

Choice and the Constitution

By Michael S. Greve

Federalism Outlook No. 15, *on the constitutional rules that protect (or should protect) states against exploitation by sister states, promised a subsequent issue on the congressional protection of interstate comity and commerce, a subject that lawyers call “preemption.” We postpone publication of that eagerly awaited issue for an impromptu analysis of California Franchise Tax Board v. Hyatt, now pending before the U.S. Supreme Court. Hyatt, too, illustrates the distressing level of mutual state exploitation and its source—the Supreme Court’s lack of a coherent constitutional theory on the relations among the states. A careful examination of this little-noted case reveals a rare opportunity to reestablish a piece of such a theory.*

California Wants Me

“Get that Jew bastard.” On that rationale, articulated by one of its agents, the California Franchise Tax Board (FTB) is attempting to collect income taxes from Gilbert Hyatt, a computer engineer and successful entrepreneur who fled California’s oppressive regulations for Nevada’s more hospitable climate. Hyatt obtained a federal patent while doing business in California, moved to Nevada sometime in 1991, and started to earn substantial license fees on the patent. Having learned of Hyatt’s bonanza through a 1993 newspaper article, the FTB launched a “residency audit” against Hyatt, claiming that the proceeds of his patent are taxable in California. (The disputed tax amount ranges from \$17 million to \$40 million.) Hyatt disputes that claim and has sued the FTB, in Nevada courts, for intentional torts—such as invasion of privacy—allegedly committed in both California and Nevada by the FTB in the course of trying to prove his continued California residency and taxability.

California grants the FTB immunity against allegations of both negligent and intentional torts. Nevada, in contrast, affords its agencies immunity against suits for negligence—but not for intentional torts. So: when Hyatt sues the California FTB in a Nevada state court, must that court respect and apply California law—or may it apply its home state law? The Nevada Supreme Court ruled that California must stand trial in Nevada, under Nevada law. The U.S. Supreme Court is reviewing that determination and will decide the case before the end of June.

When more than one state’s law may apply to a legal case (because the parties reside, or events took place, in different states), courts must choose. While such “choice-of-law” questions implicate fundamental questions of federalism’s constitutional logic, legal scholars have labeled the field a “dismal swamp” and “the law’s psychiatric ward.”¹ Lest we drown or go nuts at the outset, we first explore the somewhat firmer surrounding terrain.

Hotel California

California is dedicated to proving that socialism in one country is not impossible. It can indulge that fantasy, up to a point, because it possesses

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what economists call “exploitable advantages”: beaches, blondes, sun, and above all, size. For ready access to California’s vast market, productive citizens and businesses will put up with regulatory impositions that they would not tolerate in, say, North Dakota.

The Golden State, however, has pressed its advantages beyond the breaking point. Harsh environmental, labor, and tax laws, including the highest marginal income tax rate in the country, have rendered California the least attractive among all fifty states in which to do business.² For over a decade, entrepreneurial and wealthy Californians have departed for such states as Colorado and Nevada. Those states have fostered a favorable business climate, and they aggressively recruit California refugees such as Gil Hyatt.

The best way to adapt and to stem the exodus would be to improve California’s own business environment. That strategy, though, would entail a massive confrontation with rapacious interests, from environmentalists to unions, which run California politics. California has therefore “adapted” by attempting to lock the exit doors and to extend its regulatory reach beyond its own borders. The California Franchise Tax Board has taken a particularly expansive view of its powers. A decade ago, the board caused a major diplomatic crisis with America’s trading partners by taxing the worldwide profits of multinational corporations—even if those firms *lose* money on their California operations.³ More recently, California has led the states’ attempt to impose sales tax collection obligations on out-of-state e-commerce firms.

The *Hyatt* case results from the FTB’s firm policy of trolling after businessmen who leave the state. The agency conducts systematic searches for those individuals and, through residency audits, attempts to prove that their postpartum income is, for one reason or another, still taxable in California. The state applies an extremely malleable definition of “residency,” and the FTB has consistently stretched that definition to exact tax settlements from refugees. As far as the Board is concerned, Californians can check out any time they want, but they can never leave—at least not for tax purposes.

Sympathy for the Poor Devil

Although (or perhaps because) tax collectors have had a bad rep since at least the New Testament, they do stick

together. In the *Hyatt* case, California enjoys the support of some twenty individual states; the Multistate Tax Commission (MTC), a tax harmonization agency of which California (but not Nevada) is a member; the National Association of Governors; the National Conference of State Legislatures; and several local government associations. Hyatt’s suit, they all clamor, “sends chills down the spines of state tax administrators,” “provides a roadmap for disgruntled taxpayers,” and threatens “legitimate tax collection efforts.”⁴ The MTC frets about “tax havens” and “tax evasion that subverts fair, rational, and credible federal and state tax systems.”⁵

That begs the question, for the legitimacy and fairness of the FTB’s actions are precisely at issue in the suit. The FTB—whose training manuals for enforcement agents feature skull and crossbones insignia—has a reputation as the nation’s most ruthless tax agency.⁶ Hyatt credibly alleges that all the cops here are criminals—and the alleged sinner, if not quite a saint, is at least an innocent victim. In seeking to establish Hyatt’s continued California tax obligations, the FTB showed no sympathy, and no courtesy, and no taste. FTB agents entered Nevada, monitored Hyatt’s apartment, and rummaged through his garbage. The FTB also threatened to publicize personal information (relating to Hyatt’s family and to his murdered son) that it had obtained, on a promise of confidentiality, in the course of its audit.

While California vaguely disputes some of Hyatt’s allegations, the nature of its game is not the least bit puzzling. In moving to Nevada, Gil Hyatt mobilized the genius of America’s competitive federalism: Citizens choose their own state. The states want it the other way around. The question in *Hyatt* is where citizens and states get to fight that battle, and on what terms.

The Taxman Meets the Trial Bar

Gil Hyatt plainly has the equities on his side. His legal position, however, is highly problematic. His lawyers essentially argue as follows:

1. Any state can be sued, regardless of its own laws, in any state with which it has some sort of contact. The choice of the forum is up to the plaintiff.
2. In choosing which state law to apply (the defendant’s or the plaintiff’s), the state court should look to the governments’—not the parties’—“interests.” When the state laws conflict, the court should

apply the law of its own state, which has an “interest” *because it is the forum state*.

What follows? No imagination is needed, for *those are the firmly established rules that apply in private tort litigation*. The first rule is called the “minimum contacts” rule; the second, “interest analysis.” We know the result: the liability explosion. Plaintiffs’ lawyers go forum-shopping, and juries in Mississippi or Madison County, Illinois, homecook companies from Detroit or Duluth.

California has two arguments for a different rule. First, if state governments were subject to the rules that apply to private defendants, they would be subject to similar claims. They might as well go into the asbestos business. Second, the U.S. Constitution prohibits a forum state’s preference for its own law over the conflicting law of a sister state. This argument is right on the money—but not for the reasons and in the form proffered by California.

Come the Constitution

Article IV Section 1 of the Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” Notwithstanding the Founders’ bizarre capitalization habits, the operative words are “full” and “shall.” In a union of equal states, California argues with great force, “full” credit must mean equal credit. Full credit, moreover, is not a random act of comity or kindness; it is a constitutional command.

A state court’s choice of law based on state “interests” necessarily violates that command, since it permits states to prefer their own law. Nevada plainly has an interest in applying its own law in *Hyatt*, both because the case was filed in its courts and because it has a right to protect its citizens from intentional torts. The effect, however, is a legal regime that may deprive sister states of their capacity to fulfill their own sovereign responsibilities, such as the administration of their tax laws. Such choice-of-law rules, California says, are constitutionally prohibited. The Full Faith and Credit Clause requires a “new rule” that compels state courts to consider not the states’ “interests,” but rather the *effects* of a particular choice of state law on sister states’ sovereign responsibilities.

Bingo! The notion that “interest analysis” is unconstitutional has occurred to legal scholars for some time.⁷ In *Hyatt*, at long last, a state attorney general manages to get

the issue right. Nothing like a trial lawyer threat to bring people to their senses.

Rules and Exceptions

Having started out on the right constitutional foot, California promptly stumbles. California insists on a “new rule” that respects state equality only for cases that implicate a state’s immunity laws—and, more narrowly still, immunity laws that protect a state’s “core sovereign functions.” In other words, California does not argue for a new choice-of-law rule; it argues for a state exemption from the choice-of-law rules that apply to private defendants.

The obvious problem is the impossibility of defining “core sovereign functions” in a nonarbitrary fashion. The Supreme Court has rejected the concept as “unsound in principle and unworkable in practice,”⁸ and even California admits that “there is no clear definition” of core sovereign responsibilities. The true problem of *Hyatt*, though, lies deeper: one cannot articulate a coherent constitutional reason why government defendants and their immunities should be subject to special choice-of-law rules. To see the point, consider a typical case involving a private defendant:

State A prohibits punitive damages in tort actions. State B permits them. Plaintiff in State B sues manufacturer from State A in State B on the grounds that his injury was caused by a product design defect.

Under interest analysis, State B may choose its own law and award punitive damages, regardless of the place of purchase or injury. If the manufacturer is held liable, State B will have defeated State A’s liability rules. If the verdict prompts the manufacturer to redesign the product, State B will effectively have established a national product standard, thus violating the political autonomy of *all* other states.

Liability rules assign rights and responsibilities. They establish rules of conduct and allocate risks. The rules matter greatly, and their definition and enforcement are quintessential governmental responsibilities. Why should the discharge of those responsibilities command lesser respect by sister states than a government’s immunity rules? If the constitutional premise of state equality demands respect for the “core sovereign function” of

taxation, why should it not demand respect for a sister state's legislative choice of liability laws and other rules governing private conduct? By all lights, California's argument—in determining which state law governs, state courts must look to the external effects—should extend to all true conflicts of law, not just to those involving state immunities.

Why should California propose such an implausible limitation for its eminently plausible choice-of-law rule? For one thing, Attorney General Bill Lockyer, like most of his colleagues, is a creature of the trial bar. If his constitutional views on choice of law applied to private lawsuits, the trial bar would be cooked. Loath to give such offense, he is begging for an exemption from the rules that apply to private defendants (including California defendants).

More charitably, Mr. Lockyer's job is not to propound sound constitutional theory but to win the *Hyatt* case for his client. The Rehnquist Court is very fond of state immunities—and indifferent at best to constitutional choice-of-law theories. California will certainly win, perhaps unanimously, if the justices cabin *Hyatt* in a “government immunity” box. California might well lose, perhaps unanimously, under a constitutional choice-of-law theory.

Immunity from *Hall* to *Hyatt*

The only direct Supreme Court precedent for *Hyatt* is *Hall v. Nevada* (1979), which happened to involve the same two states. A Nevada state employee, driving on official business in California, ran over a California citizen. The victim sued in a California state court. Nevada law limited the damages available in such actions to \$25,000; California law did not. The California Supreme Court ruled that Nevada could not avail itself of its home-state damage limit and had to stand trial under California's laws. The U.S. Supreme Court affirmed, in an opinion written by Justice Stevens and signed by five other justices.

In a powerful dissent joined by Chief Justice Burger, then-Justice Rehnquist argued that the Full Faith and Credit Clause requires states to respect a sister state's immunity rules. While the clause does not by its terms dictate that result, state immunity is one of the “silent postulates” of the Constitution. It must be inferred from the structure of the Constitution, whose architecture would collapse without the postulate. A union of equal states—autonomous except to the extent that their sovereignty has

been ceded to the national government—cannot tolerate mutual state aggression dressed up as tort law.

In contrast to the “shut up, he explained” tenor of many Rehnquist opinions, the *Hall* dissent supplies a masterful explication of the constitutional architecture and logic. It is arguably the first and certainly the most compelling statement of a federalism vision for which the chief has mobilized a stable majority of five justices. *Hall* was the beginning; *Hyatt* will be the bookend.⁹

While *Hyatt* is before the Court because the chief relishes the rematch with Justice Stevens, the case may not put the “Federalist Five” majority to the test. The four liberal justices (Breyer, Ginsburg, Souter, and Stevens) have fought the majority's immunity rulings tooth and nail, but may want to back off in this case. The optimal federalism rule of their imagination is whatever maximizes forcible income redistribution.¹⁰ In *Hall*, the abrogation of immunity worked for the trial lawyers who sued Nevada. In *Hyatt*, a *pro*-immunity ruling will protect tax authorities and their attempt to stem a tax evaders' “race to the bottom”—meaning less confiscatory states. *Hall* is easily distinguished. While states can be sued for ordinary torts in sister states, Justice Stevens wrote in that case, the rule might be different for lawsuits that interfere with a state's core sovereign functions. That, of course, is California's contention in *Hyatt*.

Agnostic Front¹¹

The justices may well produce more than one opinion in *Hyatt*, reflecting their differing views on the precise scope of government immunity.¹² But they may all choose to focus on the immunity question and lose sight of the larger issue—that is, a recognition that the choice-of-law rules that here expose a state to suit in a hostile forum pose grave constitutional problems *even in their application to private defendants*. Neither party presses that point. Mr. Hyatt's lawyer insists that there is no warrant for a state immunity exception from well-settled rules. California clamors for an exemption from those rules, not for their revision. The constitutional choice-of-law argument lurks behind *Hyatt*, but it is not directly forced upon the Court. Even if it were, moreover, it might not resonate: to a man and woman, the justices insist that choice of law has no constitutional implications. So long as a state court has jurisdiction over a case, it may choose to give zero faith and effect to a sister state's public acts.¹³

'Twas not always thus. Prior to 1940 or so, the courts had a clear view of choice of law and its constitutional dimensions. Choice of law was traditionally governed by *lex loci*, meaning the place where an injury occurred or a contract was entered. Difficult cases arose under that territorial rule, but they were relatively rare. Among other reasons, disputes among parties from different states were decided under *federal* common law (and typically in federal court), which obviated conflicts and choice among state laws. In the handful of conflicts cases that did reach the U.S. Supreme Court, the justices consistently held that the Full Faith and Credit Clause commands equal respect for sister-state law. Even when the strict territorial learning began to weaken, the Court still employed what one may call a “comparative impairment” theory: in cases where the application of home state law threatened a sister state’s autonomy, state courts were under a constitutional obligation to apply the “foreign” law.¹⁴

Then, several things happened—not all at once, but with dismaying ineluctability. First, legal theorists made fun of the territorial choice-of-law regime and its purportedly absurd results (for example, the fact that disputes over the terms of a contract might be governed by the law of State A and disputes over the parties’ performance by State B). Brainerd Currie, the leader of that movement, proposed to replace the old rules with the “interest analysis.” Beginning in the 1940s, that theory gained ground and, by the 1960s, near-universal acceptance among scholars and state courts.

Second, in 1938, the Supreme Court cashiered the federal common law and ruled that federal courts would henceforth be guided by the common law of the state in which they are sitting. Concurrent with this so-called *Erie* doctrine, the Court worked an enormous expansion of the extraterritorial powers of state courts.¹⁵

As a result, conflicts of laws went from rare to pervasive. The old constitutional universe arguably did not require a serious constitutional theory of full faith and credit; the new one, plainly, demanded it in spades. In 1941, though, in one of its looniest decisions ever, the Supreme Court took precisely the opposite tack and held that federal courts must follow state courts *even on the choice of state law*. In practice, this meant that a plaintiff’s strategic choice of a state forum, followed by that forum’s parochial preference for its own law, became the general norm for cases affecting more than one state. Two decades later, the late, great Professor William Baxter compared that regime to an attempt to improve baseball by leaving

the umpiring to the first team that manages to call a disputed play. Another two decades later, the Supreme Court renounced any intention of reviewing those calls, let alone making them in the first instance.¹⁶

The Price of Abdication

The Rehnquist Court has officially, and repeatedly, abjured any intention of resurrecting constitutional choice-of-law rules. We the justices, Justice Scalia has written on behalf of his brethren and sistren, should not “embark upon the enterprise of constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable.”¹⁷

The judicial reticence is understandable: The choice-of-law swamp looks too vast and foreboding for even a partial reclamation project. Since no serious restrictions exist on state courts’ extraterritorial authority, anybody can sue anyone else in just about any state forum. Worse yet, companies and their customers may not agree by contract to resolve disputes in an agreed-upon forum and its local law. (Such clauses in consumer contracts are deemed coercive and therefore unenforceable.) Any given case may easily involve two dozen parties in as many states, arising over events in another dozen states. Any one of those states may be a proper forum. In short, the conflicts are everywhere. No conceivable choice-of-law rule can reestablish order, let alone constitutional order. Like any other constitutional norm, the Full Faith and Credit Clause works well enough as part of a larger constitutional structure. Like all other norms, it will fail to work when the legal landscape is a formless wasteland.

Even so, the federal judiciary can no longer shrug off choice of law as infraconstitutional and beneath its dignity. The backdrop of *Hyatt* is the liability explosion. That crisis defies a political solution because it is a *constitutional* crisis. The explosion happened, and the crisis continues, because the Supreme Court trashed all the constitutional doctrines that once limited conflicts, aggression, and exploitation among the states. The demise of the Full Faith and Credit Clause is not the whole story, but it is a big part of the story. The Supreme Court should reexamine its role in that story, starting with *Hyatt*.

Simple Rules

The Full Faith and Credit Clause does not provide an exclusive means of protecting state equality and mutual

respect—either by its terms, or by virtue of its place in the constitutional architecture. Nor does the clause affirmatively command a particular choice-of-law rule; in that sense, the warning against “constitutionalizing” choice of law is entirely correct. The clause, however, restricts the range of permissible state court choices. Those restrictions and their constitutional foundations are clear and straightforward.

Equality. The irreducible constitutional baseline is state equality and integrity. (See Chief Justice Rehnquist’s *Hall* dissent.) Each state must be free to govern its own affairs, without unwanted interference by sister states. The constitutionally (and, as it happens, economically) optimal choice-of-law rule would maximize state autonomy, consistent with equal autonomy for all other states.

Effects. Leading contributors to the modern Law and Economics scholarship on choice of law have concluded that it is not possible, even at a high level of abstraction, to specify an unambiguous set of “optimal” choice-of-law rules.¹⁸ One can, however, identify—and exclude—from the universe of constitutionally permissible rules—choice-of-law rules that systematically violate state equality and integrity. That set includes an “interest analysis” that invariably favors the forum state. California is right: a constitutional test must rest on the *effects* of state choice-of-law rules, including the effects on sister states.

Contracts. The equality baseline demands a robust presumption for the enforcement of contractual choices of law. That presumption gives each state an equal chance—and incentive—to match the largest number of buyers and sellers. Under current rules, trial lawyers shop for favorable jurisdictions. Under a contractual regime, buyers and sellers shop for a forum—the legal regime that best suits their interests. The trial-lawyer model invariably compromises sister-state interests; the contractual model does not. The trial-lawyer model generates conflicts of law; the contractual model eliminates most of them.

In areas where the Supreme Court has permitted the enforcement of contractual forum choices—such as admiralty law and general business law—we have no serious choice-of-law problems, and no liability explosion. A contractual regime reduces choice of law to a system of default rules, which kick in only when the parties have

made no binding *ex ante* agreements. That is what the Full Faith and Credit Clause is supposed to do; that is what it can handle.

Territoriality. Traditional choice-of-law doctrine, as noted, rested on a territorial understanding. While that focus is easily pooh-poohed in an interdependent world without borders (and yada yada yada), it is in fact perfectly sensible. True conflicts are zero-sum games: no state can give more credit to a sister state’s law without giving less to its own—and vice versa. A preference for either state’s law would violate the constitutional command of equality among the states. The most plausible neutral principle is a presumption that state sovereignty must end at the borders—in other words, a presumption against the extraterritorial reach of state authority.

Our Competitive Constitution

The rules just sketched are common currency in the modern Law and Economics literature on choice of law. That sophisticated literature seeks to identify *efficient* rules, which may or may not be required by the Constitution. The social welfare inquiry, though, consistently drives back to ancient, supposedly discredited doctrines—an emphasis on effects rather than interests; a presumption in favor of contractual choice; a presumption against extraterritoriality. Even the finding that optimal choice-of-law rules cannot be specified for all cases mirrors the structure of the Full Faith and Credit Clause. The difficulty of identifying, at a conceptual level, rules that will let states operate in mutual harmony explains why the clause permits Congress “to prescribe the Manner in which [state] Acts, Records and Proceedings shall be proved, and the Effect thereof.” When a rigid constitutional rule is unavailable or inadvisable, a legislative rule—made in a forum where all states are represented—is a sensible alternative.

The New Deal Court wiped out the traditional rules precisely *because* they were efficient. Consider the expansion of state courts’ extraterritorial power and the accompanying rule that federal courts must follow state courts’ choice of law: normatively and constitutionally, the regime is nuts. (Choice-of-law rules allocate rights and responsibilities among the states. How can that *not* be a federal task?) The only plausible reason for the arrangement is that extraterritorial regulation, and state courts’ unilateral authority to impose such regulation, expands the sphere of

government. States will naturally choose regulations that impose burdens on outsiders, while producing benefits at home. Extraterritoriality produces overregulation. That is why economists dislike it, and why New Dealers liked it.

For another example, consider “interest analysis.” Brainerd Currie, the father of that theory, criticized the old territorial learning as not only incomplete but also arbitrary: the physical place of an event, he argued, cannot settle the normative question of what law *should* apply. But, his own, now-operative rule—state courts should in true conflicts apply their own law *because the plaintiff chose it*—is every bit as arbitrary. And whereas the old rule occasionally produced erratic results, the new one is systematically biased: it encourages plaintiffs to shop for the most favorable jurisdiction. The most regulation-minded state will set the rules for all others.

That regime is neither efficient nor constitutional. The constitutional background norm is state equality, autonomy, and *competition*—not mutual state exploitation. States must govern themselves, not one another. Citizens choose their state, not (to repeat) the other way around. Which brings us back to *Hyatt*.

Hyatt Revisited

Having correctly identified effects as the constitutional touchstone of choice-of-law analysis, California counts only the effects of choosing Nevada law on California’s sovereign immunized functions. The emphasis on state immunities conveniently obscures the zero-sum nature of the game: applying California law would compromise Nevada’s own sovereign functions—not its immunities, but its equally respectable legislative autonomy. Nevada has chosen to compensate for its obvious natural disadvantages by offering a favorable business climate. That sovereign choice is compromised by a rule that would let California agents drag their home-state immunities into Nevada like some junkyard dog—and then demand that the local puppies take the mauling.

The neutral principle of decision is territorial. The FTB agents who trolled after Gil Hyatt may be used to operating with perfect immunity, and impunity, in Los Angeles. They have no reason, however, to expect that same protection on a foray through garbage cans in Las Vegas. To the extent that Hyatt complains of intentional torts committed in Nevada, Nevada law should apply. To the extent that he wants to sue the FTB for what it did to him in California, that state’s immunity laws apply. This

territorial rule is not some newfangled invention but traditional learning. In fact, it was the California Supreme Court’s holding in *Hall v. Nevada*—until Justice Stevens and his colleagues trumped it with a more trial lawyer-friendly rule.

The territorial rule does not quite decide the *Hyatt* case. The extent to which Hyatt is complaining only of the FTB’s conduct in Nevada or also of its enforcement practices in California is contested among the parties, and a Supreme Court ruling along territorial lines would imply a remand of the case to the Nevada courts, rather than a conclusive affirmance or dismissal. A remand, in turn, raises difficult questions concerning the availability of removal of state court cases to federal court, as well as the appropriate standards of proof and review. (The danger that state courts might interpret territorial rules in a tendentious, parochial fashion must be balanced against the risk of undue federal intrusion.) One might also contend that state courts should abstain—that is, refuse to allow a plaintiff to open a “second front”—while his tax enforcement proceeding is still ongoing in a sister state’s agencies or courts. Those complications, though, arise only *after* a serious constitutional analysis of the choice-of-law problem.

For a Supreme Court that does not wish to think about constitutional choice-of-law principles, *Hyatt* offers an easy way out. Taking their bearings from the parties’ sparring over a selective exemption for state defendants, the justices could simply pen another paean—of interest to no one but incurable federalism wonks—to the states’ dignity and immunity. And yet, *Hyatt* raises, albeit obliquely, fundamental constitutional questions about federalism and state relations, which the Court has routinely cast aside. If the Court will ever revisit those questions, it will do so in a government immunity case. Let *Hyatt* be that case.

Notes

1. William L. Prosser, “Interstate Publications,” *Michigan Law Review*, vol. 51, p. 959, 971 (1952-53); Perry Dane, “Conflicts of Laws,” in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory*, p. 209 (1996).

2. See Ken Gepfert, “California Loses Favorable Rating with Executives,” *Wall Street Journal*, Sept. 24, 2002; and Development Counsellors International, *A View from Corporate America: Winning Strategies in the Economic Development Game*, third edition, study released

September 2002 (http://www.dc-intl.com/winningstrategies/DCIs_Winning_Strategies_2002.pdf) (accessed February 2003).

3. The U.S. Supreme Court rejected a constitutional challenge to that practice in *Barclay's Bank, PLC v. California Franchise Tax Board*, 512 U.S. 298 (1994). The long-running controversy was eventually resolved through the federal imposition of so-called "water's edge" regulations.

4. See amicus brief filed by Oregon, et al., September 6, 2002. (For "chills" and "legitimate tax collection efforts," see p. 3. For "roadmap," see p. 12.)

5. See amicus brief filed by the Multistate Tax Commission, p. 9, September 6, 2002.

6. See Liz Pulliam, "State Agency Rivals IRS in Toughness," *Los Angeles Times*, August 2, 1999.

7. See, for example, Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law," *Columbia Law Review*, vol. 92, p. 249 (1992); and William F. Baxter, "Choice of Law and the Federal System," *Stanford Law Review*, vol. 16, p. 1 (1963).

8. *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 528, 547 (1985).

9. Former solicitor general Walter Dellinger has described the patient construction of a stable, five-justice majority for an expansive view of state immunity as the chief's principal accomplishment and legacy. Dellinger identifies then-Justice Rehnquist's lone dissent in *Fry v. United States*, 421 U.S. 542 (1975) as the first statement of his position and agenda. That is altogether accurate. But while *Fry* predates *Hall*, the latter dissent contains a far more rigorous and compelling explication of the constitutional premises. Also see Tony Mauro, "Alpha Rehnquist," the *American Lawyer*, January 8, 2003. (<http://www.law.com/jsp/article.jsp?id=1039054519036>) (accessed February 2003).

10. I have argued the point on an earlier occasion. Michael S. Greve, "The Supreme Court Term That Was and the One That Will Be," *Federalist Outlook* No. 13 (July/August 2002) (available at <http://www.federalismproject.org/masterpages/publications/index.html>).

11. Agnostic Front, Dave Barry might say, would be an excellent name for a rock band. In point of fact, it already is.

12. Notably, the Justices may disagree as to whether the Constitution commands respect only for a sister state's

legislatively enacted immunities or also for the states' inherent, sovereign immunity. On the latter theory, a state is immune from *Hyatt*-style suits in foreign state courts even if its home state law is silent or ambiguous. California argues only the legislative immunity case. The sovereign immunity case is presented in the states' amicus brief.

13. See, for example, *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981); *Philips Petroleum Co. v. Shutts*, 477 U.S. 797 (1985); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). A stricter constitutional standard still applies to the state court recognition of sister state judgments, as opposed to public acts. See *Baker v. General Motors*, 522 U.S. 222 (1998).

14. The term "comparative impairment" was coined by William F. Baxter, "Choice of Law and the Federal System." (See note 5 above.) For earlier Supreme Court cases applying a similar theory see *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

15. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). On the expansion of state court jurisdiction see Stephen Gardbaum, "New Deal Constitutionalism and the Unshackling of the States," *University of Chicago Law Review* vol. 64, p. 483 (1997).

16. The 1941 decision is *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Baxter's baseball analogy appears in "Choice of Law and the Federal System," p. 23 ("Baseball's place as the favorite American pastime would not long survive if the responsibilities of the umpire were transferred to the first team member who managed to rule on a disputed event.") The case signaling the modern Court's wholesale abdication is *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981). For a wonderful, nontechnical discussion of Baxter's resistance to the deconstitutionalization of choice of law see William H. Allen and Erin A. O'Hara, "Second Generation Law and Economics of Conflicts of Law: Baxter's Comparative Impairment and Beyond," *Stanford Law Review* vol. 51, p. 1011 (1999).

17. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727-28 (1988) (footnote omitted).

18. Andrew Guzman, "Choice of Law: New Foundations," *Georgetown Law Journal* vol. 90, p. 883, 900 (2002). The text of this section is based in substantial part on Guzman's excellent article, which also contains further references to the burgeoning Law and Economics scholarship on choice of law.