
*Federalism — State Sovereign Immunity —
Structural Inferences — Franchise Tax Board v. Hyatt*

The Constitution contains no textual provision addressing interstate sovereign immunity. Nonetheless, courts have been wrestling with the implications of that silence for over a century.¹ When Gilbert Hyatt sued the Franchise Tax Board of California (FTB), a state agency, in a Nevada court, California's immunity existed at the discretion of the Nevada courts.² Last Term, in *Franchise Tax Board v. Hyatt*³ (*Hyatt III*), the Supreme Court held that the Constitution entrenched a pre-Founding law-of-nations rule of state sovereign immunity and prohibited one state's courts from abrogating the immunity of sister states.⁴ In doing so, it overruled *Nevada v. Hall*,⁵ a precedent that celebrated its fortieth anniversary this March. Writing for the majority, Justice Thomas made strong structural arguments in favor of interstate sovereign immunity, but his use of such arguments in this case is in tension with his previous state sovereignty jurisprudence. That said, because of *Hyatt III*'s unique fact pattern with state sovereignty concerns on both sides of the case, nearly any resolution would have created inconsistency along at least one dimension.

In 1990, Gilbert Hyatt received a computer-chip patent that proved very profitable.⁶ Shortly thereafter, he left the high-tax state of California for Nevada.⁷ In 1993, FTB audited Hyatt's 1991 tax return, which had not reported money earned from his patent.⁸ After an investigation, FTB assessed approximately \$11 million in taxes, penalties, and interest for 1991 and 1992.⁹ In 1998, Hyatt sued FTB in Nevada state court seeking declaratory relief, and for negligence and intentional tortious

¹ See generally James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998) (describing the history of state immunity and the passage of the Eleventh Amendment).

² See *Nevada v. Hall*, 440 U.S. 410, 426–27 (1979), *overruled by* *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019).

³ 139 S. Ct. 1485.

⁴ *Id.* at 1490, 1494; see also Brief of Professors William Baude & Stephen E. Sachs as Amici Curiae in Support of Neither Party at 7, *Hyatt III*, 139 S. Ct. 1485 (No. 17-1299) [hereinafter Baude-Sachs Brief] (first citing Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565, 1568, 1574 (2002); and then citing James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 559, 583 (1994)) (arguing that the pre-Founding law of nations had recognized sovereign immunity from personal jurisdiction); THE FEDERALIST NO. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.").

⁵ 440 U.S. 410.

⁶ See *Franchise Tax Bd. v. Hyatt*, 335 P.3d 125, 131 (Nev. 2014) (en banc); U.S. Patent No. 4,942,516 (issued July 17, 1990).

⁷ *Hyatt*, 335 P.3d at 131.

⁸ *Id.*

⁹ *Id.* at 132.

behavior by FTB investigators.¹⁰ The Nevada Supreme Court held that the Full Faith and Credit Clause¹¹ did not render FTB immune from suit, but the court granted immunity from the negligence claim on comity grounds because a Nevada agency would enjoy such immunity in Nevada courts.¹²

FTB sought certiorari, thus commencing Hyatt's first trip to the U.S. Supreme Court.¹³ In a unanimous decision, the Court affirmed the Nevada Supreme Court's ruling.¹⁴ The Court held that Nevada did not violate the Full Faith and Credit Clause when it refused to apply California's immunity rule to FTB.¹⁵ The Court found it sufficient that there was no "policy of hostility" toward California.¹⁶ Because FTB did not ask the Court to overrule *Hall*, which had permitted state courts to render judgments against sister states, the Court refused to reconsider it.¹⁷

After a four-month trial, the jury found for Hyatt on all intentional torts and awarded him \$388 million.¹⁸ On appeal, the Nevada Supreme Court upheld the denial of immunity to FTB because Nevada law would not give a Nevada agency immunity for bad faith conduct or intentional torts.¹⁹ The court upheld the jury's judgment on Hyatt's fraud claim and rejected FTB's request to enforce Nevada's statutory cap on government damages because, since it would be against the state's public policy, comity did not require it.²⁰ The court also upheld the intentional infliction of emotional distress judgment but vacated the damages award and remanded for a new damages trial on that claim.²¹

Over a decade after its first trip to the Supreme Court in this case, FTB made its second.²² This time, FTB did ask the Court to overturn *Hall*, but an equally divided Court let *Hall* stand.²³ The Court also considered whether the Nevada courts could award damages against another state's agencies in excess of what could be awarded against a Nevadan agency.²⁴ Writing for the Court, Justice

¹⁰ *Id.* Hyatt charged FTB with invasion of privacy, fraud, and intentional infliction of emotional distress, among other things. *Id.*

¹¹ U.S. CONST. art IV, § 1.

¹² *Hyatt*, 355 P.3d at 133.

¹³ See *Franchise Tax Bd. v. Hyatt (Hyatt I)*, 538 U.S. 488, 494 (2003).

¹⁴ *Id.*

¹⁵ *Id.* at 498–99.

¹⁶ *Id.* at 499 (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)).

¹⁷ *Id.* at 497.

¹⁸ *Franchise Tax Bd. v. Hyatt*, 335 P.3d 125, 133–34 (Nev. 2014) (en banc).

¹⁹ *Id.* at 139.

²⁰ *Id.* at 147.

²¹ *Id.* at 149. The court also vacated the punitive damages, holding that FTB was immune from them under comity principles. *Id.* at 154.

²² *Franchise Tax Bd. v. Hyatt (Hyatt II)*, 136 S. Ct. 1277 (2016).

²³ *Id.* at 1279. The case was decided after Justice Scalia died.

²⁴ *Id.* at 1281.

Breyer²⁵ held that the Nevada courts had violated the Full Faith and Credit Clause: refusing to apply either California law — which would have applied to FTB in Californian courts — or Nevada law — which would have applied to a Nevadan agency in Nevadan courts — was unfair discrimination against California.²⁶ Chief Justice Roberts²⁷ dissented on the grounds that Nevada articulated a sufficient policy rationale to justify not applying the damages cap it would apply to a Nevadan agency, and that this was all that the Full Faith and Credit Clause required.²⁸

On remand, the Nevada Supreme Court reduced Hyatt's damages to \$50,000 pursuant to the Nevada statutory damage cap.²⁹ FTB sought and obtained certiorari, again asking the Court to reconsider *Hall*.³⁰ Writing for the Court, Justice Thomas³¹ held that *Hall* was “contrary to our constitutional design” and that stare decisis did not require following the “erroneous precedent.”³² Looking to the preratification legal system, Justice Thomas found that the common law and the law of nations afforded states immunity in their own courts and the courts of sister states.³³ He concluded that the Framers presumed the Constitution would not upset that state of affairs, as evidenced by Congress's swift action to negate *Chisholm v. Georgia*³⁴ by passing the Eleventh Amendment.³⁵ Justice Thomas rejected comity as the source of immunity because “the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns.”³⁶ Article I, Section 10 of the Constitution deprived states of sovereign tools such as diplomacy and war, and Article IV required states to give full faith and credit to fellow states' judgments and to extradite fugitives.³⁷ Justice Thomas also rejected the notion that state immunity could be conferred only by an explicit constitutional provision.³⁸

²⁵ Justice Breyer was joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan. Justice Alito concurred in the judgment without a separate opinion.

²⁶ *Hyatt II*, 136 S. Ct. at 1282.

²⁷ Chief Justice Roberts was joined by Justice Thomas.

²⁸ *Hyatt II*, 136 S. Ct. at 1287 (Roberts, C.J., dissenting).

²⁹ *Franchise Tax Bd. v. Hyatt*, 407 P.3d 717, 725 (Nev. 2017) (en banc).

³⁰ *Hyatt III*, 139 S. Ct. at 1491.

³¹ Justice Thomas was joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh.

³² *Hyatt III*, 139 S. Ct. at 1492. The Court summarily rejected Hyatt's argument that the law-of-the-case doctrine or waiver of argument prohibited review. *Id.* at 1491 n.1.

³³ *Id.* at 1493–95.

³⁴ 2 U.S. (2 Dall.) 419 (1793).

³⁵ *Hyatt III*, 139 S. Ct. at 1495–96.

³⁶ *Id.* at 1497 (“[I]t embed[ded] interstate sovereign immunity within the constitutional design.”).

³⁷ *Id.*

³⁸ *See id.* at 1497–99.

He instead concluded that such immunity was “a historically rooted principle embedded in the text and structure of the Constitution.”³⁹

Regarding stare decisis, Justice Thomas explained that it is weakest in constitutional cases, that *Hall* was weakly reasoned and inconsistent with related case law, and that legal developments since *Hall* could not be reconciled with *Hall* itself.⁴⁰ Justice Thomas acknowledged that Hyatt had significant reliance interests (such as two decades of litigation), but he argued that “case-specific costs” are not the kind of reliance interests that weigh against overruling an erroneous decision.⁴¹

Dissenting, Justice Breyer⁴² both maintained that *Hall* was rightly decided and argued that stare decisis weighed against overruling it.⁴³ Pointing to early nineteenth-century cases with foreign-nation parties, Justice Breyer argued that sovereign immunity in another sovereign’s courts was a matter of comity and customary international law.⁴⁴ The Founding-era debate, he wrote, was about immunity in federal courts, not state courts, and was thus not relevant to the discussion.⁴⁵ Furthermore, Justice Breyer characterized the immunity afforded in Founding-era cases as one of consent, not right.⁴⁶ He rejected the contention that the Constitution entrenched those rules of comity and consent.⁴⁷ Justice Breyer agreed that the ratification of the Constitution changed the state-state relationship, but argued that the Constitution almost always made those changes explicitly.⁴⁸ He claimed express constitutional provisions — such as the Full Faith and Credit Clause — were adequate to prevent states from treating each other unfairly.⁴⁹ He also argued that state sovereignty and dignity would be impeded by the majority’s ruling because it would reduce states’ control over their own courts.⁵⁰

Justice Breyer also objected to the majority’s stare decisis analysis.⁵¹ Interstate sovereign immunity was an issue, he said, on which reasonable minds could differ.⁵² Cataloguing the cases since *Hall*, Justice Breyer noted that they were about a state’s immunity in federal court or in its own courts, and thus did not call into question *Hall*’s continued

³⁹ *Id.* at 1499.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.

⁴³ *Hyatt III*, 139 S. Ct. at 1502, 1504 (Breyer, J., dissenting).

⁴⁴ *Id.* at 1500–01 (first citing *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); and then citing *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822)).

⁴⁵ *Id.* at 1502–03.

⁴⁶ *Id.* at 1503 (citing *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 n.* (Pa. C.P. 1781)).

⁴⁷ *Id.* at 1503–04.

⁴⁸ *Id.* at 1504.

⁴⁹ *Id.* (citing *Hyatt II*, 136 S. Ct. 1277, 1280–81 (2016)).

⁵⁰ *Id.* at 1506.

⁵¹ *Id.* at 1504–06.

⁵² *Id.* at 1505.

viability.⁵³ Finally, he argued that stability in the law is an important value before pausing to ponder “which cases the Court [would] overrule next.”⁵⁴

Because the Constitution does not have a sovereign immunity clause, both the majority and the dissent argued about such immunity in the language of structural inferences.⁵⁵ Historically, Justice Thomas has taken an inconsistent approach to reading structural limitations on state sovereignty into the Constitution. He dissented in *U.S. Term Limits, Inc. v. Thornton*⁵⁶ when the Court held that there was a structural limitation preventing states from adding qualifications for their federal representatives outside of those in Article I.⁵⁷ In *Haywood v. Drown*,⁵⁸ Justice Thomas again argued against a structural limitation on state sovereign authority — then protecting a state’s interest in dictating the jurisdiction of its courts.⁵⁹ Although *Hyatt III*’s structuralist argumentation seems to sit in tension with Justice Thomas’s textualist opinions in those earlier cases, in *Federal Maritime Commission v. South Carolina State Ports Authority*⁶⁰ he employed structural and state-dignity-grounded arguments that were similar to his arguments in *Hyatt III*.⁶¹ While his methodologies in his three pre-*Hyatt III* cases are difficult to reconcile, there is a clear and consistent thread throughout of maximizing state sovereignty. And scholars have offered a satisfactory doctrinal solution that can reconcile the outcomes Justice Thomas supported in *Federal Maritime Commission*, *Thornton*, and *Haywood*.⁶² But, because state sovereignty interests existed on both sides of the equation in *Hyatt III*, there was not a clear path from Justice Thomas’s previous opinions to a simple resolution. Instead, in *Hyatt III*, Justice Thomas made strong structural arguments in favor of interstate sovereign immunity, but his methodology stood in tension with his previous state sovereignty jurisprudence.

Justice Thomas’s dissent in *Thornton* exhibited his presumption that the Court should not read implied limits on state sovereignty into the Constitution. In determining whether the Constitution limits the ability of states to impose qualifications on representatives above and beyond

⁵³ *Id.*

⁵⁴ *Id.* at 1506.

⁵⁵ See *id.* at 1492, 1496 (majority opinion) (referencing the “constitutional design”); *id.* at 1503 (Breyer, J., dissenting) (disagreeing that sovereign immunity is an “implicit guarantee[]” in the Constitution).

⁵⁶ 514 U.S. 779 (1995).

⁵⁷ *Id.* at 838; *id.* at 845 (Thomas, J., dissenting).

⁵⁸ 556 U.S. 729 (2009).

⁵⁹ *Id.* at 747–49 (Thomas, J., dissenting).

⁶⁰ 535 U.S. 743 (2002).

⁶¹ *Id.* at 760, 769.

⁶² See, e.g., William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 15–16 (2017).

those listed in the Qualifications Clauses,⁶³ Justice Thomas started with the proposition that “where the Constitution is silent, it raises no bar to action by the States or the people.”⁶⁴ Because there was no textual prohibition on states “prescrib[ing] eligibility requirements for [congressional] candidates,” he reasoned, states were free to do so.⁶⁵ He added that “[t]he Federal Government and the States thus face different default rules: [w]here the Constitution is silent about the exercise of a particular power — that is, where the Constitution does not speak either expressly or by necessary implication — the Federal Government lacks that power and the States enjoy it.”⁶⁶ Furthermore, the powers the states exercise are not limited to those they had at the Founding.⁶⁷ Justice Thomas did not reject the structural reasoning of *McCulloch v. Maryland*⁶⁸ — he accepted that “delegations and prohibitions can also arise by necessary implication.”⁶⁹ Nonetheless, he expressed a “reluctance to read constitutional provisions to preclude state power by negative implication.”⁷⁰ He also cited *Barron v. Mayor of Baltimore*,⁷¹ which held that the Bill of Rights did not apply to the states because restrictions on the states were limited to ones that were “by express words applied to the states.”⁷²

In his *Haywood* dissent, Justice Thomas applied the same presumption against structural limitations that he did in *Thornton* and argued that states had a sovereignty interest in determining the scope of their courts’ jurisdiction and the constitutional text did not abrogate that power. Grappling with what states must do rather than what they cannot do, he argued that it is a state’s “sovereign prerogative” “to determine whether [its] local courts may entertain a federal cause of action.”⁷³ He wrote that “[t]he Constitution’s implicit preservation of state authority to entertain federal claims, however, did not impose a duty on state courts to do so.”⁷⁴ Justice Thomas cited to his *Thornton* dissent here on how constitutional silences should be read.⁷⁵ He found that “subject to only one limitation, each State of the Union may . . . define the conditions for the exercise of their [courts’] jurisdiction . . . to the same extent as Congress is empowered to establish a system of inferior federal courts within the

⁶³ U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.

⁶⁴ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting).

⁶⁵ *Id.*

⁶⁶ *Id.* at 848.

⁶⁷ *Id.* at 852. Under this logic, the power to abrogate sovereign immunity would not rest solely on whether states could have done so at the Founding.

⁶⁸ 17 U.S. (4 Wheat.) 316 (1819).

⁶⁹ *Thornton*, 514 U.S. at 853 (Thomas, J., dissenting).

⁷⁰ *Id.* at 870. Ironically, he cited the majority in *Nevada v. Hall* for this point. *Id.*

⁷¹ 32 U.S. (7 Pet.) 243 (1833).

⁷² *Id.* at 248, cited with approval in *Thornton*, 514 U.S. at 871 (Thomas, J., dissenting).

⁷³ *Haywood v. Drown*, 556 U.S. 729, 749 (2009) (Thomas, J., dissenting).

⁷⁴ *Id.* at 747.

⁷⁵ *Id.* at 748.

limits of federal judicial power.”⁷⁶ Although he did not speak of state dignity, he nonetheless found that the constitutional “text, structure, and history” did not support any kind of “antidiscrimination principle.”⁷⁷

In *Federal Maritime Commission*, his first majority contribution to the state sovereign immunity debate,⁷⁸ Justice Thomas shifted from his more strictly textualist approach to an intentionalist approach grounded in the importance of state dignity. He concluded that state sovereign immunity barred an action by an individual against a South Carolina agency before a federal administrative agency.⁷⁹ Justice Thomas reasoned that “the [Constitutional] Convention did not disturb States’ immunity from private suits, thus firmly enshrining this principle in our constitutional framework.”⁸⁰ He recounted the history of *Chisholm* and its discontents, and concluded that “the Eleventh Amendment does not define the scope of the States’ sovereign immunity; it is but one particular exemplification of that immunity.”⁸¹ Without pointing to another textual provision, Justice Thomas invoked the Court’s previous holdings that “the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment.”⁸² To determine to what point exactly states’ sovereign immunity did extend, Justice Thomas employed an intentionalist approach.⁸³ To ascertain the Framers’ intent, he looked at the purpose of state sovereign immunity — “to accord States the dignity that is consistent with their status as sovereign entities.”⁸⁴ Justice Thomas found this dignitary interest and the overwhelming similarities between Federal Maritime Commission adjudications and

⁷⁶ *Id.* at 768 (quoting *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring)).

⁷⁷ *Id.* at 764.

⁷⁸ Justice Thomas did also join the majorities in *Alden v. Maine*, 527 U.S. 706 (1999), and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Both of those cases held that Congress could not abrogate state sovereign immunity. See Baude, *supra* note 62, at 15–16.

⁷⁹ *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 747 (2002).

⁸⁰ *Id.* at 752. Of course, this assumes, without discussing, what the nature and source of that immunity was. The *Hyatt III* majority and dissent disagreed about the answer to that question.

⁸¹ *Id.* at 753. This practice of finding state sovereign immunity that goes beyond the text of the Eleventh Amendment dates back to *Hans v. Louisiana*, 134 U.S. 1 (1890). See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1683 (2004) (“[T]he *Hans* Court relied on the political context and the temper of the times to infer a broader spirit than the Amendment’s text could bear.”); see also *id.* at 1680–86 (explaining *Hans*’s reasoning in light of contemporary principles of statutory interpretation).

⁸² *Fed. Mar. Comm’n*, 535 U.S. at 754.

⁸³ See *id.* at 755 (“[T]he Constitution was not intended to ‘rais[e] up’ any proceedings against the States that were ‘anomalous and unheard of when the Constitution was adopted.’” (second alteration in original) (emphasis added) (quoting *Hans*, 134 U.S. at 18)); see also *id.* at 756 (“To decide whether the *Hans* presumption applies here, however, we must examine FMC adjudications to determine whether they are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union.” (emphasis added)).

⁸⁴ *Id.* at 760 (citing *In re Ayers*, 123 U.S. 443, 505 (1887)). State “dignity” makes an appearance six times. *Id.* at 760 & n.11, 760; see also *id.* at 765 (“[T]he doctrine’s central purpose is to ‘accord

Article III adjudications sufficient to conclude that “state sovereign immunity bar[red] the FMC from adjudicating complaints filed by a private party against a nonconsenting State.”⁸⁵

Although the methodology of original intent that Justice Thomas deployed in *Federal Maritime Commission* seems in tension with the more textualist approach in *Thornton* and *Haywood*, Justice Thomas’s preferred outcomes can still be understood together in two ways. First, all of the opinions maximized state sovereignty in the face of constitutional silence. Second, Professor William Baude has offered an elegant reframing that could unify the outcomes while applying a consistent methodology. *Federal Maritime Commission* could have avoided looking at the Framers’ original intent by adopting Baude’s argument: Congress lacks the Article I power to abrogate state sovereign immunity.⁸⁶ In fact, Baude’s argument that abrogating state sovereign immunity is outside the “implied powers” in Article I aligns with Justice Thomas’s rule in *Thornton*: “Where the Constitution is silent about the exercise of a particular power — that is, where the Constitution does not speak either expressly or by necessary implication — the Federal Government lacks that power and the States enjoy it.”⁸⁷ Justice Thomas’s *Thornton* rule thus avoids an inquiry into either intent or dignity, but it does not provide a clear answer when state sovereignty interests exist on both sides of the equation.⁸⁸

But neither a simple rule of maximizing state dignity nor Baude’s reframing can be used to understand *Hyatt III*. Baude’s solution comes to the opposite conclusion of Justice Thomas’s in *Hyatt III*.⁸⁹ And because there were state sovereignty interests on both sides of the case, a simple preference for maximizing state sovereignty also could not resolve the question. There is simply no way to answer the question presented in *Hyatt III* without burdening a state — either the state cannot determine the jurisdiction of its own courts or it must defend itself against its will in a foreign forum.⁹⁰ Justice Thomas favored avoiding

the States the *respect* owed them as’ joint sovereigns.” (emphasis added) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

⁸⁵ *Id.* at 760; see also *id.* at 757–59 (comparing *Federal Maritime Commission* and Article III proceedings).

⁸⁶ Baude, *supra* note 62, at 14, 18. Baude argues that abrogating state sovereign immunity is too “great and important” to be a part “of the implied powers of Article I.” *Id.* at 15 (quoting James Madison, Speech in the House of Representatives (Feb. 2, 1791), <https://founders.archives.gov/documents/Madison/01-13-02-0282> [<https://perma.cc/RV88-NR7U>]).

⁸⁷ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting).

⁸⁸ It also does not address whether constraints imposed by the states ought to be treated differently from those imposed by the federal government.

⁸⁹ See Baude-Sachs Brief, *supra* note 4, at 5–15.

⁹⁰ *Hyatt III*, 139 S. Ct. at 1504 (Breyer, J., dissenting) (“When a citizen brings suit against one State in the courts of another, both States have strong sovereignty-based interests. In contrast to a State’s power to assert sovereign immunity in its own courts, sovereignty interests here lie on both

the former burden over avoiding the latter.⁹¹ And the *Federal Maritime Commission* methodology of looking to the Framers' intent to protect state "dignity" is insufficient to answer the question unless the Court engages in an open-ended balancing of state dignity interests to determine which one is more weighty. If that were the framework, then *Hyatt III* was probably rightly decided. Because states rarely choose to open their courts to suits against other states and presumably face great burdens on their coffers on the rare occasion they are sued, the rule in *Hyatt III* protects state dignity more than allowing them unfettered discretion over the jurisdiction of their courts would.⁹² But it is difficult to tie this balancing framework to the constitutional text, structure, or history. And, in a textualist argument against a broad reading of state sovereign immunity into the Constitution, Dean John Manning has pointed out that the Constitution itself is a compromise: it "go[es] so far and no farther in pursuit of a goal."⁹³ This makes open-ended balancing of various state sovereignty interests more puzzling.

In the face of these unresolved issues, in *Hyatt III*, Justice Thomas shifted from an inquiry into intent based on dignity to an inquiry into structure. He started with the fact that state sovereign immunity "was well established and widely accepted at the founding."⁹⁴ He found that both the common law and the law of nations offered an independent basis for state sovereign immunity.⁹⁵ Justice Thomas tied the preratification legal regime to the Constitution through its "use of the term 'States[,] [which] reflects both of these kinds of traditional immunity."⁹⁶ He argued that state sovereign immunity is not derived from the Eleventh Amendment but is "preserved in the constitutional design."⁹⁷ To support this structural claim, Justice Thomas surveyed the ways in

sides of the constitutional equation." Justice Thomas did recognize this concern. *See id.* at 1497 (majority opinion) ("Each State's equal dignity and sovereignty under the Constitution implies certain constitutional 'limitation[s] on the sovereignty of all of its sister States.'" (alteration in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980))).

⁹¹ *See id.* at 1498–99 (majority opinion).

⁹² It is telling that forty-three states — including Nevada — joined Indiana's amicus brief supporting FTB. *See* Brief of Indiana and 43 Other States as Amici Curiae in Support of Petitioner at 1, *Hyatt III*, 139 S. Ct. 1485 (No. 17-1299).

⁹³ Manning, *supra* note 81, at 1720; *see id.* at 1713.

⁹⁴ *Hyatt III*, 139 S. Ct. at 1493 (citing THE FEDERALIST NO. 39, *supra* note 4, at 245 (James Madison)).

⁹⁵ *Id.* at 1494.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1496. Justice Thomas's language suggests that this is *not* an argument about intent — what the Framers expected to happen — but rather about the legal meaning conveyed in the text of the Constitution. *See* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019) (discussing the distinction).

which the Constitution changed relations among the states⁹⁸ He argued that these changes provided support for constitutionalizing the previously common law and law-of-nations rule.⁹⁹ He rejected Hyatt’s contention that an explicit grant of immunity is necessary as “ahistorical literalism.”¹⁰⁰ All of these arguments stand in tension with the approaches taken in his earlier cases. This is not an argument based on the Founders’ intent, as was the case in *Federal Maritime Commission*. But it is also not an argument that follows clearly from the *Thornton* rule — that when the Constitution is silent, the Court should not read limitations on the states into the document.

Hyatt III is methodologically inconsistent with Justice Thomas’s earlier jurisprudence on state sovereignty. The background postulate motivating Justice Thomas’s jurisprudence as a whole, however, is one of state sovereignty and dignity. When those values lie on only one side of the equation, they can be prioritized without resorting to structuralist arguments. But, when those values are on both sides of the equation, Justice Thomas’s priorities require structural interpretation. This limitation’s effect, on display in *Hyatt III*, is difficult to square with Justice Thomas’s approach to structural interpretations in the individual rights context.¹⁰¹ The inconsistent treatment of structural interpretations of individual rights and structural interpretations of state rights is not new.¹⁰² And, as Professor Thomas Colby has noted, it is hard to fit this kind of structural reasoning into original-public-meaning originalism’s mandate for fidelity to the text of the Constitution.¹⁰³ Since what exactly is “inherent in the constitutional plan” is open-ended,¹⁰⁴ there is plenty of space for Justice Thomas’s structural protection of state sovereignty and dignity. What is not clear is if there are any limits.¹⁰⁵

⁹⁸ See *Hyatt III*, 139 S. Ct. at 1497–98 (pointing to Article I, Section 10 prohibitions on the states and Article IV duties, as well as constitutional prohibitions on states applying their own law to border disputes, water disputes, and interstate compact disputes).

⁹⁹ See *id.*

¹⁰⁰ *Id.* at 1498 (quoting *Alden v. Maine*, 527 U.S. 706, 730 (1999)). This stands in contrast to Justice Breyer’s *expressio unius* view — he wrote that “where the Constitution alters the authority of States vis-à-vis other States, it tends to do so explicitly.” *Id.* at 1504 (Breyer, J., dissenting).

¹⁰¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J., and White and Thomas, JJ.) (objecting to a protected liberty interest in abortion, in part because “the Constitution says absolutely nothing about it”).

¹⁰² See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-13, at 41–45 (3d ed. 2000) (cataloguing conservative and liberal inconsistencies in using and criticizing structural interpretations).

¹⁰³ See Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1299–301 (2019). On textualist grounds, Manning has advocated not reading any atextual state sovereign immunity into the Constitution. See Manning, *supra* note 81, at 1671. Colby notes that this has been an unpopular approach among conservatives. See Colby, *supra*, at 1318.

¹⁰⁴ *Hyatt III*, 139 S. Ct. at 1495 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934)).

¹⁰⁵ Professor Martha Field has noted that “‘inherent in the constitutional plan’ . . . could include anything.” Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 525 & n.44 (1977) (quoting *Monaco*, 292 U.S. at 329).