore only that state's interests need be considered. It would be permissible to refer to Nevada's interests if injury in California had been caused indirectly by activity in Nevada.

any balancing of interests, one commentator has suggested other limitations on a forum's use of its own law<sup>88</sup> and has justified both the existence of the proposed limitations and their relatively narrow scope as follows:

Unless a forum state directly challenges the requirements of federalism . . . , one must clearly identify the other state or states having an interest and determine the extent of the insult they would suffer from having their law ignored. The problem is more difficult than with full faith and credit to judgments, where the focus on, and sensitivity of, the rendering state is clear. Something must take the place of the judgment to provide the necessary focus on the law of a particular state, unless the case involves a significant question of nationwide harmony. Moreover, unless a failure to defer to a given state's law would represent a clear slap in the face to that state or to the federal system itself, the full faith and credit clause and the Supreme Court simply cannot assume the day-to-day task of sorting out the provincialism still at large.<sup>89</sup>

If sovereign immunity of one state in the courts of another is not a "requirement of federalism" because it is not constitutionally compelled, it does at least involve a "significant question of nationwide harmony." Furthermore, the "focus on and sensitivity of" Nevada in these circumstances is certainly as great as with respect to a Nevada judgment, and to force an unconsenting sovereign to ac-

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88. (A) The forum state cannot devise a policy or rule for a particular case or discrete class of cases that defeats a claim for relief or a defense created by the law . . . of another state whose law the forum would apply under its normal choice-of-law approach. Thus:

(1) It cannot refuse to provide a forum for adjudication of a transitory dispute arising out of an occurrence or relationship in another state, solely because it arose in another state or solely as a subterfuge for some disguised policy applicable to the merits of the dispute. It may, however, refuse to provide a forum if its refusal would effectuate a genuine policy for the orderly administration of justice or a genuine moral standard it considers fundamental—provided that its policy or standard is not so aberrational as to be thoroughly out of line with prevailing norms among virtually all other states.

(2) The forum state cannot defeat an otherwise enforceable claim or applicable defense based on another state's law by blatantly manipulating its professed choice-of-law method to apply its own law.

(B) The forum cannot choose its own law on a particular issue when, on the specific facts:

(1) Another state has an interest in applying its law that is overwhelming by comparison with the interest of the forum; or

(2) There is an overwhelming reason to decide all similar claims according to one legal system, and one state other than the forum clearly would be the bellwether.

(C) The forum cannot apply a statute of another state in a way that seriously distorts a nondivisible statutory scheme formulated by that state's legislature, unless the forum can justify its action by simply applying its own law to reach the same result.

Kirgis, *supra* note 74, at 119-20. Either (B)(1) or (2) would arguably sustain application of Nevada's law of immunity.

89. *Id.* at 111 (footnotes omitted).

cept foreign jurisdiction is equally as certain a "slap in the face." The effect of applying the forum law, therefore, brings into question the legitimacy of the forum's interest, which is necessary to justify its application.

Absent some references to the interest of the state whose law is being rejected, either by a balancing of those interests and the forum's or by considering them as affecting the legitimacy of the forum's interests, analysis under the full faith and credit clause becomes hardly distinguishable from a jurisdictional analysis.<sup>90</sup> Although activity in the state is used to demonstrate the state's interest in the resulting litigation, rather than the contacts between the state and the defendant, the same activity justifies both choice of law and jurisdiction over nonresident, nonconsenting defendants. While such a result may be justifiable in other contexts, it begs the question presented by a defense of sovereign immunity. The issues thus raised cannot be resolved either by reference to the interests of another state or by considering the defendant as though it were an individual. The entire point of the defense is that the state is not an individual but a sovereign and, as such, may command special treatment. In light of the Court's past pronouncements under the full faith and credit clause, that clause clearly does not provide an ideal vehicle for the resolution of this issue. But, in the absence of an implicit constitutional recognition of the doctrine, it was the only vehicle available. Unfortunately, the Court failed to consider to what extent its usual analysis might need to be altered to accommodate the unique facts presented.

## B. Statutory Law

The Constitution does not provide the only command to the states that full faith and credit be given to the statutes of other states. Congressional legislation also requires full faith and credit.<sup>91</sup> Originally, Congress required only that such recognition be given to foreign judgments;<sup>92</sup> the reason the statute was amended is as unclear as the original reason for the limitation.<sup>93</sup> The Court has not seemed perturbed by either version of the statute. It compelled one state to utilize the substantive law of another when the statute related only to judgments;<sup>94</sup> nowhere in *Hall* does it indicate that the statute as amended affects the valid-

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90. See note 70 *supra*.

91. 28 U.S.C. § 1738 (1976).

92. Act of May 26, 1790, ch. XI, 1 Stat. 122 (1790).

93. See Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33 (1957); Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339 (1952); Sumner, *The Full-Faith-and-Credit Clause—Its History and Purpose*, 34 ORE. L. REV. 224 (1955).

94. *Bradford Elec. Co. v. Clapper*, 286 U.S. 145 (1932).

ity of holdings prior to its passage. Apparently, if Congress wishes to demand full faith and credit for state legislation greater than that which the Court believes to be constitutionally compelled, it must do so specifically. While creating an entire body of conflicts rules presents obvious problems for both Congress and the courts,<sup>95</sup> drafting legislation which compels recognition of a state's own sovereign immunity statutes would be relatively easy. It may also be the only practical way to avoid the problems discussed below, until the states themselves decide to waive their immunity in all courts.<sup>96</sup>

#### IV. IMPLICATIONS AND CONCLUSION

As already indicated, the Court's reasoning in *Hall v. Nevada* permits a suit against one state, brought in another state, to be treated more or less as is a suit against any other nonresident defendant. It is possible that the nature of the defending state's activity which gives rise to the cause of action will limit permissible suits, but it is not necessary.<sup>97</sup> Similarly, it is possible that contacts between the defending state and the forum state that are suf-

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95. See Reese, *supra* note 93, at 339-41.

96. Of course, it might also be thought to imply that *only* in the designated area need such recognition be given. However, the constitutional provision is arguably self-executing to the extent it confines the states, see note 90 & accompanying text *supra*; specific legislation would therefore only limit, not expand, a state's ability to choose its own law. But such a result was considered by Justice Stone:

The mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or contracted by Congress. Much of the confusion and procedural deficiencies which the constitutional provision alone has not avoided may be remedied by legislation. The Constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone. It was remarked on the floor of the Constitutional Convention that without the extension of power in the legislature, the provision 'would amount to nothing more than what now takes place among all Independent Nations.' Hunt and Scott, *Madison's Reports of the Debates in the Federal Convention of 1787*, p. 503. The play which has been afforded for the recognition of local public policy in cases where there is called in question only a statute of another state, as to the effect of which Congress has not been legislated, compared with the more restricted scope for local policy where there is a judicial proceeding, as to which Congress has legislated, suggests the Congressional power.

*Yarborough v. Yarborough*, 290 U.S. 202, 215 n.2 (1933) (Stone, J., dissenting) (citations omitted). The legislation which Congress eventually passed did not have the effect he predicted, but it was generally drawn and since its wording nearly parallels that of the Constitution, may properly have been thought to add nothing to the clause.

97. See note 10 & accompanying text *supra*.

ficient to obtain jurisdiction in other contexts may not be sufficient to justify the use of forum law. This may make available the defense of sovereign immunity but it is not necessary.<sup>98</sup> If states are to become frequent defendants in foreign courts, two issues not addressed by the *Hall* majority should be considered: is another forum or body of law available if the forum is biased, or if fear of such bias is likely to cause discontent; and if judgment is entered against a state which is not paid, and if the state has no property in the forum, how, if at all, can that judgment be enforced.

Generally, a defendant sued in a state court on a claim originally cognizable in the federal system may remove the suit to a federal court.<sup>99</sup> Federal subject matter jurisdiction extends to suits brought against a state by citizens of a different state,<sup>100</sup> if the state consents to such jurisdiction.<sup>101</sup> A defending state, fearful of bias against it in the forum, therefore has the choice of locating the dispute in a national tribunal. However, such removal will not change the substantive law applicable to that dispute. It has been suggested that since the tension between the two states (the forum and the defendant) is inevitably greater here than in the ordinary conflict of laws situation, and in fact more closely resembles the tension inherent in suits between states, federal common law rather than the law of the forum ought to govern the outcome.<sup>102</sup> The Supreme Court has held that, in disputes between states, it sits as "an international, as well as a domestic tribunal" and so applies "Federal law, state law, and international law, as the exigencies of the particular case may demand."<sup>103</sup> But it is doubtful that the Court has not felt compelled to follow state law in such cases because of the nature of the parties before it. While the language of article III apparently grants subject matter jurisdiction here by reference to the status of the parties, the Court is also concerned with the nature of the dispute. Only when states are involved in a controversy in their quasi-sovereign capacity will the Court find a "controversy" within the meaning of article III which is capable of decision.<sup>104</sup> Thus it is not the tension between the states but the lack of any single state body of law rationally capa-

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98. See notes 87-89 & accompanying text *supra*.

99. 28 U.S.C. § 1441 (1976).

100. U.S. CONST. art. III, § 2.

101. See note 25 & accompanying text *supra*.

102. Martiniak, *supra* note 10, at 166. Even if the states were to utilize federal common law, lack of uniformity or clear standards would result in a continuing fear of bias, so removal to the federal system would still be desirable from the defendant's point of view. *Id.*

103. *Kansas v. Colorado*, 185 U.S. 125, 146-47 (1902). See also *Parden v. Terminal Ry.*, 377 U.S. 184, 196 (1964); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278-79 (1959) (indicating that whether state action constitutes a waiver of immunity is also a federal law question).

104. See note 36 & accompanying text *supra*.

ble of determining the outcome which justifies the use of federal common law. This is consistent with the Court's holding in *Erie R.R. v. Tompkins*,<sup>105</sup> article III jurisdiction based upon diversity of citizenship between the parties does not constitute a concomitant grant of authority to the federal system to determine substantive rules of decision for those controversies. Unless the dispute arises under federal law or involves concerns unique to the federal system,<sup>106</sup> article III cannot be read to permit creation of applicable law. In a case such as *Hall*, the plaintiffs' cause of action is based upon state, not federal, law; the fact that the defendant is a state and, therefore, capable of removing the suit to the federal system cannot change that.

The enforcement of a judgment rendered by one state in the courts of another<sup>107</sup> is a function of the full faith and credit clause

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105. 304 U.S. 64 (1938).

106. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (foreign affairs); *Bank of America Nat. Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29 (1956) (federal paper); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (same).

107. There is no reason why the federal courts also cannot be requested to enforce a state judgment provided that ordinary jurisdictional requirements are met. Personal jurisdiction must be obtained over the defendant, and Fed. R. Civ. P. 4(e) generally compels a finding of such jurisdiction in the state in which the federal court sits. Jurisdiction should not be assumed because there is jurisdiction at the time of the original suit, but it is unclear what additional contacts are required. For example, in *Threlkeld v. Tucker*, 496 F.2d 1101 (9th Cir. 1974), a state counterclaim for malicious prosecution resulted in a verdict; enforcement was allowed in a district court sitting in the state which rendered the verdict although the counterclaim defendant had no contacts with the state subsequent to the filing of the counterclaim against him. However, the claim was for an intentional, rather than a negligent, tort; the original contacts were continuous and systematic rather than single and isolated; and the judgment was not "stale." While the last factor is one within the control of the prevailing party, the first two are not. Nor are they frequently present. If together they must be shown (in the absence of new contacts), personal jurisdiction will rarely be found in an enforcement action against a nonresident defendant.

In addition, the federal court must have jurisdiction over the subject matter of the action. In *Threlkeld*, such jurisdiction was based upon diversity of citizenship. But unless the state consents, no such jurisdiction would exist on facts similar to *Hall*; it would be barred by the eleventh amendment. *See* notes 62-65 & accompanying text *infra*. If the original claim had been properly heard in the federal courts, the federal court would have ancillary jurisdiction to enforce the judgment. *Virginia v. West Virginia*, 246 U.S. 565 (1918).

It should be noted that while suits against states in the federal system are enforceable in the federal system, suits against states in state courts, absent consent of the state, are not enforceable. *See, e.g.*, *Railroad Co. v. Tennessee*, 101 U.S. 337 (1879) (A state was permitted to repeal waiver of its immunity which was based on a debt that accrued while the waiver was in force: there was no impairment of contract because no "remedy" had been revoked; the original right to sue did not encompass a right to enforce the judgment). The distinction between waiver of immunity from liability and waiver of immunity from execution is one which is also recognized in the context of suits

of the Constitution and legislation passed pursuant to it.<sup>108</sup> Although the Court has been willing to accept numerous evasions of the commands embodied therein when one state is asked to utilize the law of another to determine a dispute, it has consistently upheld the language of the clause when a judgment is brought to another state for enforcement. The clause does not require that a state treat the judgment of another state as though it were rendered in the forum.<sup>109</sup> It does require, however, that when such a judgment is attempted to be made a judgment of the forum, it must be given the "same credit, validity, and effect . . . which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States."<sup>110</sup> Lack of either personal jurisdiction over the defendant or subject matter jurisdiction over the dispute in the rendering court will preclude enforcement; in the one instance, due process compels the limitation,<sup>111</sup> and in the other, the judgment is void.<sup>112</sup> Of course, the judgment only affects that which it decides<sup>113</sup> and must be considered final and conclusive by the rendering court.<sup>114</sup> However, defenses to the enforcement of a foreign judgment which are based on the underlying civil<sup>115</sup> cause of action inevitably fail. Thus, a judgment of State Y, based upon a contract in State X between residents of

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against the United States or against foreign nations. *See generally* Stewart, *The Enforcement of Judgments Against the United States*, 12 CREIGHTON L. REV. 815 (1979). With respect to suits in state court, one exception may exist; if a state can be forced to permit a federal claim to be heard against it in its own courts, it may also be forced to permit enforcement of any resulting judgment. *See* note 66 & accompanying text *supra*.

108. *See* note 21 *supra*.

109. *Gasquet v. Fenner*, 247 U.S. 16 (1918); *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839).

110. *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234, 235 (1818).

111. *Williams v. North Carolina*, 317 U.S. 287 (1942); *Haddock v. Haddock*, 201 U.S. 562 (1906) (reversed on other grounds by *Williams*); *National Exch. Bank v. Wiley*, 195 U.S. 257 (1904); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

112. *Hodd v. McGehee*, 237 U.S. 611 (1915); *Olmsted v. Olmsted*, 216 U.S. 386 (1910); *Fall v. Eastin*, 215 U.S. 1 (1909); *Clarke v. Clarke*, 178 U.S. 186 (1900).

113. For example, a judgment permitting a fraternal benefit society to raise its assessments on members binds all members but does not preclude them from raising defenses personal to themselves in suits to collect such assessments. *Royal Arcanum v. Green*, 237 U.S. 531 (1915). Similarly, a judgment assessing stockholders of insolvent corporations does not prevent recourse to personal defenses, although it does foreclose attack on the validity of the assessment. *Chandler v. Peketz*, 297 U.S. 609 (1936); *Marin v. Augedahl*, 247 U.S. 142 (1918); *Converse v. Hamilton*, 224 U.S. 243 (1912); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640 (1900). *See also* *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201 (1941); *Clark v. Williard*, 292 U.S. 112 (1934).

114. *Compare* *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943) *with* *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947).

115. Judgments based on foreign penal laws are not enforceable elsewhere (*Huntington v. Attrill*, 146 U.S. 657 (1892); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265

that state, and illegal in State *X* must be enforced in State *X*.<sup>116</sup> An allegation that the judgment was procured by fraud will not affect its enforceability unless it was fraudulently procured according to the law of the state rendering judgment and unless that state would permit collateral attack of the judgment on the ground of fraud.<sup>117</sup> Even though the state rendering the original judgment would no longer allow its enforcement, if a second state has rendered judgment enforcing the first judgment, that judgment itself must be given full faith and credit in the rendering state.<sup>118</sup>

The court requested to enforce a foreign judgment must of course have jurisdiction to enforce it and, as a general proposition, control of state court jurisdiction is for the state.<sup>119</sup> Thus, in the *Hall* situation, should Nevada be requested to enforce in its own courts the California judgment against it, Nevada's inevitable response will be that its courts lack subject matter jurisdiction over such a claim, not because the judgment is foreign to the forum but because no act of the state constitutes a waiver of immunity in actions to enforce or execute a judgment rather than merely to determine liability.<sup>120</sup> The success of the response will depend upon the Court's willingness to accept the jurisdictional limitation. There

(1888)), while judgments based on tax liabilities are (*Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935)).

116. *Fauntleroy v. Lum*, 210 U.S. 230 (1908). It makes no difference that the rendering state apparently entered the judgment based upon its misconception of the law of the enforcing state, which it applied. *See also* *American Express Co. v. Mullins*, 212 U.S. 311 (1909). State *X* would not be compelled to hear an original claim based on such contract entered into elsewhere and legal there. *Loughran v. Loughran*, 292 U.S. 216 (1934). *Cf.* *Bond v. Hume*, 243 U.S. 15 (1917) (federal court sitting in Texas could enforce a contract entered into and valid in New York, as enforcement of that contract did not violate the public policy of Texas).

117. *Titus v. Wallick*, 306 U.S. 282 (1939).

118. *Roche v. McDonald*, 275 U.S. 449 (1928). Neither can an enforcing state refuse to recognize a judgment based on a cause of action which arose there in reliance on the fact that its statute of limitations had run on the cause when the original suit was filed. *Christmas v. Russell*, 72 U.S. (5 Wall.) 290 (1866). *But see* note 80 *supra*. Of course, a state can place a limit on the time within which a judgment must be enforced; an early case permitted such a limit to differ depending on whether the judgment was that of the forum or of a foreign state. *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839). But some time must be given.

119. *Missouri v. Lewis*, 101 U.S. 22 (1879), indicated that such control may not encroach upon the proper jurisdiction of the United States, . . . abridge the privileges and immunities of citizens of the United States, . . . deprive any person of his rights without due process of law, [or] deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress.

101 U.S. at 30. In addition to the provisions mentioned, a denial of jurisdiction which places an unconstitutional burden on interstate commerce is also invalid. *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910).

120. *See* note 107 *supra*.



are intimations that a removal of jurisdiction may preclude enforcement of a judgment, at least in some circumstances,<sup>121</sup> but the Court has been extraordinarily reluctant to define or find those circumstances.<sup>122</sup> The nature of the underlying judgment cannot be used here to deny jurisdiction of an action to enforce it,<sup>123</sup> nor can jurisdictional statutes, even with respect to an original claim based on foreign law, be used to mask invalid public policy<sup>124</sup> or to discriminate against claims based on foreign law.<sup>125</sup> However, if a state refuses to permit its courts to hear any actions to enforce judgments against it, the jurisdictional limitation<sup>126</sup> thus imposed does not reflect discrimination based upon either the original cause of action or its legal source, nor does it constitute invalid public policy. The state would give precisely the same effect to the foreign judgment as it would to its own. Furthermore, to disallow the limit would lead to an absurd result: foreign judgments, but only foreign judgments, would be cognizable in the state courts, where they, and only they, would be enforceable for an amount greater than anyone could collect in any way from a forum judgment. The full faith and credit clause need not, nor should it, compel such a dichotomy.<sup>127</sup>

The Court in *Hall* permitted an unconsenting state to be sued in the courts of another state because it focused on the continued implications of international law governing relationships between

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121. *Fauntleroy v. Lum*, 210 U.S. 230 (1908), in fact rested upon a finding that a state statute precluding enforcement of certain judgments was not jurisdictional; it went not to the power of the court but to its duty, and so only established a rule of substantive law—a rule in conflict with the full faith and credit clause and, therefore, invalid. See also *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 440 (1943).

122. Thus far, only facts justifying dismissal under the common law doctrine of forum non conveniens have been held sufficient to sustain a statute denying enforcement jurisdiction. *Anglo Am. Prov. Co. v. Davis Prov. Co. No. 1*, 191 U.S. 373 (1903) (statute precluded suit by one foreign corporation against another unless the cause of action arose in the forum).

123. *Kenney v. Supreme Lodge*, 252 U.S. 411 (1920).

124. *Broderick v. Rosner*, 294 U.S. 629 (1935).

125. *First Nat'l Bank v. United Air Lines*, 342 U.S. 396 (1952); *Hughes v. Fetter*, 341 U.S. 609 (1951) (if state accepts jurisdiction over claims for wrongful death in state, it cannot deny jurisdiction over claims arising outside the state and based on foreign wrongful death statute). See *Chambers v. Baltimore & O. R.R.*, 207 U.S. 142 (1907). See also *McKnett v. St. Louis & S.R. Ry.*, 292 U.S. 230 (1934) (if jurisdiction granted when claim brought by foreign corporation based on law of another state, it cannot be denied because the claim is based on federal law).

126. Traditionally, all limitations placed on waiver of immunity are jurisdictional. See generally note 25 *supra*.

127. While it is possible that congressional legislation could overturn the Court's refusal to compel one state to recognize another's immunity statutes, should the Court find that full faith and credit requires a defending state to enforce a foreign judgment against it, legislation might be of no aid; the result could be constitutionally commanded. See notes 95-96 & accompanying text *supra*.

totally independent sovereigns and avoided any consideration of the changed status of the states in a federal system. While recognizing that the full faith and credit clause somehow affected that status, the Court limited its impact in deference to the interests of the forum. Although this approach produced a logical opinion with respect to the specific questions presented, it is questionable in so many other contexts that its application in *Hall* may create more difficulties than it resolves. It certainly creates a number of contradictions. For example, the Constitution is to be read literally to determine the existence of state immunity in the courts of other states; it is to be read in light of the "plan of Convention" to determine the existence of state immunity in the federal courts. The Constitution does not include a guarantee of states' immunity from suit in other state courts; it may include such a guarantee when suit is commenced in the federal courts. The Constitution grants original jurisdiction to the Supreme Court to hear controversies between the states, and by legislation such jurisdiction is exclusive, in an attempt to ease whatever indignity a sovereign suffers by being forced to defend against its will; there is no way in which the same sovereign can prevent itself from being brought before the lower courts of an equal, not superior, sovereign at the behest of individuals. In a conflict between the states, bias is avoided not only by the nature of the forum but by use of a neutral body of law; in a conflict between an individual and a state, only that bias which is a function of the forum can be avoided. Full faith and credit is satisfied when a forum, refusing to utilize the substantive law of another state, can demonstrate contacts which give rise to jurisdiction in other situations; though the contacts justify activity of the forum as though it were an independent nation, they may compel enforcement of a jurisdictionally permissible judgment in another state through invocation of federal authority.

Sovereign immunity is an unpopular doctrine. No plaintiff enjoys being confronted with it, and nearly everyone agrees that it ought to be abolished—except the sovereign claiming it. Its logic is anathema to our theory of government, and, as governments act to a greater degree in a greater number of spheres than before, it becomes a more and more insulting anachronism. However, if it is to be abolished, it ought to be abolished directly; by each sovereign. To destroy it piecemeal is to produce confusing precedent and continuing problems.