AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Federalism: Sovereign Immunity

**Franchise Tax Board of California v. Hyatt**, \_\_\_ U.S. \_\_\_ (2019).

*Gilbert Hyatt and the Franchise Tax Board of California engaged in a decade long legal battle over whether Hyatt had legally moved to Nevada in order to avoid paying a substantial state income tax, or whether his alleged move to Nevada was a sham. In 1998, Hyatt filed a lawsuit in Nevada courts claimed that the Franchise Tax Board had committed numerous torts during the audit. A jury awarded Hyatt almost a half a billion dollars, but that award was first reduced to just over a million dollars by the Nevada Supreme Court and then to $50,000 by the Supreme Court of the United States in* Franchise Tax Board of California v. Hyatt *(2016) on the ground that a Nevada law capping the damages that could be collected against state agencies had to be applied to out of state agencies. When the Nevada Supreme Court attempted to issue final judgment on the $50,000 damages, the Franchise Tax Board of California claimed that principles of state sovereign immunity prohibited an individual from suing a state in another state court. The Nevada Supreme Court rejected this claim. The Franchise Tax Board appealed to the Supreme Court of the United States.*

 *The Supreme Court, by a 5-4 vote, reversed the Nevada Supreme Court. Justice Clarence Thomas’s majority opinion held that state sovereign immunity extended to lawsuits brought by individuals against one state in the court of another state. Both the majority opinion and the dissent agree that as a matter of international law, foreign nations are expected to grant other nations sovereign immunity in their courts but that this grant is a matter of comity rather than law. Why does Thomas think that states lack the power to decide whether to grant other states sovereign immunity in their courts. Why does Justice Stephen Breyer disagree? Both Thomas and Breyer outline the conditions under which the Supreme Court may overrule past precedents: in this case,* Nevada v. Hall *(1979). What are the similarities and differences in these conditions? To what extent do differences in approaches to stare decisis explain the result in this case? Is, as Breyer hints,* Franchise Tax Board *a stare decisis dress rehearsal for judicial decisions overruling Supreme Court decisions on abortion and same-sex marriage?*

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I09858248757811e99a6efc60af1b5d9c) delivered the opinion of the Court.

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*Nevada v. Hall*’s(1979) determination that the Constitution does not contemplate sovereign immunity for each State in a sister State’s courts misreads the historical record and misapprehends the “implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers.” . . . And although the Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States’ relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other’s immunity.

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After independence, the States considered themselves fully sovereign nations. . . . Under international law, then, independence “entitled” the Colonies “to all the rights and powers of sovereign states.” “An integral component” of the States’ sovereignty was “their immunity from private suits.” This fundamental aspect of the States’ “inviolable sovereignty” was well established and widely accepted at the founding. As Alexander Hamilton explained: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. . . .”

The Founders believed that both “common law sovereign immunity” and “law-of-nations sovereign immunity” prevented States from being amenable to process in any court without their consent. The common-law rule was that “no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.” The law-of-nations rule followed from the “perfect equality and absolute independence of sovereigns” under that body of international law. . . . The sovereign is “exemp[t] ... from all [foreign] jurisdiction.”

The founding generation thus took as given that States could not be haled involuntarily before each other’s courts. . . . In 1781, a creditor named Simon Nathan tried to recover a debt that Virginia allegedly owed him by attaching some of its property in Philadelphia. James Madison and other Virginia delegates to the Confederation Congress responded by sending a communique to Pennsylvania requesting that its executive branch have the action dismissed. See As Madison framed it, the Commonwealth’s property could not be attached by process issuing from a court of “any other State in the Union.” To permit otherwise would require Virginia to “abandon its Sovereignty by descending to answer before the Tribunal of another Power.” Pennsylvania Attorney General William Bradford intervened, urging the Court of Common Pleas to dismiss the action. According to Bradford, the suit violated international law because “all sovereigns are in a state of equality and independence, exempt from each other’s jurisdiction.” “[A]ll jurisdiction implies superiority over the party,” Bradford argued, “but there could be no superiority” between the States, and thus no jurisdiction, because the States were “perfect[ly] equa[l]” and “entire[ly] independen[t].” The court agreed and refused to grant Nathan the writ of attachment.

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The Founders were well aware of the international-law immunity principles behind these cases. Federalists and Antifederalists alike agreed in their preratification debates that States could not be sued in the courts of other States. One Federalist, who argued that Article III would waive the States’ immunity in federal court, admitted that the waiver was desirable because of the “impossibility of calling a sovereign state before the jurisdiction of another sovereign state.” . . .

. . . . One constitutional provision that abrogated certain aspects of this traditional immunity was Article III, which provided a neutral federal forum in which the States agreed to be amenable to suits brought by other States. “The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union.” . . . The States, in ratifying the Constitution, similarly surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts. “While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan.” Given that “all jurisdiction implies superiority of power,” the only forums in which the States have consented to suits by one another and by the Federal Government are Article III courts.

\*6 The Antifederalists worried that Article III went even further by extending the federal judicial power over controversies “between a State and Citizens of another State.” They suggested that this provision implicitly waived the States’ sovereign immunity against private suits in federal courts. But “[t]he leading advocates of the Constitution assured the people in no uncertain terms” that this reading was incorrect. . . .

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Not long after the founding, however, the Antifederalists’ fears were realized. In *Chisholm v. Georgia*(1793), the Court held that Article III allowed the very suits that the [Federalists] insisted it did not. That decision precipitated an immediate “furor” and “uproar” across the country. Congress and the States accordingly acted swiftly to remedy the Court’s blunder by drafting and ratifying the Eleventh Amendment. The Eleventh Amendment confirmed that the Constitution was not meant to “rais[e] up” any suits against the States that were “anomalous and unheard of when the Constitution was adopted.” Although the terms of that Amendment address only “the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the [*Chisholm*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1700148725&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) decision,” the “natural inference” from its speedy adoption is that “the Constitution was understood, in light of its history and structure, to preserve the States’ traditional immunity from private suits.” . . . In proposing the Amendment, “Congress acted not to change but to restore the original constitutional design.” The “sovereign immunity of the States,” we have said, “neither derives from, nor is limited by, the terms of the Eleventh Amendment.”

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Despite this historical evidence that interstate sovereign immunity is preserved in the constitutional design, Hyatt insists that such immunity exists only as a “matter of comity” and can be disregarded by the forum State. . . . The problem with Hyatt’s argument is that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns. Each State’s equal dignity and sovereignty under the Constitution implies certain constitutional “limitation[s] on the sovereignty of all of its sister States.” One such limitation is the inability of one State to hale another into its courts without the latter’s consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design. Numerous provisions reflect this reality.

To begin, Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess. Specifically, the States can no longer prevent or remedy departures from customary international law because the Constitution deprives them of the independent power to lay imposts or duties on imports and exports, to enter into treaties or compacts, and to wage war. . . . Article IV also imposes duties on the States not required by international law. The Court’s Full Faith and Credit Clause precedents, for example, demand that state-court judgments be accorded full effect in other States and preclude States from “adopt[ing] any policy of hostility to the public Acts” of other States. States must also afford citizens of each State “all Privileges and Immunities of Citizens in the several States” and honor extradition requests upon “Demand of the executive Authority of the State” from which the fugitive fled. Foreign sovereigns cannot demand these kinds of reciprocal responsibilities absent consent or compact.

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The Constitution also reflects implicit alterations to the States’ relationships with each other, confirming that they are no longer fully independent nations. For example, States may not supply rules of decision governing “disputes implicating the[ir] conflicting rights.” Thus, no State can apply its own law to interstate disputes over borders, or the interpretation of interstate compacts. The States would have had the raw power to apply their own law to such matters before they entered the Union, but the Constitution implicitly forbids that exercise of power because the “interstate ... nature of the controversy makes it inappropriate for state law to control.”

Interstate sovereign immunity is similarly integral to the structure of the Constitution. Like a dispute over borders or water rights, a State’s assertion of compulsory judicial process over another State involves a direct conflict between sovereigns. The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity, just as it denies them the power to resolve border disputes by political means. Interstate immunity, in other words, is “implied as an essential component of federalism.”

Hyatt argues that we should find no right to sovereign immunity in another State’s courts because no constitutional provision explicitly grants that immunity. But this is precisely the type of “ahistorical literalism” that we have rejected when “interpreting the scope of the States’ sovereign immunity since the discredited decision in [Chisholm](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1700148725&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).” In light of our constitutional structure, the historical understanding of state immunity, and the swift enactment of the Eleventh Amendment after the Court departed from this understanding in [*Chisholm*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1700148725&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), “[i]t is not rational to suppose that the sovereign power should be dragged before a court.” Moreover, Hyatt’s ahistorical literalism proves too much. There are many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice—including, for example, judicial review. . . Like these doctrines, the States’ sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution.

With the historical record and precedent against him, Hyatt defends [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) on the basis of stare decisis. But stare decisis is “ ‘not an inexorable command’” and we have held that it is “at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment.” The Court’s precedents identify a number of factors to consider, four of which warrant mention here: the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.

The first three factors support our decision to overrule [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). . . . [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) failed to account for the historical understanding of state sovereign immunity and that it failed to consider how the deprivation of traditional diplomatic tools reordered the States’ relationships with one another. . . . [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) stands as an outlier in our sovereign-immunity jurisprudence, particularly when compared to more recent decisions.

. . . [W]e acknowledge that some plaintiffs, such as Hyatt, have relied on [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) by suing sovereign States. Because of our decision to overrule [Hall](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), Hyatt unfortunately will suffer the loss of two decades of litigation expenses and a final judgment against the Board for its egregious conduct. But in virtually every case that overrules a controlling precedent, the party relying on that precedent will incur the loss of litigation expenses and a favorable decision below. Those case-specific costs are not among the reliance interests that would persuade us to adhere to an incorrect resolution of an important constitutional question.

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Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I09858248757811e99a6efc60af1b5d9c), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I09858248757811e99a6efc60af1b5d9c), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I09858248757811e99a6efc60af1b5d9c), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I09858248757811e99a6efc60af1b5d9c) join, dissenting.

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[*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) first . . . asked whether sovereign nations would have enjoyed absolute immunity in each other’s courts at the time of our founding. The answer was no. At the time of the founding, nations granted other nations sovereign immunity in their courts not as a matter of legal obligation but as a matter of choice, i.e., of comity or grace or consent. Foreign sovereign immunity was a doctrine “of implied consent by the territorial sovereign ... deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect.” Since customary international law made the matter one of choice, a nation could withdraw that sovereign immunity if it so chose. . . . Drawing on the comparison to foreign nations, the Court in [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))emphasized that California had made a sovereign decision not to “exten[d] immunity to Nevada as a matter of comity.” Unless some constitutional rule required California to grant immunity that it had chosen to withhold, the Court “ha[d] no power to disturb the judgment of the California courts.”

The Court in [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) next held that ratification of the Constitution did not alter principles of state sovereign immunity in any relevant respect. The Court concluded that express provisions of the Constitution—such as the Eleventh Amendment and the Full Faith and Credit Clause of Article IV—did not require States to accord each other sovereign immunity. And the Court held that nothing “implicit in the Constitution” treats States differently in respect to immunity than international law treats sovereign nations. To the contrary, the Court in[*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) observed that an express provision of the Constitution undermined the assertion that States were absolutely immune in each other’s courts. . . . The Court in [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) . . . justified its decision in part by reference to “the Tenth Amendment’s reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people.” Compelling States to grant immunity to their sister States would risk interfering with sovereign rights that the Tenth Amendment leaves to the States.

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The majority asserts that before ratification “it was well settled that States were immune under both the common law and the law of nations.” . . . But the question in [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) concerned the basis for that exemption. As to that question, nothing in the majority’s opinion casts doubt on [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s conclusion that States—like foreign nations—were accorded immunity as a matter of consent rather than absolute right.

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The majority cites *Nathan v. Virginia* (1781). . . . The Pennsylvania Court of Common Pleas accepted Virginia’s claim of sovereign immunity and dismissed the suit. But it did so only after “delegates in Congress from Virginia ... applied to the supreme executive council of Pennsylvania” for immunity, and Pennsylvania’s Attorney General, representing its Executive, asked the court to dismiss the case. The Pennsylvania court thus granted immunity only after Virginia “followed the usual diplomatic course.” Given the participation of Pennsylvania’s Executive in this diplomatic matter, the case likely involved Pennsylvania’s consent to a claim of sovereign immunity, rather than a view that Virginia had an absolute right to immunity.

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The majority next argues that “the Constitution affirmatively altered the relationships between the States” by giving them immunity that they did not possess when they were fully independent. . . . The most obvious problem with this argument is that no provision of the Constitution gives States absolute immunity in each other’s courts. . . . I agree with today’s majority . . . that the Constitution contains implicit guarantees as well as explicit ones. But, as I have previously noted, concepts like the “constitutional design” and “plan of the Convention” are “highly abstract, making them difficult to apply”—at least absent support in “considerations of history, of constitutional purpose, or of related consequence.” Such concepts “invite differing interpretations at least as much as do the Constitution’s own broad liberty-protecting phrases” such as “ ‘due process’ ” and “ ‘liberty,’ ” and “they suffer the additional disadvantage that they do not actually appear anywhere in the Constitution.” At any rate, I can find nothing in the “plan of the Convention” or elsewhere to suggest that the Constitution converted what had been the customary practice of extending immunity by consent into an absolute federal requirement that no State could withdraw. . . .

The majority argues that the Constitution sought to preserve States’ “equal dignity and sovereignty.” That is true, but tells us nothing useful here. When a citizen brings suit against one State in the courts of another, both States have strong sovereignty-based interests. . . . [W]here the Constitution alters the authority of States vis-à-vis other States, it tends to do so explicitly. The Import-Export Clause cited by the majority, for example, creates “harmony among the States” by preventing them from “burden[ing] commerce ... among themselves.” By contrast, the Constitution says nothing explicit about interstate sovereign immunity.

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In any event, stare decisis requires us to follow [Hall](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), not overrule it. Overruling a case always requires “ ‘special justification.” The majority believes that [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was wrongly decided. But “an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent.” . . .

The law has not changed significantly since this Court decided [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and has not left [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) a relic of an abandoned doctrine. To the contrary, [Hall](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) relied on this Court’s precedent in reaching its conclusion, and this Court’s subsequent cases are consistent with [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). . . .The Court has recently reaffirmed “Chief Justice Marshall’s observation that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement.” And the Court has reiterated that a nation may decline to grant other nations sovereign immunity in its courts.

Nor has our understanding of state sovereign immunity evolved to undermine [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The Court has decided several state sovereign immunity cases since [*Hall*,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) but these cases have all involved a State’s immunity in a federal forum or in the State’s own courts. None involved immunity asserted by one State in the courts of another. . . .

The [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) issue so rarely arises because most States, like most sovereign nations, are reluctant to deny a sister State the immunity that they would prefer to enjoy reciprocally. Thus, even in the absence of constitutionally mandated immunity, States normally grant sovereign immunity voluntarily. States that fear that this practice will be insufficiently protective are free to enter into an interstate compact to guarantee that the normal practice of granting immunity will continue.

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I understand that judges, including Justices of this Court, may decide cases wrongly. I also understand that later-appointed judges may come to believe that earlier-appointed judges made just such an error. And I understand that, because opportunities to correct old errors are rare, judges may be tempted to seize every opportunity to overrule cases they believe to have been wrongly decided. But the law can retain the necessary stability only if this Court resists that temptation, overruling prior precedent only when the circumstances demand it.

It is one thing to overrule a case when it “def[ies] practical workability,” when “related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine,” or when “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. It is far more dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question. The majority has surrendered to the temptation to overrule [*Hall*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I09858248757811e99a6efc60af1b5d9c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) even though it is a well-reasoned decision that has caused no serious practical problems in the four decades since we decided it. Today’s decision can only cause one to wonder which cases the Court will overrule next.