Article IV — Full Faith and Credit — Sovereign Immunity — Franchise Tax Board v. Hyatt

The Constitution commands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[1] But what happens when one state's laws conflict with another's? In that case, a "rigid and literal" reading of the Full Faith and Credit Clause "would lead to the absurd result that . . . the statute of each state must be enforced in the courts of the other, but cannot be in its own."[2] Courts and commentators have long labored to conceive a principled application of this enigmatic constitutional text.[3] The clause's most eloquent expositor, Justice Jackson, found it "difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character."[4] Last Term, in *Franchise Tax Board v. Hyatt* (*Hyatt II*),[5] the Supreme Court held that Nevada's high court violated the Full Faith and Credit Clause by approving a judgment against a California state agency awarding damages greater than Nevada allowed in suits against its own government.[6] In dissent, Chief Justice Roberts disputed both the aggressive diagnosis of a constitutional violation and the crafting of a novel remedy that applied something in between Nevada and California law.[7] The dissent's formalist appeals to precedent and text have some force. But the Court's compromise holding reflects on the whole a wiser approach to the peculiar hazards of the Full Faith and Credit Clause, where the text is indeterminate and the original meaning uncertain. The pragmatic reasoning of Justice Breyer's majority opinion finds vindication in doctrine and constitutional history, in the structural balance of state and federal power under the Constitution, and in the practical likelihood

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[1] U.S. CONST. art. IV, § 1.

[2] Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935); *accord* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 297 (1992) ("To simultaneously apply the conflicting law of two states is impossible; to require each state to apply the law of the other is absurd; and to let each state apply its own law repeals the Clause.").

[3] The "absurdity" above is not the only mystery in the first section of Article IV. The Effects Clause, which follows the guarantee of full faith and credit — "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." — has provoked its fair share of consternation in the commentariat. *See, e.g.*, Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1202–05 (2009).

[4] Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 16 (1945).

[5] 136 S. Ct. 1277 (2016).

[6] *Id.* at 1280–83 (citing NEV. REV. STAT. § 41.035(1) (1995)).

[7] *Id.* at 1287–88 (Roberts, C.J., dissenting).

that this decision will reduce interstate friction without occasioning undue uncertainty or excessive litigation.

Gilbert Hyatt says he moved from California to Nevada in September 1991. The state of California doesn't believe he moved until April 1992, shortly after licensing a lucrative microprocessor patent.[8] To California's Franchise Tax Board, that seven months' difference meant more than $10 million in unpaid taxes, fees, and interest.[9] The Board audited Hyatt's 1991 tax return and sent state employees to Las Vegas to investigate his change of residence.[10] According to Hyatt, these government agents spent their official visit to Sin City engaged in an orgy of tortious conduct: snooping around his house and synagogue, sifting through his mail, repeatedly harassing him, his friends, "and alas, even his trash collector!"[11] Hyatt sued the Board in Nevada state court in 1998 seeking damages and other relief.[12] That lawsuit in turn spawned a constitutional controversy over state sovereign immunity that has so far spanned the better part of two decades and entailed two trips to the Supreme Court of the United States.[13]

Hyatt's first victory was establishing that a Nevada court could hear his claims. The Board argued that "principles of sovereign immunity, full faith and credit, choice of law, [and] comity"[14] compelled the application of California law, which would grant the Board complete immunity from suit — a degree of protection that Nevada did not afford its own state agencies.[15] But the Nevada Supreme Court

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[8] Franchise Tax Bd. v. Hyatt, 335 P.3d 125, 131–32 (Nev. 2014). These events marked the final chapter in another decades-long legal battle, by which Hyatt won a controversial patent for the first microprocessor. Dean Takahashi, *Chip Designer's 20-Year Quest*, L.A. TIMES (Oct. 21, 1990), http://articles.latimes.com/1990-10-21/business/fi-4400_1_chip-design [https://perma.cc/T8F2-BPAR].

[9] *Hyatt II*, 136 S. Ct. at 1279–80.

[10] *Hyatt*, 335 P.3d at 131–32.

[11] Joint Appendix, Franchise Tax Bd. v. Hyatt (*Hyatt I*), 538 U.S. 488 (2003) (No. 02-42), 2002 WL 32127282, at *50; *see also Hyatt II*, 136 S. Ct. at 1280.

[12] *Hyatt I*, 538 U.S. at 491. Hyatt alleged that the Board had committed torts including invasion of privacy, outrageous conduct, abuse of process, fraud, and negligent misrepresentation. *Id.* He also challenged the Board's actions in California through the agency's own administrative process and is now seeking review from the Ninth Circuit in that case. *See* Hyatt v. Chiang, No. 14-00849, 2015 WL 545993, at *1 (E.D. Cal. Feb. 10, 2015), *appeal filed*, No. 15-15296 (9th Cir. Feb. 19, 2015).

[13] *Cf.* CHARLES DICKENS, BLEAK HOUSE 16 (Nicola Bradbury ed., Penguin Books 1996) (1853) ("Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least . . . .").

[14] *Hyatt I*, 538 U.S. at 491.

[15] *Id.* at 491–93 (citing CAL. GOV'T CODE § 860.2 (West 1995); NEV. REV. STAT. § 41.031 (1996)). The source and strength of the "principles" brandished by the Board would become a central matter of debate in Hyatt's case over the next decade and a half. At oral argument in 2015, the Justices themselves appeared to struggle to pin down the legal authority invoked against Hyatt. *See* Transcript of Oral Argument at 18, *Hyatt II*, 136 S. Ct. 1277 (No. 14-1175), https://

disagreed,[16] and the U.S. Supreme Court unanimously upheld that decision in 2003.[17] Writing for the Court in *Hyatt I*,[18] Justice O'Connor affirmed that the Full Faith and Credit Clause did not require Nevada to apply California's law of immunity.[19] In another era, Justice O'Connor noted, the Court had unreservedly "appraised and balanced state interests . . . to resolve conflicts between overlapping laws of coordinate States" in the name of full faith and credit.[20] But the Court renounced that self-assured balancing approach when, as Justice Jackson "aptly observed," it proved unprincipled and unpredictable in application.[21] From that history, the modern Court drew lessons of restraint and declined to compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[22] Because Nevada was "undoubtedly" competent to legislate with respect to the torts that Hyatt, a Nevada citizen, had allegedly suffered within its borders, the Court let stand the state court's finding of jurisdiction.[23] The Court was persuaded of "neither the relative soundness nor the relative practicality" of the Board's attempts to distinguish its position from the discredited balancing tests of yesteryear.[24]

On remand, a Nevada jury awarded Hyatt nearly $400 million in damages.[25] But Hyatt will never see more than an infinitesimal fraction of that sum. First, the Nevada Supreme Court reduced the award to approximately $1 million — though not, as the Board requested, to the $50,000 cap that would apply in a suit against a Nevada agency.[26]

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www.supremecourt.gov/oral_arguments/argument_transcripts/14-1175_ed9l.pdf [https://perma.cc/7N3R-P69Y] ("[The Board's argument] seems to me intuitively at some level correct . . . . So I thought, well, where in heaven's name does that come from? And that's what's bothering me, and I'd like a theory." (statement of Breyer, J.)).

16 The court held that Nevada courts could exercise jurisdiction over Hyatt's intentional tort claims, because any countervailing interest in maintaining interstate comity — by rejecting jurisdiction over another state's government — was outweighed by "Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees." *Hyatt I*, 538 U.S. at 493 (quoting Appendix to Petition for Writ of Certiorari at 12–13, *Hyatt I*, 538 U.S. 488 (No. 02-42)). Nevada's high court did, however, find that the interest of comity compelled the trial court to decline jurisdiction over Hyatt's negligence claims. *Id.*

17 *Id.* at 494.

18 538 U.S. 488.

19 *Id.* at 494.

20 *Id.* at 495.

21 *Id.* at 495–96 (citing Jackson, *supra* note 4, at 16).

22 *Id.* at 494 (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988)).

23 *Id.* at 494, 499.

24 *Id.* at 498.

25 Franchise Tax Bd. v. Hyatt, 335 P.3d 125, 134 (Nev. 2014).

26 *Id.* at 145–46, 157 (citing NEV. REV. STAT. § 41.035(1) (1995)). The court reversed some portions of the damages on grounds that the claims failed as a matter of law, remanded others for recalculation to correct for evidentiary and jury instruction errors, and held that considerations of comity barred an award of $250 million in punitive damages. *Id.* at 130–31, 152–54.

Then, in 2016, the U.S. Supreme Court vacated and remanded the case with instructions to further restrict damages to that $50,000 statutory limit.[27] Writing for the Court in *Hyatt II*, Justice Breyer[28] noted that the Justices were divided four against four on the first question presented — whether to overrule the Court's 1979 holding in *Nevada v. Hall*[29] that the Constitution grants states no sovereign immunity in other states' courts.[30] The equally divided Court accordingly affirmed Nevada's exercise of jurisdiction over the Board.[31] But a majority of the Court held that the Nevada court's damages ruling violated the Full Faith and Credit Clause because it reflected a "special, and constitutionally forbidden, '"policy of hostility to the public Acts" of a sister State.'"[32] When entertaining a suit against another state's government, Nevada was bound to provide at least the same extent of immunity that it would afford its own government.[33] The Constitution allowed Nevada to "open the doors of its courts to a private citizen's lawsuit against another State (here, California) without the other State's consent," but it forbade those courts to "award[] the private citizen greater damages than Nevada law would permit a private citizen to obtain in a similar suit against Nevada's own agencies."[34]

In so holding, the Court distinguished *Hyatt I*, and other precedents allowing state courts free rein to apply their own law in suits involving sister states, on two grounds. First, the litigant states' statutes in those cases "embodied 'a conflicting and opposed policy'" to the laws of the forum state.[35] As Justice O'Connor noted in *Hyatt I*, the failure of past judicial attempts to balance these opposing interests had made the modern Court wary of intervening to bar state courts from applying their own law.[36] But there was no interstate "conflict" in *Hyatt II* until the Nevada court created one, because "the ordinary

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[27] *Hyatt II*, 136 S. Ct. at 1283.

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

[29] 440 U.S. 410 (1979).

[30] *Hyatt II*, 136 S. Ct. at 1279.

[31] *Id.* Had he lived to take part in *Hyatt II*'s decision, Justice Scalia was widely expected to vote to overrule *Hall* and so obviate the need to reach the full faith and credit question. *See, e.g.*, Nicholas Datlowe, *Minor Error, Major Effect*, BLOOMBERG BNA (Apr. 21, 2016), http://www.bna.com/minor-error-major-b57982070195 [https://perma.cc/T7AP-Q9XA].

[32] *Hyatt II*, 136 S. Ct. at 1279 (quoting *Hyatt I*, 538 U.S. 488, 499 (2003)).

[33] *Id.* at 1281.

[34] *Id.* at 1279. Of course, nothing in *Hyatt II* appears to prohibit a state from granting foreign agencies *greater* immunity than it affords its own government. That kind of beneficent disparate treatment would not seem to be the "kind of discriminatory hostility" that violates the clause. *Id.* at 1282. Nevada presumably remains free to limit California agencies' liability to $10,000 or to hold them immune from any suit in Nevada courts.

[35] *Id.* at 1281 (quoting Carroll v. Lanza, 349 U.S. 408, 412 (1955)).

[36] *Hyatt I*, 538 U.S. at 495–96.

principles" of *both* Nevada law and California law would immunize the states' own agencies against damages exceeding $50,000.[37]

Second, the state courts in previous cases like *Carroll v. Lanza*[38] "did not 'exhibi[t] a "policy of hostility to the public Acts" of a sister State,'" because they had shown "sufficient policy considerations" to justify the choice of their own law.[39] Here, by contrast, the Court smoked out impermissible hostility behind the Nevada court's latest decision. According to Nevada's high court, the Board's imperviousness to "legislative control, administrative oversight, and public accountability" in the Silver State justified the stricter treatment of intentional torts committed by that foreign state agency.[40] But the Supreme Court dismissed this proffered policy interest as "little more than a conclusory statement disparaging California's own legislative, judicial, and administrative controls."[41] If left unchecked, the Nevada court's hostile ruling was "likely to cause chaotic interference by some States into the internal, legislative affairs of others."[42] The Court found that unfortunate eventuality "difficult to reconcile . . . with the Constitution's vision of 50 individual and equally dignified states" and remanded the case with instructions to limit damages to $50,000.[43]

Chief Justice Roberts dissented.[44] Noting the decision's departure from the text of the clause, he accused the majority of distorting the constitutional decree of "*full* faith and credit" into a "partial credit" guarantee of rough equity.[45] The dissent disclaimed any quarrel with *Carroll*'s principle that the clause proscribes a state from adopting a "'policy of hostility to the public Acts' of another State," as shown when "it has 'no sufficient policy considerations to warrant' its refusal to apply the other State's laws."[46] But the Chief Justice found the Nevada court's policy explanation "sufficient" under the Court's previous applications of the test.[47] He also rejected the majority's creative rem-

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[37] *Hyatt II*, 136 S. Ct. at 1282.

[38] 349 U.S. 408.

[39] *Hyatt II*, 136 S. Ct. at 1282 (first quoting *Hyatt I*, 538 U.S. at 499; then quoting *Carroll*, 349 U.S. at 413).

[40] Franchise Tax Bd. v. Hyatt, 335 P.3d 125, 147 (Nev. 2014) (quoting Faulkner v. Univ. of Tenn., 627 So. 2d 362, 366 (Ala. 1992)).

[41] *Hyatt II*, 136 S. Ct. at 1282.

[42] *Id.*

[43] *Id.* at 1283. Here as elsewhere, Justice Breyer evinces a concern that constitutional interpretation should serve to pacify internecine conflict. *Cf.* Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment) ("[The Religion Clauses] seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.").

[44] The Chief Justice was joined by Justice Thomas.

[45] *Hyatt II*, 136 S. Ct. at 1284 (Roberts, C.J., dissenting).

[46] *Id.* at 1286 (quoting Carroll v. Lanza, 349 U.S. 408, 413 (1955)).

[47] *Id.* at 1286–87.

edy for that supposed constitutional violation — a "new hybrid rule" applying neither California's law of immunity, which barred any recovery, nor Nevada's, which applied only to Nevada state agencies.[48] The dissent allowed that the Court's in-between solution "seems fair," but reminded that "the word 'fair' does not appear in the Full Faith and Credit Clause."[49] If the Nevada court had indeed violated the Constitution, the Chief Justice read the clause to compel the application of California's law of *full* immunity.[50]

In *Hyatt II*, the Court's pragmatic creativity and the dissent's resolute formalism reflect two divergent approaches to the difficult task of guaranteeing full faith and credit to the public acts of other states. The pragmatists have the better of this particular argument. The dissent criticized the majority for deviating from text and precedent, for disparaging the autonomy of Nevada's state government, and for resurrecting a balancing approach previously abandoned as practically untenable. But a closer look at the history of the clause's enforcement and its place in our constitutional structure blunts these critiques. While *Hyatt II* extended precedent in novel ways, it did so in fealty to a tradition of pragmatic experimentation expressed in that same case law. And this case's factual and legal idiosyncrasies make its holding unlikely either to upset the balance of state and federal power or to unleash a flood of undesirable litigation.

To appreciate the majority's fidelity to the long arc of the Court's precedents, it is worth distinguishing the *Hyatt II* opinions' two points of disagreement: the finding of a violation, and the remedy for that breach. First, the constitutional violation. The Court has long recognized that the impossibility of a "rigid and literal enforcement" of the clause makes it "unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another."[51] Both opinions in *Hyatt II* accept that premise, and they agree that *Carroll*'s "sufficient policy" test supplies the proper measure for this choice of law.[52] They part ways only at the specific application of that test: for the majority, the mere fact of the California Franchise Tax Board's foreignness is not a good enough reason for a Nevada court to afford it weaker immunity than its home-state counterpart enjoys. The dissent may fairly debate the precedential support for this particular application of *Carroll*.[53] But

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[48] *Id.* at 1288.

[49] *Id.* at 1284.

[50] *Id.* at 1288.

[51] Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935).

[52] *See Hyatt II*, 136 S. Ct. at 1286 (Roberts, C.J., dissenting).

[53] The majority found precedent in *Hughes v. Fetter*, 341 U.S. 609 (1951), which deemed the Wisconsin Supreme Court's choice of law to reflect unconstitutional "antagonism" toward Illinois.

by assenting to the premise of that debate, the dissenting Justices have already embraced a doctrinal innovation "nowhere to be found" in the concise constitutional text.[54] The dissent is correct that "the word 'fair' does not appear in the Full Faith and Credit Clause" — but then again, neither does "sufficient policy reason for applying its own law."[55] That much judicial gloss on the word "full," it seems, is water over the dam.

This "unavoidable" concession takes some of the sting out of the dissent's charge that *Hyatt II* departed from text and precedent in the second matter of dispute: the remedy.[56] On its face, the clause commands respect for the laws of *other* states. It was indeed unprecedented for the Court to cure a breach of that duty by ordering that Nevada abide by a reciprocal version of its *own* statute.[57] Here, the dissent is right to say that the Court's decision "shifts course."[58] But such doctrinal drift is the rule and not the exception in these murky waters. Decades before Chief Justice Roberts protested *Hyatt II*'s award of "partial credit," textualist critics like Professor Douglas Laycock lamented the twentieth-century Court's doctrine of "some credit, partial credit, or credit where it would be wholly unreasonable to deny credit."[59] The dissent thus damns the majority for transgressions long predating the case at bar. Justice Jackson, for his part, traced the uncertainty attending the clause back to 1787 and found "no satisfactory evidence that the members of the Constitutional Convention or the early Congresses had more than a hazy knowledge of the problems they sought to settle or of those which they created by the faith and credit clause."[60] He and others have accordingly regarded the provision as "peculiarly a lawyer's clause," committed to judicial discre-

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Hyatt II, 136 S. Ct. at 1281. But the dissent read *Hughes* as an inapposite exception to the Court's "general[]" rule that "when a State chooses 'to apply its own rule of law to give affirmative relief for an action arising within its borders,' the Full Faith and Credit Clause is satisfied." *Id.* at 1286 (Roberts, C.J., dissenting) (quoting Carroll v. Lanza, 349 U.S. 408, 413 (1955)).

[54] *Hyatt II*, 136 S. Ct. at 1288 (Roberts, C.J., dissenting). Though he joined the dissent in *Hyatt II*, Justice Thomas has elsewhere criticized both the judicial construction of the Constitution through "invented" balancing tests and the Court's later interventions to "radically rewrite[]" those "baseline" tests. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting). Here, only the latter step drew his and Chief Justice Roberts's censure.

[55] *Hyatt II*, 136 S. Ct. at 1284, 1286 (Roberts, C.J., dissenting).

[56] In the same breath with which the dissent condemned the Court's infidelity to text, it appended its own parenthetical proviso to the clause: "The [majority] opinion also departs from the text of the Clause, which — *when it applies* — requires a State to give *full* faith and credit to another State's laws." *Id.* at 1284 (first emphasis added).

[57] *See id.* at 1287–88.

[58] *Id.* at 1284.

[59] Laycock, *supra* note 2, at 296.

[60] Jackson, *supra* note 4, at 6. *But see* Laycock, *supra* note 2, at 289–90 (arguing that the Framers "saw no ambiguity" in the clause because they intended it to be read "in light of the familiar choice-of-law rules then applied in English and American courts").

tion — and innovation.[61] To single out the majority's "hybrid rule" for condemnation, then, misses the Full Faith and Credit Clause's forest for *Hyatt*'s trees.

Against this backdrop, the dissent's formalist arguments fail to persuade. Chief Justice Roberts questioned the majority's commitment to "this Court's decision to get out of the business of 'appraising and balancing state interests under the Full Faith and Credit Clause.'"[62] But that decision was itself a pragmatic determination to "heed the lessons learned" from years of doctrinal experimentation.[63] The Court that grew to question the balancing approach "[i]n light of this experience" never purported to condemn those decades of doctrine as wanderings in the unconstitutional wilderness.[64] The dissent may be right that the Court has not previously applied its tests in this particular way. But the majority holds true to the spirit of pragmatic flexibility that the Court has embraced in the shadow of the clause's universally acknowledged textual indeterminacy.[65]

There is surely virtue in principled loyalty to text and precedent even amidst a jungle of shifting doctrine — in declaring, of the Court's pragmatic experiments on the language of the Full Faith and Credit Clause, "this far and no further." But there are also costs and contradictions to such faint-hearted formalism. Chief Justice Marshall — that "first great textualist"[66] — recognized that a narrow focus on necessarily spare constitutional text may obscure the structure behind a specific provision.[67] And Professor Charles Black described how instinctive adherence to "the textual method" when the text runs out "forces us to blur the focus and talk evasively," while a pragmatic consideration of constitutional structure "frees us to talk sense."[68] A principled pragmatist need not question "*whether* the text shall be respected, but rather *how* one goes about respecting a text of that high

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61 Jackson, *supra* note 4, at 2.

62 *Hyatt II*, 136 S. Ct. at 1287 (Roberts, C.J., dissenting) (quoting *Hyatt I*, 538 U.S. 488, 498 (2003)).

63 *Hyatt I*, 538 U.S. at 499.

64 *Id.* at 496.

65 *See, e.g.*, Hughes v. Fetter, 341 U.S. 609, 611 (1951) ("[F]ull faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved."); Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 210 (1941) ("[T]he full faith and credit clause is not an inexorable and unqualified command.").

66 Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1122 (1998).

67 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[A constitution's] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.").

68 CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13 (1969).

generality and consequent ambiguity which marks so many crucial constitutional texts."[69] Decades of realist doctrine may likewise necessitate a flexible approach to precedents that were devised in the first instance to make sense of indeterminate text.[70]

One way to interpret such a provision is to look to its role in the structure of our Constitution's federal system. The Court in *Hyatt II* appealed to the clause's purpose as a safeguard against interstate rivalry.[71] The dissent, on the other hand, took issue with the majority's refusal to respect Nevada courts' autonomy.[72] But as Justice Jackson observed, "states have less to fear from a strong federalist[73] influence in dealing with this than with most other constitutional provisions," thanks to the clause's reciprocal nature: "Anything taken from a state by way of freedom to deny faith and credit to law of others is thereby added to the state by way of a right to exact faith and credit for its own."[74] Federal scrutiny of state courts in this area thus poses relatively little threat to the balance of state and national power.[75]

More specifically, there are practical reasons not to fear the Court's tentative step back toward balancing in the area of sovereign immunity. In *Hyatt I*, Justice O'Connor hesitated to open the floodgates to a deluge of interstate disputes "[w]ithout a rudder to steer us."[76] The Chief Justice's invocation of that opinion summoned up a standard argument against pragmatic balancing tests: they invite uncertainty and unpredictability when future litigants seek to test their limits.[77] But *Hyatt II*'s distinctive factual and procedural history makes it unlikely

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[69] *Id.* at 30 (emphases added); *see also id.* at 29 ("Why should one not explicitly base such holdings, not on Humpty-Dumpty textual manipulation, but on the sort of political inference which not only underlies the textual manipulation but is, in a well constructed opinion, usually invoked to support the interpretation of the cryptic text?").

[70] *Cf.* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 192–208 (2006) (arguing that formalists should not rigidly apply "antiformalist" or "realist" precedents).

[71] *Hyatt II*, 136 S. Ct. at 1282–83.

[72] *Id.* at 1287 (Roberts, C.J., dissenting).

[73] That is to say, "federal" — or federalist in an old-fashioned sense connoting enthusiasm for strong national government. *Cf.* Letter from Thomas Jefferson to John Langdon (Mar. 5, 1810), *in* 12 THE WRITINGS OF THOMAS JEFFERSON 373, 373–74 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) ("The toryism with which we struggled in '77, differed but in name from the federalism of '99 . . . . It is a longing for a King, and an English King rather than any other.").

[74] Jackson, *supra* note 4, at 33.

[75] Aggressive judicial enforcement of the dormant commerce clause, for instance, strikes more directly at the ability of states to structure their own affairs. *See, e.g.*, Camps Newfound /Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

[76] *Hyatt I*, 538 U.S. 488, 499 (2003).

[77] *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989) ("[W]here an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. . . . [P]redictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.").

that similar cases will recur with great frequency.[78] For one thing, lawsuits like Hyatt's require that one state's agents come under another state's personal jurisdiction. *Hall* involved a collision with a vehicle driven out of state by a University of Nevada employee;[79] *Hyatt* dealt with California officials pursuing a former resident across state lines.[80] The physical insularity of most organs of state government may protect against conflicts larger than these interpersonal disputes — and so assuage any fear that the Court's equitable balancing could foster unpredictability and invite vexatious litigation.[81] And the Court appears to have originally taken this case in hopes of settling a different issue altogether — the substantive question of sovereign immunity after *Hall*, not the choice-of-law issue of full faith and credit.[82] This course of events suggests that the latter question was not in dire need of attention and certiorari.[83] The Court is probably right that it can "safely conclude" that the Nevada court overstepped its bounds here, without inviting an avalanche of litigation or upsetting a lifetime of case law.[84]

Judged by the light of constitutional history and structure, *Hyatt II* accords with the spirit of the Court's pragmatic precedents guaranteeing full faith and credit to state statutes. There is a remorseless logic to the Chief Justice's steadfast insistence that a Nevada court must either submit entirely to another state's statute or else freely impose its own conflicting law. But if clear constitutional text or principle may sometimes compel such all-or-nothing disjuncture, it is difficult to rest the dissent's weighty conviction on the slender reed of the word "full."[85] While the dissent denounced the majority's split-the-baby approach for inventing an untenable compromise, others may recognize the Court's ruling as Solomonic in the finest sense.[86]

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[78] *See* Jackson, *supra* note 4, at 26 (noting that the Court's cases applying the clause to statutory questions are generally "less numerous and less consistent" than those respecting judgments).

[79] Nevada v. Hall, 440 U.S. 410, 411 (1979).

[80] *Hyatt II*, 136 S. Ct. at 1280.

[81] *Cf., e.g.*, Faulkner v. Univ. of Tenn., 627 So. 2d 362 (Ala. 1992) (state university's contacts with out-of-state alumnus); Sam v. Estate of Sam, 134 P.3d 761 (N.M. 2006) (Arizona government employee's car accident in New Mexico).

[82] *See* Datlowe, *supra* note 31.

[83] *See* Lyle Denniston, *Argument Preview: States' Legal Immunity at Stake*, SCOTUSBLOG (Nov. 30, 2015, 12:34 AM), http://www.scotusblog.com/2015/11/argument-preview-states-legal-immunity-at-stake [https://perma.cc/3B4N-D28T].

[84] *Hyatt II*, 136 S. Ct. at 1283.

[85] *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819) ("It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense . . . .").

[86] *Compare* Jackson, *supra* note 4, at 24 ("Where there is a choice under the full faith and credit clause, the one should be made, I should say, which best will meet the needs of an expanding national society for a modern system of administering, inexpensively and expeditiously, a more certain justice."), *with* Scalia, *supra* note 77, at 1176 ("King Solomon is also supposed to have done a pretty good job, without benefit of a law degree, dispensing justice case-by-case.").