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ARTICLE

Environmental Controversies “Between Two or More States”

ROBERT D. CHEREN[†]

*“Controversies between the States are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so.”**

I. INTRODUCTION

Controversies abound between distinct political communities that routinely interact with and affect one another, and the several states are no exception. The Constitution prevents the states from using the full range of diplomatic methods ordinarily available in controversies between nations. And while the Commerce Clause empowers Congress to unilaterally resolve controversies that are commercial in nature, the enumeration of congressional power in Article I, Section 8 limits those controversies between states that may be unilaterally resolved by Acts of Congress. Rather, the plenary constitutional mechanisms for resolving state controversies are: (1) litigation in the original and exclusive

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**Kansas v. Colorado*, 206 U.S. 46, 80 (1907).

jurisdiction in the Supreme Court over “controversies between two or more states,” and (2) trilateral negotiation of interstate compacts enforceable against states by Acts of Congress and by states through suits filed in the Supreme Court.¹

The state controversy jurisdiction of the United States Supreme Court was created by the Constitution’s extension of the “judicial power” of the Court “to controversies between two or more states” over which the Supreme Court has “original jurisdiction.”² The compacting power of the states is recognized by the Constitution’s prohibition of states from entering into binding agreements and compacts without the assent of Congress.³ Valid compacts may be enforced by Acts of Congress and by states through enforcement suits against states under the Court’s state controversy jurisdiction.⁴

The state controversy jurisdiction is so far most frequently used to resolve disputes over territory and interstate waters. States have also invoked this mechanism to obtain Supreme Court determinations of the constitutionality of the laws of other states and to determine the domicile of citizens. Suits “between two or more states” constitute a small portion of the Court’s docket and only a tiny fraction of the docket of the entire federal judiciary.⁵ This state controversy jurisdiction is invoked by states submitting requests for leave to file bills of complaint against other states. To date, the states have sought leave to file a bill of complaint against other states on 135 occasions. The Court held ninety-nine of these requests were proper invocations of the

1. U.S. Const. art. III, § 2 (“The judicial power shall extend . . . to controversies between two or more states In all cases . . . in which a state shall be party, the Supreme Court shall have original jurisdiction.”); U.S. Const. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State”); 28 U.S.C. § 1251(a) (2012).

2. U.S. Const. art. III, § 2, cl. 1 (“The judicial power shall extend . . . to controversies between two or more states”); U.S. Const. art. III, § 2, cl. 2 (“In all cases . . . in which a state shall be party, the Supreme Court shall have original jurisdiction.”).

3. U.S. Const. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State”).

4. *Virginia v. West Virginia*, 246 U.S. 565, 601 (1918).

5. This is due in part to the limited class of potential plaintiffs—only thirteen at the founding and still only fifty today.

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Court's state controversy jurisdiction and thirty-six were improper. The Court's opinions and orders arising from the proper invocations of the Court's jurisdiction appear on roughly 4100 pages of the United States Reports. The Court's opinions and orders arising from the improper invocations appear on roughly 200 pages. The state controversy cases are, to say the least, a small and specialized body of law. But the Supreme Court's constitutional role in resolving state controversies is highly important, especially in environmental law. Among the ninety-nine exercises of the Court's state controversy jurisdiction, numerous federal common law suits and compact enforcement suits have played a substantial role in the resolution of environmental controversies between states.

The Supreme Court's resolution of environmental controversies falls into two categories. First, the Court apportions natural resources among states through federal common law suits and by enforcing resource apportionment compacts. Second, the Court protects state natural resources from inequitable disruption by other states through federal common law suits and by enforcing resource protection compacts. The Court has to date asserted its state controversy jurisdiction to apportion territory, water, and fish and to protect navigation, land use, and water. Noticeably absent from these ninety-nine exercises of the Court's state controversy jurisdiction are suits seeking protection of air from pollution.

To determine the viability of air pollution suits, this Article first considers in detail the scope of the Court's jurisdiction over controversies between states, the scope of the Court's remedial power in controversies between states, and the rule of decision in suits between states. From this analysis, this Article concludes in Part V.A. that suits seeking protection from air pollution against upwind states are available to downwind states under federal common law. In Part V.B. this Article further concludes that while suits challenging emissions from individual sources are displaced by the Clean Air Act, this unilateral Act of Congress does not provide the rule of decision in a suit seeking protection from the aggregate emissions of an upwind state and therefore aggregate state emission suits are not displaced and remain a viable mechanism for resolving air pollution controversies.

Part I outlines the constitutional limitations on resolution of controversies between states through state self-help and unilateral Acts of Congress. Part II outlines the plenary judicial power of the Supreme Court and the plenary legislative power of compacts to resolve environmental controversies between states.⁶ Part III recounts the Court's resolution of environmental controversies between states in resource apportionment and protection suits. Part IV analyzes in detail the Court's authority under the Constitution to resolve controversies between states by considering the scope of the state controversy jurisdiction, the scope of the Court's remedial power, and the constitutional determination of the rule of decision in state controversy suits. Part V demonstrates the availability of air pollution protection suits filed in the Supreme Court by downwind states against upwind states for inequitably excessive aggregate state emissions notwithstanding the Clean Air Act's displacement of suits seeking protection from individual sources of emissions. An Appendix catalogs the ninety-nine state controversy suits properly filed and the thirty-six improper requests for leave to file state controversy suits.

II. LIMITED ENVIRONMENTAL CONTROVERSY RESOLUTION

Nations and landowners have a panoply of mechanisms to resolve disputes with neighbors. But the options for the states to resolve environmental controversies with other states through self-help are limited, and so too is Congress constitutionally limited in its power to unilaterally resolve state controversies over the environment.

A. State Self-Help

States are constitutionally prohibited from wielding the full range of diplomatic options usually available between independent political communities: "Bound hand and foot by the prohibitions of the constitution, a complaining state can neither

6. Plenary here denotes the relative absence of constitutional restrictions compared with the powers of Congress and states outlined in Part I.

treat, agree, or fight with its adversary, without the consent of congress”⁷ So New Mexico, Oklahoma, Arkansas, and Louisiana need not fear messing with Texas because the Constitution effectively forbids states from using their muscle to resolve disputes with one another.⁸ Texas cannot ban the export of natural gas into Arkansas. Texas cannot pass a law forbidding the import of Oklahoma cattle. And Texas cannot build a wall on its border with New Mexico.

These constitutional restrictions are imposed not because these acts are always wrongful and unjustified and could not serve as a productive way to resolve disputes between Texas and its neighbors. Indeed, if the states were not united, these actions would be referred to as “diplomacy.” Rather, the constitutional provisions banning this conduct reflect a belief that on the whole, the ability to deploy these measures of self-help would work great evil to the union. The Framers held this view because “[t]rade barriers, recriminations, [and] intense commercial rivalries had plagued the colonies.”⁹ There are of course, less forceful means of “diplomacy” that are constitutionally permissible, namely begging and bribing. But the former is weak and the latter impracticable. Thus, the strictures of the Constitution disable states from exercising ordinary and effective means of dispute resolution between sovereigns.¹⁰

7. Rhode Island v. Massachusetts, 37 U.S. 657, 726 (1938); *see also* Massachusetts v. EPA, 549 U.S. 497, 519 (2007) (“When a State enters the Union, it surrenders certain sovereign prerogatives.”).

8. U.S. Const. art. I, § 10. Kansas v. Colorado I, 185 U.S. 125, 143 (1902) (“The States of this Union cannot make war upon each other. They cannot ‘grant letters of marque and reprisal.’ They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties.”); *Massachusetts v. EPA*, 549 U.S. at 519 (“Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions . . .”).

9. Georgia v. Pennsylvania R.R., 324 U.S. 439, 450 (1945).

10. States may, however, exercise petty and ineffective means of dispute resolution because the Supreme Court exercises its discretion in granting leave to file exclusive original jurisdiction cases. *See* California v. West Virginia, 454 U.S. 1027 (1981) (denying leave to file a bill of complaint “to adjudicate a controversy with . . . West Virginia arising out of an alleged breach of contract covering athletic contests between two state universities”); McKusick, *supra* note 5, at 209 (noting athletic contests at issue were “football games between San Jose State University and the University of West Virginia”). So a state may be able to issue an ultimatum to another state—stop polluting our interstate river or our state

B. Acts of Congress

The Constitution limits the ability of Congress to unilaterally resolve interstate environmental conflicts. Congress's enumerated powers do not necessarily extend to all environmental controversies between states. And the Constitution prevents Congress from compelling state legislative and regulatory action even as a necessary and proper exercise of one of the enumerated powers.

The enumeration of the proper subject matter of congressional regulation in Article I does not explicitly include the environment or the "interstate environment."¹¹ The Commerce Clause together with the Necessary and Proper Clause have been interpreted broadly enough to encompass emissions controls and endangered species protection.¹² But much of the nation's environmental regulations were passed during the post-New Deal détente, now a distant memory in the wake of *NFIB v. Sebelius*.¹³

Further, the Constitution forbids congressional commandeering of state governments except in the enforcement of compacts because the several sovereign "States are not mere political subdivisions of the United States" and "State governments are neither regional offices nor administrative agencies of the

university football teams will refuse to play your state university football teams. *But see California v. West Virginia*, 454 U.S. at 1028 (Stevens, J., dissenting) ("The fact that two sovereign States have been unable to resolve this matter without adding to our burdens does not speak well for the statesmanship of either party but does not, in my opinion, justify our refusal to exercise our exclusive jurisdiction under 28 U.S.C. §1251(a).").

11. U.S. CONST. art. I, § 8.

12. See James R. May, *Healthcare, Environmental Law, and the Supreme Court: An Analysis Under the Commerce, Necessary and Proper, and Tax and Spending Clauses*, 43 ENVTL. L. 233, 245 (2013).

13. *Nat'l Fed. Indep. Business v. Sebelius*, 132 S. Ct. 2566 (2012); Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 IOWA L. REV. 377, 379 (2005) ("From the New Deal through the 1980s the Supreme Court showed little interest in policing the division of state and federal power. Beginning in the 1990s, however, the Court reasserted the importance of state sovereignty and enumerated powers . . ."); *id.* at 390–91 ("For most of the latter half of the twentieth century, the notion that there were justiciable limits on the scope of Congress's Commerce Clause power was a dead letter. In the name of regulating commerce, Congress could regulate just about anything.").

Federal Government.”¹⁴ Simply put, the Constitution “confers upon Congress the power to regulate individuals, not States.”¹⁵ Thus, as the Court held in *New York v. United States*, “Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,’”¹⁶ and as the Court held in *Printz v. United States*, neither may Congress simply commandeer the executive functions of the States.¹⁷

Short of directly compelling state regulation, Congress may still coax states into regulating according to federally set guidelines.¹⁸ This coaxing method of regulation is usually referred to as cooperative federalism. For the purposes of resolving environmental controversies that arise between states, the process is best referred to as indirectly compelling state regulation, to fashion a term by negation of Justice O’Connor’s proscription in *New York v. United States* of “directly compelling”

14. *New York v. United States*, 505 U.S. 144, 188 (1992).

15. *Id.* at 166.

16. *Id.* at 161 (alteration in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981)); *see also id.* at 162 (“While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the states, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”); *id.* at 166 (“[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”).

17. *Printz v. United States*, 521 U.S. 898, 935 (1997).

18. *New York v. United States*, 505 U.S. at 166–68 (“Congress may urge a State to adopt a legislative program consistent with federal interests. . . . First, under Congress’ spending power, ‘Congress may attach conditions on the receipt of federal funds.’ . . . Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. . . . By either of these methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. . . . By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”).

regulations.¹⁹ This method is widely used, but it is meaningfully limited by the constitutional rule that Congress can never directly compel a state to adopt a regulatory program necessary to resolve an environmental controversy between states.

Congress may also “regulate state conduct . . . so long as they do not regulate states as states, but rather only regulate states as private actors, such as employers or owners of databases.”²⁰ This includes congressional regulations that limit proprietary state actions that injure other states, but would not extend to any state controversies involving the exercise or non-exercise of the legislative, executive, and administrative functions of the states.²¹

The constitutional limitations on congressional power to enact federal statutes render some environmental controversies unresolvable by the unilateral acts of Congress.²² In others, the constitutional limitations may prohibit otherwise desirable means of resolving environmental controversies.²³ Furthermore, the Court’s recent cases interpreting the scope of the Commerce Clause and the limits on congressional commandeering of state governments may portend successful challenges to some federal environmental statutes.²⁴ Thus, the Court’s respect for the states has circumscribed Congress’s role as an arbiter of interstate environmental disputes. Indeed, the United States argued against the limit on congressional regulation imposed by *New York v. United States* on this very ground, to no avail.²⁵

19. *Id.* at 161.

20. Adler, *supra* note 13, at 400; *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Reno v. Condon 528 U.S. 141, 151 (2000).

21. As will be shown below, states are responsible for more than the injuries that state action directly causes to other states.

22. *See* Part IV.C.b; Part V.B., *infra*.

23. *See New York v. United States*, 505 U.S. at 149 (“We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability to simply compel the States to do so.”).

24. *See, e.g.,* Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

25. *New York v. United States*, 505 U.S. at 179-80 (“[T]he United States . . . argues that the Constitution envisions a role for Congress as an arbiter of interstate disputes. The United States observes that federal courts, and this Court in particular, have frequently resolved conflicts among States. . . . The

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**III. PLENARY ENVIRONMENTAL CONTROVERSY
RESOLUTION**

What are the states to do given the limitation of their own power and the power of Congress to resolve environmental controversies between states? The states may turn to two plenary means of resolving state controversies: state controversy suits and compacts.

**A. The Supreme Court's Plenary State Controversy
Jurisdiction**

The Supreme Court's extensive authority over interstate controversies is entirely set out and defined by the first two sections of Article III and the first section of 28 U.S.C. 1251. Article III, Section 1 provides: "The judicial power of the United States, shall be vested in one [S]upreme Court" ²⁶ And Article III, Section 2, in defining the jurisdictional scope of that judicial power, provides: "The judicial Power shall extend . . . to Controversies between two or more states In all Cases . . . in which a State shall be Party, the [S]upreme Court shall have original Jurisdiction." ²⁷ Congress's sole statutory provision regarding this jurisdiction is to make it exclusive to the Supreme Court: "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." ²⁸ The sum total of these provisions is that the judicial power of the United States vested in the Supreme Court extends to

United States suggests that if the Court may resolve such interstate disputes, Congress can surely do the same under the Commerce Clause. . . . While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did not intend that Congress should exercise that power through the mechanism of mandating state regulation.").

26. U.S. CONST. art. III, § 1.

27. U.S. CONST. art. III, § 2.

28. 28 U.S.C. § 1251(a); *see also* *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) ("[T]he uncompromising language of 28 U. S. C. § 1251(a), which gives to this Court 'original and *exclusive* jurisdiction of all controversies between two or more States' (emphasis added). Though phrased in terms of a grant of jurisdiction to this Court, the description of our jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court.").

controversies between two or more states over which the Court has original and exclusive jurisdiction. As foundations of federal jurisdiction go, this framework is as simple as it gets.²⁹

Supreme Court historian Charles Warren in his book on the subject declares at the outset: “The great function of the Supreme Court of the United States, in adjudicating controversies between sovereign States of the Union has its roots in history.”³⁰ Indeed, the history of the “between two or more states” clause is so deeply engrained in the constitutional woodwork that the Supreme Court has treated its development as precedent and as important as any interpretive decision of the Court.

The Articles of Confederation “contained, amongst other provisions, one entirely new expedient of statecraft.”³¹ Benjamin Franklin on July 21, 1775 had suggested “that a Congress, representing all disputes and differences between colony and colony about limits or any other cause if such should arise.”³² The first draft of such a provision was proposed by John Dickinson of Delaware on July 12, 1776.³³ Article IX, Clause 2 of the Articles of Confederation ultimately provided a complex mechanism for congressional resolution of “disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever.”³⁴ Though Congress was denominated the “last resort on appeal,” this power was to be exercised through a court either selected by the “joint consent” of the contravening states or—if the states do not agree—by a court created by Congress to hear the matter composed of between five judges and nine judges

29. The Exceptions Clause does not apply because the jurisdiction is not appellate and the lower federal courts do not have jurisdiction because it is withdrawn by 28 U.S.C. § 1251(a).

30. CHARLES WARREN, *THE SUPREME COURT AND SOVEREIGN STATES* 2 (1924).

31. *Id.* at 3.

32. *Id.* at 4 (quoting 6 *WRITINGS OF BENJAMIN FRANKLIN* 420 (1904)).

33. *Id.* at 126, n.5. The Committee of Congress prepared the second draft based on Dickinson’s provision which provided: “The United States assembled shall have the sole and exclusive right and power of . . . settling all disputes and differences now subsisting or that may hereafter arise between two or more Colonies concerning boundaries, jurisdiction or any other cause whatever.” *Id.* at 126.

34. ARTICLES OF CONFEDERATION art. IX, cl. 2.

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appointed through an elaborate process.³⁵ This authority was exercised precisely once before the Articles of Confederation were supplanted by the Constitution.³⁶ While it was innovative, the drawbacks of this mechanism were one of the motivations for the Constitutional Convention.³⁷

At the Constitutional Convention, the Framers set out to provide a replacement for Article IX, Clause 2. The Virginia Plan proposed on May 29, 1787 by Edmund Randolph included a provision giving the national judiciary jurisdiction to “hear and determine . . . ‘questions which may involve national peace or harmony.’”³⁸ The Committee of the Whole on June 19 reported a draft following this suggestion with a provision “[t]hat the jurisdiction of the Natl. Judiciary shall extend to all . . . questions which involve the national peace & harmony.”³⁹

Rather than going forward with this Virginia Plan language, the Framers next drew upon the Articles of Confederation provision of jurisdiction over “all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever”⁴⁰ by splitting this power in two. The power to decide territorial controversies was given to the Senate for trial, and the power to decide other causes was given to the Supreme Court.⁴¹ The Committee of Detail report on August 6 in Article IX, Section 2 gave the Senate power to try “all disputes and controversies now subsisting, or that may hereafter subsist between two or more States, respecting jurisdiction or territory” and “[a]ll controversies concerning lands claimed under different grants of

35. *Id.*

36. *Pennsylvania v. Connecticut*, 131 U.S. Appendix liv (1781).

37. JAMES BROWN SCOTT, *JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION* 3 (1919) (“[T]he 9th Article was a prophecy of better things, rather than a realization; for only one case was decided and only one commission was appointed under this procedure ; and when the government under the Constitution succeeded the government under the Articles there were controversies between eleven States concerning their boundaries, to mention only differences of this nature, unsettled between the States.”).

38. *Id.* at 3 n.1 (quoting 3 *THE WRITINGS OF JAMES MADISON* 163 (Gaillard Hunt, ed.)).

39. *Id.*

40. *Id.* at 3.

41. *Id.* at 3-4.

two or more states” utilizing procedures similar to those in the Articles of Confederation.⁴² That same draft in Article XI, Section 3 provided that “[t]he Jurisdiction of the Supreme Court shall extend . . . to controversies between two or more States (except such as shall regard Territory or Jurisdiction).”⁴³ The Court has long found significance in this stage in the drafting because it evidences that the “controversies between two or more states” that the Framers had in mind must include much more than territory and jurisdiction controversies, given the draft provision of jurisdiction included everything but these.⁴⁴

At this point in the debates the Framers amalgamated the jurisdiction of the Senate over territory and jurisdiction controversies and the jurisdiction of the Supreme Court over all other controversies into one provision.⁴⁵ To do this, the Framers eliminated the Senate’s role and simply dropped the exception language from the provision for the Supreme Court’s jurisdiction. The Committee on Style on September 12 reported extending the judicial power “to Controversies between two or more States.”⁴⁶ It is this language that appears in the final constitutional provision of the state controversy jurisdiction: “The judicial power shall extend . . . to controversies between two or more states . . .”⁴⁷

During the ratification, James Madison in Federalist No. 39 noted that the state controversy jurisdiction as an example of an exception to the general principle that the federal government under the Constitution operates on the people and not the states.⁴⁸

42. SCOTT, *supra* note 35, at 4 (1919) (quoting 4 THE WRITINGS OF JAMES MADISON 101-03 (Gaillard Hunt, ed.)).

43. *Id.* at 4 (quoting 4 THE WRITINGS OF JAMES MADISON 104-05 (Gaillard Hunt, ed.)). Story reports a slightly different draft with the jurisdiction over controversies “between two or more states, except such as shall regard territory or jurisdiction.” 2 STORY, CONST. § 1673 n.1.

44. This drafting history makes clear the Framers did not intend to limit the jurisdiction to territory and jurisdiction because they had language before them that did just that in the Senate provision and they did not use it. No one has ever attempted to interpret the provision so narrowly.

45. 2 STORY, CONST. § 1673 n.1 (citing JOURNAL OF CONVENTION 226); SCOTT, *supra* note 35, at 4.

46. SCOTT, *supra* note 35, at 4.

47. U.S. CONST. art. III, § 2.

48. THE FEDERALIST NO. 39 (James Madison).

Alexander Hamilton provides a more extensive discussion in Federalist No. 80 that has proved influential in the interpretation of the Court's authority over state controversies.⁴⁹

Hamilton begins by listing the proper objects of the judicial power vested in the Supreme Court, two of which he argues include controversies between states: (1) "all those [cases] which involve the *peace* of the *confederacy*"; and (2) "all those [cases] in which the State tribunals cannot be supposed to be impartial and unbiased."⁵⁰

Hamilton pointed to the "horrid picture of the dissensions and private wars" among German states in the 1400s "which distracted and desolated Germany prior to the institution of" a court to resolve controversies among them as a justification for the Court's "power of determining causes between two states."⁵¹ Hamilton also argued that the federal government must have power to enforce federal law in controversies between states and that the Supreme Court is the body best suited to do so because the Court has no "local attachments" and is therefore "likely to be impartial between the different States."⁵²

Two portions of the Federalist No. 80 are worthy of special notice. First, Hamilton argues that "[w]hatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control."⁵³ Second, Hamilton pointed out the need for a mechanism for states to resolve even those disputes that had never before arisen and were not yet foreseen.⁵⁴

49. THE FEDERALIST NO. 80 (Alexander Hamilton).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* ("[T]here are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. . . . [T]hough the proposed Constitution establishes particular guards against the repetition of those instances which have heretofore made their appearance, yet it is warrantable to apprehend that the spirit which produced them will assume new shapes, that could not be foreseen nor specifically provided against. Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control.").

During the ratification debates, the anti-federalists did not challenge the utility of the state controversy resolution power, either because the jurisdictional provision in the Articles of Confederation was substantively coextensive with that proposed in the Constitution and, or perhaps because, they agreed that providing for jurisdiction over state controversies was a good idea.⁵⁵

Congress determines whether the Court's original jurisdiction is exclusive or concurrent with the lower federal courts.⁵⁶ Since the enactment of the Judiciary Act of 1789, the state controversy jurisdiction has been exclusive.⁵⁷

As of this Article, the Supreme Court has exercised this power in ninety-nine state controversies. As one compiler puts it, the cases "run like threads of gold" through the many volumes of the United States Reports.⁵⁸ These ninety-nine controversies and the thirty-six improperly brought controversies are summarized in the Appendix, and Part III reviews in detail the environmental controversies between the states that have been resolved to date.

B. Interstate Compacts as Plenary Legislative Power

The Constitution permits states, with congressional assent, to enter into binding compacts resolving interstate controversies that become the supreme law of the land and are enforceable against one another through enforcement suits brought in the Supreme Court and by Acts of Congress.⁵⁹

55. *Interstate Disputes*, HERITAGE.ORG, <http://www.heritage.org/constitution#!articles/3/essays/112/interstate-disputes> (last visited Sept. 25, 2013) ("The logic of this position was such that even Anti-Federalists, such as Brutus, conceded the utility of the provision, and there is little or no recorded opposition to this grant of federal jurisdiction in the ratifying debates.").

56. *Mississippi v. Louisiana*, 506 U.S. 73, 78 n.1 (1992).

57. Judiciary Act of 1789 § 13, 1 Stat. 73, 80–81 ("[T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction."); 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.").

58. Scott, *supra* note 35, at vii.

59. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .").

Some commentators believe the Compact Clause prohibits state collusion without the assent of Congress.⁶⁰ The better view is that states can collude without congressional approval, and this cannot be challenged. What states cannot do is enter into binding agreements enforceable against states without congressional approval.⁶¹ Though, the Court has found implied congressional assent, it has never enforced an agreement between states that did not have the assent of Congress. The Court has articulated a test for when the congressional assent is required, but this is meaningful whether the consequence is limited to the availability of compact enforcement suits in the Supreme Court.⁶² Properly understood, the Compact Clause operates in the same manner as the statute of frauds—the Compact Clause renders agreements not enforceable against states if they are made without congressional assent.

But this does not mean that the agreements cannot bind citizens. Suppose a citizen challenges the assessment of an interstate tax commission. The citizen argues the interstate tax commission was created by state agreement but without

The Exceptions Clause in Article I, section 10 could be grammatically read to apply to each of its restrictions as opposed to merely the final restriction on engaging in war. This is undermined by the reference to “time of Peace” in the standing army limitation. *Id.* Still, it is worth pondering whether states during the Civil War could have entered into compacts without the consent of Congress.

60. See, e.g., Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285 (2003); Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007).

61. States can probably waive sovereign immunity in a compact that does not implicate federalism concerns, and this would be sufficient to make it binding at least in the state’s own courts without congressional consent. But without a continuing voluntary waiver of sovereign immunity a state may only be sued by another state in the Supreme Court because the Eleventh Amendment prevents suits by citizens, and a state cannot be sued in the Supreme Court under a compact that has not been assented to by Congress. U.S. CONST. amend. XI.

62. *New Hampshire v. Maine*, 426 U.S. 363, 369-70 (1976) (“The application of the Compact Clause is limited to agreements that are ‘directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.’ . . . Whether a particular agreement respecting boundaries is within the Clause will depend on whether ‘the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority.’” (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519-20, 22 (1893))).

congressional assent. The commission's assessment is binding on the citizen so long as the state under whose authority it is enforced has properly delegated the necessary authority to the commission. That another state has done so as well does not matter, nor does it matter that the state under whose authority the citizen is bound is collecting the tax on behalf of another state. To argue otherwise would be to argue that the Constitution makes service for one state incompatible with service for another state. The Constitution contains no such provision, and to say that it is implied by the Compact Clause is to put too much upon those words which speak only of compacts and nothing of delegation.⁶³ If the Framers intended the Constitution to forbid interstate officers without congressional assent, it is unthinkable they would have left the matter implied in a Compact Clause that can simply and functionally be understood as a limit on *enforceability* of agreements between states, not the *lawfulness* of interstate collusion.

There are environmental disputes that can be resolved through non-binding collusion, just as agreements between landowners do not always require judicial enforcement. Just as with landowners and the statute of frauds, it is those disputes that can only be resolved by judicially enforceable agreements that are limited by the constitutional limit in the Compact Clause. When an environmental controversy can be resolved by an agreement that produces mutual gains to the contending states, compacting should occur unless the costs of negotiating with one another and obtaining congressional assent are too high.⁶⁴ Of course, when the performances by the states are not simultaneous, the existence of the Supreme Court's authority (and willingness) to enforce compacts is crucial to their inception. Other environmental controversies are less likely to be resolved by compacting absent some other remedy for the states—those in which the controversy is asymmetrical. For example, an

63. The Constitution express provision in the Incompatibility Clause that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office” supports the view that the Constitution does not forbid officers of one state from simultaneously serving as officers of other states. U.S. CONST. art. I, § 6, cl. 2.

64. Full consideration of this point is outside the scope of this Article.

environmental controversy between upriver and downriver states over the use and pollution of river water is unlikely to be resolved by compacting unless the downriver states have some leverage.

A little discussed case from 1918 held that compacts may also be enforced by the unilateral Acts of Congress.⁶⁵ The significance of this holding was made clear by *New York v. United States* because the 1918 Court explicitly held that the Constitution does not limit congressional commandeering of state governments when Congress passes Acts to enforce compacts: “[T]he lawful exertion of [the national power’s] authority by Congress to compel compliance with the obligation resulting from the contract between the two States which it approved *is not circumscribed by the powers reserved to the States.*”⁶⁶ Thus, if two states enter into an environmental controversy resolving compact, Congress would gain enforcement powers to regulate the underlying environmental problem that Congress may not otherwise have.

65. *Virginia v. West Virginia*, 246 U.S. 565, 601 (1918).

66. *Virginia v. West Virginia*, 246 U.S. 565, 601 (1918) (“The vesting in Congress of complete power to control agreements between States, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the States and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between States carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement. This must be the case unless it can be said that the duty of exacting the carrying out of a contract is not, within the principle of *McCulloch v. Maryland*, 4 Wheat. 316, relevant to the power to determine whether the contract should be made. But the one is so relevant to the other as to leave no room for dispute to the contrary. Having thus the power to provide for the execution of the contract, it must follow that the power is plenary and complete, limited of course, as we have just said, by the general rule that the acts done for its exertion must be relevant and appropriate to the power. This being true, it further follows, as we have already seen, that, by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two States which it approved is not circumscribed by the powers reserved to the States.”).

IV. ENVIRONMENTAL CONTROVERSY SUITS BETWEEN STATES

The Court resolves environmental controversies between states: (1) by apportioning scarce environmental resources; and (2) by protecting environmental resources from interference. The controversies brought before the Court within these two categories to date are as follows:

| Apportioned Resources | Protected Resources |
|--------------------------|------------------------|
| State Territory | Waterway Navigability |
| Interstate Waters | Interstate Waters |
| Migratory Fish | Land Use |

These are by no means the only resources that the Court may apportion and protect. Indeed, Part V shows that the Court has jurisdiction to resolve controversies between states over air pollution.⁶⁷

This Part will survey the apportionment and protection suits litigated to date without detailing the jurisdictional, remedial, and rule of decision issues, as these matters are treated in depth and by issue in Part IV rather than by the substance of the controversies as the controversies are related here.

A. Apportioning Environmental Resources Among States

There is perhaps no more classically legal dispute than between two competing claimants to a resource.⁶⁸ The same is true as between states. To date, the majority of controversies litigated before the Supreme Court between two or more states meet this description.

67. Speculative discussion of other environmental controversies that fall within these two categories is relegated to the lengthy note 111, *infra*.

68. See *Pierson v. Post*, 3 Cai. 175 (N.Y. 1805).

a. Apportioning Territory

Adjacent states have most frequently contended with one another in the Supreme Court over the sovereign ownership of land.⁶⁹ The Supreme Court historian Charles Warren noted in 1924 that the seriousness of state controversies over territory is gravely evidenced by “the fact that in at least four instances—*New Jersey v. New York* in the 1820’s; *Missouri v. Iowa* in the 1840’s; *Louisiana v. Mississippi* in the 1900’s; and *Oklahoma v. Texas* in [the 1920’s], armed conflicts between the militia or citizens of the contending States had been a prelude to the institution of the suits in the Court.”⁷⁰

In the state controversy cases over territory, the states assert conflicting claims to land based on differing definitions of the interstate boundary.⁷¹ The problems giving rise to these suits are not limited to technical failings of cartographers. For instance, what happens if a river that forms a boundary between two states

69. *New York v. Connecticut* (1799); *New Jersey v. New York* (1830); *Rhode Island v. Massachusetts* (1833); *Missouri v. Iowa* (1849); *Florida v. Georgia* (1850); *Alabama v. Georgia* (1859); *Virginia v. West Virginia* (1870); *Missouri v. Kentucky* (1870); *Indiana v. Kentucky* (1890); *Nebraska v. Iowa* (1892); *Iowa v. Illinois* (1893); *Virginia v. Tennessee* (1893); *Missouri v. Nebraska* (1904); *Louisiana v. Mississippi* (1906); *Washington v. Oregon* (1908); *Missouri v. Kansas* (1908); *Maryland v. West Virginia* (1910); *Arkansas v. Tennessee* (1912); *North Carolina v. Tennessee* (1914); *Arkansas v. Mississippi* (1919); *Georgia v. South Carolina* (1919); *Minnesota v. Wisconsin* (1920); *Oklahoma v. Texas* (1920); *New Mexico v. Texas* (1923); *New Mexico v. Colorado* (1925); *Vermont v. New Hampshire* (1925); *Michigan v. Wisconsin* (1926); *New Jersey v. Delaware* (1929); *Wisconsin v. Michigan* (1932); *Arkansas v. Tennessee* (1935); *Kansas v. Missouri* (1940); *Mississippi v. Louisiana* (1953); *Louisiana v. Mississippi* (1963); *Illinois v. Missouri* (1965); *Ohio v. Kentucky* (1966); *Michigan v. Ohio* (1967); *Arkansas v. Tennessee* (1968); *Texas v. Louisiana* (1970); *Mississippi v. Arkansas* (1971); *New Hampshire v. Maine* (1973); *South Dakota v. Nebraska* (1976); *California v. Nevada* (1977); *Georgia v. South Carolina* (1977); *Tennessee v. Arkansas* (1978); *Texas v. Oklahoma* (1980); *Louisiana v. Mississippi* (1980); *Arkansas v. Mississippi* (1982); *Illinois v. Kentucky* (1986); *Louisiana v. Mississippi* (1993); *New Jersey v. New York* (1998); *New Hampshire v. Maine* (2000); *New Jersey v. Delaware* (2006). There are also controversies over proprietary ownership of land. *Massachusetts v. New York* (1926); *Nebraska v. Iowa* (1964); *California v. Arizona* (1978).

70. WARREN, *supra* note 28, at 38.

71. A large number of boundaries are defined as the main channel of a river and are accordingly subject to change.

changes course?⁷² What if landfill extends the area of an island?⁷³ Only a minority of the border controversies resolved to date arose from disagreement over the location of unchanging reference points.⁷⁴ And new disputes of this description are limited by the Court's recognition of sovereign acquiescence and prescription to resolve the problem of ancient boundary mistakes.⁷⁵

Many of these territory controversies involve interpretations of boundary compacts. This is because Congress may not reduce the territory of a state without its consent, and so the usual manner for legislative settlement of a boundary between two states is a compact entered into by the states and assented to by Congress.⁷⁶ It is not worth noting which cases are and which cases are not grounded in the interpretation of a boundary compact because they are no different from cases in which the document to be interpreted is a grant of land by Congress to the various sovereign states.

72. The wonderful principles of thalweg, accretion, and avulsion apply.

73. The terms of the territorial grants and the principles of accretion and avulsion apply.

74. See *Maryland v. West Virginia*, 217 U.S. 1 (1910); *North Carolina v. Tennessee*, 235 U.S. 1 (1914); *New Mexico v. Colorado*, 267 U.S. 30 (1925); *New Mexico v. Texas*, 275 U.S. 279 (1927); *California v. Nevada*, 447 U.S. 125 (1980).

75. See, e.g., *Oklahoma v. Arkansas*, 469 U.S. 1101 (1985) (summarily adopting master's report); *Oklahoma v. Arkansas*, 473 U.S. 610 (1985) ("It Is Ordered, Adjudged, and Decreed That: . . . Arkansas has exercised continuous sovereignty, dominion, control, and exclusive criminal and civil jurisdiction over the disputed tract since . . . 1905; that Sebastian County, Arkansas, has continuously levied and collected real property taxes within the disputed tract; and that Le Flore County, Oklahoma, has never levied or collected taxes within the disputed tract. . . . [T]he doctrine of acquiescence applies to the boundary dispute between . . . Oklahoma and . . . Arkansas. Therefore . . . the disputed tract has become and continues to be a part of . . . Arkansas under the doctrine of acquiescence.").

76. U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."). The unusual manner would be a state ceding territory to the Federal Government or another state because this does not create a consent issue. It is possible therefore for Congress to "purchase" this consent. The Federal Government's power of eminent domain does not extend to the forced cessation of sovereignty, only title to land.

The majority of the territory controversy cases have been over water boundaries in part because of the lesser certainty of aquatic boundaries but also because “great [f]inancial interests” are at stake for the citizens of the contending states.⁷⁷ For example, in one controversy the fisherman of the victor would gain access to valuable “oyster fisheries in the waters between the two states.”⁷⁸ In another controversy, “control of the very valuable salmon fisheries” in the Columbia River hung in the balance.⁷⁹ And in another controversy, lobster fishing rights were at stake.⁸⁰ Recent droughts in the Southeast have led states to consider disputing borders to increase access to water.⁸¹ As to this last example, gaining sovereign ownership of rivers and lakes is not the only nor the most frequent way states have sought to gain access to water in the Supreme Court.

b. Apportioning Water

Requests for apportionment of interstate water resources are the second most prominent category of state controversy litigation in the Supreme Court even though the first litigated controversy did not arise until the turn of the twentieth century.⁸² In these

77. WARREN, *supra* note 28, at 43.

78. *Id.* at 44 (discussing *Louisiana v. Mississippi*, 202 U.S. 1 (1906)).

79. *Id.* (discussing *Washington v. Oregon*, 214 U.S. 205 (1909)).

80. *New Hampshire v. Maine*, 426 U.S. 364, 364 n. 1 (1976) (“Maine’s regulatory laws, if applicable, are more restrictive than those of New Hampshire. For example, Maine requires a license, available only to Maine residents, for the taking of lobsters in Maine waters. . . . Maine also imposes stricter minimum- and maximum-size requirements. . . . Before the original action was filed, efforts to settle the dispute failed, and violence over lobster fishing rights in the area was threatened.”).

81. The Georgia legislature passed “[a] Resolution proposing a settlement of the boundary dispute between the State of Georgia and the State of Tennessee; and for other purposes” and it has been sent to the Governor. H.R. Res. 4, 2012 Gen. Assemb., Reg. Sess. (Ga. 2013), *available at* <http://www.legis.ga.gov/Legislation/20132014/128071.pdf>. *See also* Andrew Exum, *Graveyard of Peaches: How Tennessee Will Win Its War Against Georgia*, WIRED (Apr. 1, 2013), <http://www.wired.com/dangerroom/2013/04/tennessee-georgia-war/all/>.

82. *Kansas v. Colorado* (1902) (Arkansas River); *Wyoming v. Colorado* (1917) (Laramie River); *Wisconsin v. Illinois* (1926) (Lake Michigan); *New Jersey v. New York* (1929) (Delaware River); *Arizona v. California* (1930) (Colorado River); *Connecticut v. Massachusetts* (1931) (Connecticut River); *Washington v. Oregon* (1931) (Walla Walla River); *Nebraska v. Wyoming* (1934) (North Platte

cases, the states request an equitable determination of amounts of water the citizens of each state within a watershed may withdraw from it. The underlying dispute is analogous to the disputes long resolved by common law courts regarding landowner rights to surface waters. The common law of the individual states generally follows either a riparian rights or appropriation doctrine for allocating rights to surface waters. The Supreme Court has developed its own approach of equitable apportionment that recognizes the equal dignity of the states and the equal right of each state's citizens to utilize the watershed.

A majority of these water apportionment controversies involve nonnavigable rivers, and for good reason.⁸³ The Commerce Clause gives to Congress "the general power over navigation" and Congress "control[s], in general, the use of navigable waters."⁸⁴ In 1902, when the first case arose in a dispute over the Arkansas River, it was conceded by the United States that Congress did not have power under the Commerce Clause to regulate the Arkansas River because it was not navigable.⁸⁵ The existence of interconnected resource systems that cross state lines but that, as Justice Holmes put it in his cautionary note in *Missouri v. Illinois*, do "not fall within the power of Congress to regulate" leaves only two possibilities for

River); *Colorado v. Kansas* (1942) (Arkansas River); *Colorado v. New Mexico* (1978) (Vermejo River); *South Carolina v. North Carolina* (2007) (Catawba River).

83. *Kansas v. Colorado* (1902) (Arkansas River); *Wyoming v. Colorado* (1917) (Laramie River); *Washington v. Oregon* (1931) (Walla Walla River); *Nebraska v. Wyoming* (1934) (North Platte River); *Colorado v. Kansas* (1942) (Arkansas River); *Colorado v. New Mexico* (1978) (Vermejo River).

84. *Gibbons v. Ogden*, 22 U.S. 1, 22 (1824).

85. See *Kansas v. Colorado*, 185 U.S. 125 (1902). The Court noted that it might be possible that Congress could regulate the Arkansas River under other clauses of the constitution but reserved the question. Interestingly, "[t]he Arkansas River is unique in that the pronunciation of its name changes from State to State. In Colorado, Oklahoma, and Arkansas, it is pronounced as is the name of the State of Arkansas, but in Kansas, it is pronounced Ar-KAN-sas." *Kansas v. Colorado*, 514 U.S. 673, 677 (1995). It would be profitable for the *The Green Bag* 2d. to publish an analysis, in the same vein as Jay D. Wexler's *Laugh Track*, of the pronunciation used by the justices at oral argument and their votes for and against Kansas in Arkansas River dispute cases.

peaceful and efficient allocation.⁸⁶ Either the states must come to an agreement or the Supreme Court must resolve the controversy. As the likelihood of the states reaching an efficient agreement is increased if the downriver state has a remedy against a non-cooperative upriver state, the Court recognized the cause of action for equitable apportionment of interstate waters in the *Kansas v. Colorado* controversy in 1906.⁸⁷

Having recognized the cause of action in part because of the perceived absence of congressional power, the Court nevertheless recognizes a cause of action for equitable apportionment of navigable waters.⁸⁸ The first such case, *Wisconsin v. Illinois*, is interesting in that the contending states intended the water for very different uses. Illinois and the Sanitary District of Chicago pumped 8,500 cubic feet of water per second from Lake Michigan into an artificial canal so as to enable it to be used to dispose of sewage from the residents of the city of Chicago. This massive quantity of water was required to get the sewage to move through the canal, otherwise it would stand still. This copious withdrawal decreased the water level of Lake Michigan, the other Great Lakes, and their connecting waterways by inches. This diminishment threatened navigation, not the consumptive use of water. The Court issued an injunction requiring graduated reductions in the water the Court found was wrongfully

86. *Missouri v. Illinois*, 200 U.S. 496, 520 (1906). This assumes the absence of Coasian coordination without interposition of a judicial remedy.

87. *See Kansas v. Colorado*, 206 U.S. 46, 95–96 (1907) (“Now the question arises between two States, one recognizing generally the common law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court.”).

88. *Wisconsin v. Illinois* (1926) (Lake Michigan); *New Jersey v. New York* (1929) (Delaware River); *Arizona v. California* (1930) (Colorado River); *Connecticut v. Massachusetts* (1931) (Connecticut River); *South Carolina v. North Carolina* (2007) (Catawba River).

withdrawn from Lake Michigan at the expense of the other states' interests in navigation.

Wisconsin v. Illinois had features sufficient to distinguish it from a request by states for apportionment of interstate navigable water systems (as opposed to nonnavigable water systems). Thus, recognition of a cause of action in *Wisconsin v. Illinois* did not compel the Court to extend the equitable apportionment cause of action to navigable waterways. But it seems no defendant state raised this argument. Accordingly, the Court continued to recognize actions for navigable water apportionment in the *New Jersey v. New York* controversy over the Delaware River.⁸⁹ This was followed by the *Arizona v. Colorado* controversy over the Colorado River arising out of the plan to construct what is now the Hoover Dam.⁹⁰ In the *Arizona v. Colorado* controversy, the Court again recognized its jurisdiction to equitably apportion interstate navigable waters, but also held that Congress had a concurrent power to apportion the use of navigable waters amongst states under the Commerce Clause and that the exercise of this power displaced the Court's power to do so.⁹¹ The states have brought two other controversies over apportionment of navigable waters before the Court, bringing the number of navigable water apportionment cases to five.⁹²

As noted above, even where Congress does not have the power to apportion interstate waters because they are nonnavigable, the Supreme Court is not alone in its power to issue a binding resolution of the controversy. The states can agree as to the proper apportionment of the water system. For that agreement to bind the states, it must be a compact formed by the mutual assent of the states and Congress. If it is not binding, the states following the agreement are simply cooperating with one another and there is no legally enforceable resolution of the controversy as between the states.

After the Court recognized the cause of action for equitable apportionment of interstate water systems in 1906, many states

89. *New Jersey v. New York* (1929) (Delaware River).

90. *Arizona v. California* (1930) (Colorado River).

91. *Id.*

92. *Connecticut v. Massachusetts* (1931) (Connecticut River); *South Carolina v. North Carolina* (2007) (Catawba River).

entered into compacts apportioning the waters between them, including the waters of the Arkansas River. They did so not only spurred by the Court's recognition of the action, but at the behest of the Court which encouraged states to avoid equitable apportionment litigation by entering into compacts and to resolve any problems with the Court's apportionment determinations by compacting around them. The States heeded this advice, and the results give rise to another form of environmental controversy between states—breach of resource apportionment compact controversies.

The Supreme Court generally has original and exclusive jurisdiction to enforce state compliance with interstate resource apportionment compacts.⁹³ To date, all seven resource compact enforcement proceedings brought before the Supreme Court have been interstate water apportionment compacts.⁹⁴ But, other compacts exist apportioning other resources, and upon their breach, actions can be brought before the court. The enforcement jurisdiction exists and so do the compacts, and this is no coincidence. Why would any state expend resources entering into and complying with a compact that cannot be enforced? If

93. The Court has rejected the sole attempt by a commission created by a compact to itself bring an enforcement suit against another state because the commission is not a sovereign state and so a controversy between it and another state is not a controversy between two or more states. See *Se. Interstate Low-Level Radioactive Waste Mgmt. Comm'n v. North Carolina*, 533 U.S. 926 (2001). Such a commission cannot bring a suit in Federal Court against a non-compliant state because this is barred by the Eleventh Amendment. But see *Alabama v. North Carolina*, 130 S. Ct. 2295 (2010) (permitting the Commission to be joined as a party plaintiff with other states seeking the same relief as the commission from a state over the dissent of Chief Justice Roberts that this violates the Eleventh Amendment). A state could be sued in state court under the compact because the compact qualifies as federal law for Supremacy Clause purposes, but it would be sovereignly immune from such a suit without its consent. It is an open question whether a state can irrevocably waive sovereign immunity to suit by a compact commission. Such a consent is after all the basis of the Court's jurisdiction in interstate controversy cases. Perhaps a state can give an irrevocable consent to waive sovereign immunity in proceedings brought by an interstate compact commission only through processes equivalent to those used to ratify the Constitution. Even if this is not a necessary condition for such a waiver, it should be sufficient.

94. *Texas v. Colorado* (1967); *Texas v. New Mexico* (1975); *Kansas v. Colorado* (1986); *Oklahoma v. New Mexico* (1987); *Kansas v. Nebraska* (1998); *Virginia v. Maryland* (2000); *Montana v. Wyoming* (2007).

enforcement is not thought necessary, the states can simply agree to the allocation of the resources.

As outlined above, the Court encourages states to enter into resource apportionment compacts. If these give rise to breach of compact proceedings, what is the gain? The rule of decision in an equitable apportionment of interstate waters case is federal common law, whereas in a breach of compact case the rule of decision regarding the allocation of the resources is set by the compact.⁹⁵ This is preferable because allocations set by the agreement of the parties are likely to be more efficient than those set by the court and determining the proper allocation requires the expenditure of significant judicial resources.⁹⁶

c. Apportioning Fish

As noted above, many of the territory disputes are proxies for disputes over the bounty of the rivers and seas.⁹⁷ Much of this bounty, like interstate waters, migrates between states and, accordingly, the sizes of each state's catch are inextricably intertwined. And so, there is a potential for the Supreme Court to equitably apportion catch shares amongst the states. Recent research into voluntary catch share agreements suggest they advance both conservation and the economic productivity of fishing grounds by resolving commons problems.⁹⁸ But there are impediments to private implementation of catch shares.⁹⁹ Just as with interstate water resources, the states may enter into interstate catch share compacts without recognition of an

95. However, the rule of decision as to the principles to be applied in interpreting the contract, any obligations of good faith and fair dealing, and the availability of remedies not specified in the compact is federal common law. See *Alabama v. North Carolina*, 130 S. Ct. 2295.

96. The portion of those expenditures borne by a special master assigned to controversies by the Court is assessed as costs to the states.

97. See WARREN, *supra* note 28, at 43-44 and accompanying text. See also *New Hampshire v. Maine*, 426 U.S. 364, 364 n.1 (1976).

98. See generally Christopher Costello et al., *Can Catch Shares Prevent Fisheries Collapse?*, 321 SCI. 1678 (2008).

99. See Jonathan H. Adler, *Conservation Through Collusion: Antitrust as Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3 (2004); see generally Jonathan H. Adler, *Legal Obstacles to Private Ordering in Marine Fisheries*, 8 ROGER WILLIAMS U. L. REV. 9 (2002).

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equitable apportionment of fisheries action by the Supreme Court but they are more likely to do so if a compact-less remedy for inequitable consumption of the bounty by a state exists in the Court. And just as with navigable interstate waters, Congress may only resolve the matter by adopting federal regulations of individual appropriations, not by regulating states directly. There are efficiency advantages of compacts over federal regulation that make recognition of a cause of action that increases the use of compacts worthwhile. For these reasons it is fortunate the Court has recognized a cause of action for equitable apportionment of interstate fisheries in the absence of compacts.¹⁰⁰ And it is probable that there are more fishery management compacts today than there would be without this recognition.

* * *

The non-territorial controversies detailed in this section arise out of the existence of interstate resources. When a state's consumption of a resource reduces the available portion of resources that can be consumed by other states, the Supreme Court may be called upon to equitably apportion the usage of the resource amongst the several states. In all of the environmental apportionment controversies, territorial and non-territorial, the contending states desire more of something, whether it be more territory, more water, or more fish. And in resolving these controversies, the Court allocates a scarce resource amongst multiple claimants, just as the court in *Pierson v. Post* allocated one fox between two hunters.¹⁰¹

B. Protecting State Environmental Resources from Interference

Just as the controversies outlined above are epitomized by *Pierson v. Post*, the environmental controversies discussed in this

100. See *Idaho v. Oregon* (1975). The recognition of the cause of action as well as the recognition of the interstate water apportionment cases seem to pose state action problems because the appropriators of the water and fish are usually private parties. The court has evidently applied an inverse *parens patriae* doctrine in recognizing these actions. This is discussed in depth below. See *infra*, Part III.B.d.

101. *Pierson v. Post*, 3 Cai. R. 175 (1805).

section are epitomized by *Aldred's Case*. In these controversies, the decisions of one state are alleged to interfere with another state's enjoyment of environmental resources.

a. Protecting Navigation

In the earliest case of this description, South Carolina alleged Georgia and agents of the United States were improperly obstructing the navigation of the Savannah River and thereby interfering with South Carolina's enjoyment of that resource.¹⁰² While several of the territory controversies that centered around water boundaries were rooted in a state's desire to gain access to a greater share of the bounty of the rivers and seas, the others were concerned with increasing each state's ability to use rivers for their primary purpose—navigation. This is reflected by the Court's default rule for river boundaries.¹⁰³ Once a state has jurisdiction over this valuable resource, it has a strong interest in keeping its portion of the river free of obstruction. It is obviously less concerned with the navigability of the other state's portion of the river, if not actually interested in reductions in the navigability of that portion.

Surprisingly, only South Carolina has filed a bill of complaint alleging obstruction of navigation.¹⁰⁴ Although the Court held that the obstruction South Carolina complained of was authorized

102. *South Carolina v. Georgia* (1876).

103. When a river is specified as a boundary, rather than the geographic middle of the river, the Court holds that the boundary is the center of the main navigation channel or "thalweg" of the river, which is usually the deepest portion of the river. It may be closer to one state's bank than another, and it may drift back and forth between the banks. The Court adopts this boundary formula as a default principle because of the importance of controlling as much of the prime navigable portion of the waterway as possible is important to the states.

104. *South Carolina v. Georgia* (1876). Arizona's suit against the Hoover Dam construction did not allege obstruction probably because Congress had authorized its construction. *Arizona v. California* (1930). This may have been a mistake, as there is language in *South Carolina v. Georgia* leaving open the question of whether Congress can totally disrupt the navigability of a river. The question is an open one. The longstanding practice of damming navigable waterways for hydroelectric power suggests Congress has authority to do so, but this result is less constitutionally justifiable without the consent of the states adjoining the waterway.

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by Congress, the resolution of the case on the merits indicates that South Carolina's bill of complaint properly stated a controversy between states. Nearly one hundred years later Vermont included in a bill of complaint an allegation that the activities complained of impeded navigation on Lake Champlain and Ticonderoga Creek.¹⁰⁵ The Court overruled a demurrer, presumably affirming once again its jurisdiction to resolve controversies between states over obstruction of navigation in interstate waters, though it was not Vermont's primary count or concern.¹⁰⁶ The case was dismissed after the states settled before final disposition. No other cases have tested the availability of the Court for resolution of controversies over obstruction of navigation, but perhaps this is because the rules are clear.¹⁰⁷ Congress and Compacts can authorize a state obstructing a portion of navigable waterway, otherwise they are probably per se unlawful.¹⁰⁸

b. Protecting Land

Interstate waters gave rise to the filing of a bill of complaint by North Dakota against Minnesota alleging an interference with the enjoyment not of a waterway, but of land.¹⁰⁹ North Dakota claimed that Minnesota had constructed so many drainage ditches leading into the Mustinka River that the resulting increased flow volume and speed caused the level of Lake Traverse to rise and in turn caused its outlet, the Bois de Sioux River, to overflow and flood valuable North Dakota land used for

105. *Vermont v. New York* (1971).

106. *Id.* The navigability allegation was discussed more during New York's oral argument on the demurrer than Vermont's, and in both portions the discussions were limited. Oral Argument, *Vermont v. New York* (1971).

107. *But see Wisconsin v. Minnesota*, 382 U.S. 935 (1965) (summarily denying leave to file a bill of complaint); McKusick, *supra* note 5, at 207 (noting Wisconsin filed bill "suit to enjoin Minnesota from permitting Northern States Power Company to build dam and coal-fired steam generating plant on St. Croix River, allegedly creating nuisance and impeding recreational use of river").

108. This implicit rule against interstate water obstruction without congressional assent probably explains the significant federal involvement in hydroelectric power.

109. *North Dakota v. Minnesota* (1921).

farming.¹¹⁰ The Court resoundingly affirmed North Dakota's right to seek relief for the alleged injury in the Supreme Court by filing a bill against the offending state, but held the state failed to meet its high burden on the merits of showing the flooding was caused by the ditches and not by heavy rains in another part of the watershed and dismissed the case without prejudice.¹¹¹ The Court's recognition of an action for interstate flooding in *North Dakota v. Wisconsin* has engendered no follow up state controversies litigated in the Supreme Court.

c. Protecting Water

States have brought three interstate water pollution controversies before the Court for resolution.¹¹² In all three controversies, the Court recognized the existence of a controversy within its original and exclusive jurisdiction and its power to provide relief. In *Missouri v. Illinois*, Missouri filed a bill of complaint against Illinois and the Sanitary District of Chicago alleging that the Sanitary District was planning to reverse the flow of the Chicago River such that it would flow into and pollute the Mississippi River.¹¹³ And in *New York v. New Jersey*, New York filed a bill of complaint against New Jersey and the Passaic Valley Sewerage Commissioners seeking an injunction against the discharge of sewage into the Upper Bay of the New York Harbor.¹¹⁴ Finally, in *Vermont v. New York*, Vermont filed a bill of complaint against New York and the International Paper Company for a pulp mill's pollution of Lake Champlain and

110. *Id.*

111. *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) ("[W]here one State, by a change in its method of draining water from lands within its border, increases the flow into an interstate stream, so that its natural capacity is greatly exceeded and the water is thrown upon the farms of another State, the latter State has such an interest as quasi sovereign in the comfort, health and prosperity of its farm owners that resort may be had to this Court for relief. It is the creation of a public nuisance of simple type for which a State may properly ask an injunction.").

112. *Missouri v. Illinois* (1901); *New York v. New Jersey* (1919); *Vermont v. New York* (1971).

113. *Missouri v. Illinois* (1901).

114. *New York v. New Jersey* (1919).

Ticonderoga Creek.¹¹⁵ In *Missouri v. Illinois* and *New York v. New Jersey*, the Court held the complainant states failed to meet the heavy burden on the merits and dismissed the bills without prejudice for refileing if more could be shown in the future.¹¹⁶ In *Vermont v. New York*, after much evidence was heard by a master, the parties entered a joint request that the Court issue a decree appointing a South Lake Master to act as arbitrator, and after the Court denied the request the parties settled the case by agreement and the court dismissed the bill.¹¹⁷

That these water pollution controversies did not result in the Court finding liability and issuing injunctions does not mean that the Court did not assist in resolving the environmental controversies at issue between the states. In the cases resolved on the merits, the Court's affirmation of its jurisdiction and the dismissal of complaints without prejudice almost certainly limited the amount of pollution by Illinois and New Jersey into the Mississippi River and New York Harbor, respectively. And if Missouri and New York ever in fact obtained evidence of injury, they could use that evidence to negotiate without having to resort to litigation. And New York assuredly made concessions to Vermont in the settlement of their controversy over the pollution of Lake Champlain and Ticonderoga Creek.

On the same day that the Court granted Vermont leave to file its bill of complaint against New York and the International Paper Company, the Court denied Illinois leave to file a bill of complaint against four Wisconsin cities and two local sewage commissions alleging pollution of Lake Michigan.¹¹⁸ The Court did so not on the ground that Wisconsin could not be sued for the alleged pollution, but because Illinois simply failed to join Wisconsin as a defendant and political subdivisions are not states for purposes of 28 U.S.C. § 1251(a)(1).¹¹⁹ Otherwise, this would

115. *Vermont v. New York* (1971).

116. *Missouri v. Illinois* (1901); *New York v. New Jersey* (1919).

117. *Vermont v. New York*, 417 U.S. 270, 277 (1974); *Vermont v. New York*, 419 U.S. 955 (1974).

118. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

119. *Id.* The Court did not rest its holding on an interpretation of Article III. This may suggest that Congress has power to limit the exclusivity of the Court's original jurisdiction over state controversies.

be wholly inconsistent with its grant of leave that same day in *Vermont v. New York*, even more so because the International Paper Company has less relation to the state of New York than the four cities and two sewerage commissions have to the state of Wisconsin.

After deciding that political subdivisions are not states for purposes of section 1251(a)(1), the Supreme Court held that the bill against the cities and sewerage commissions did fall under the non-exclusive original jurisdiction provision of 28 U.S.C. 1251(b) for suits by states against citizens of other states because political subdivisions are citizens of the state.¹²⁰ The Court then exercised discretion by denying leave to file because the cause could be brought in a federal district court since it was not within the exclusive jurisdiction of the Supreme Court. Rather than refile the bill in the Supreme Court with Wisconsin joined as a defendant, Illinois filed against the political subdivisions of the state in federal district court, presumably for strategic reasons. Several years later on appeal, the Court held the Clean Water Act displaced Illinois' suit against the four cities and the two sewerage commissions.¹²¹ This begs the question whether the Clean Water Act also displaces suits by states against states like *Missouri v. Illinois*, *New York v. New Jersey*, and *Vermont v. New York*. No states have filed bills alleging water pollution since the 1981 state versus citizen displacement holding. Part V, *infra*, argues that the displacement holding cannot apply to controversies between states and that a broad coalition of Justices are likely to so hold if a state were to file a bill of complaint for water pollution today. And states are likely to consider doing so because the absence of water pollution controversies brought before the Court these past three decades is no indication that interstate water pollution is no longer a problem.¹²²

Also, on the same day that the Court granted Vermont leave and denied Illinois leave, the Court denied leave to file a bill in a case that represents another environmental controversy that, if it

120. *Id.*

121. *Illinois v. City of Milwaukee*, 451 U.S. 304, 332 (1981).

122. See Michael Wines, *Spring Rain, Then Foul Algae in Ailing Lake Erie*, N.Y. TIMES, Mar. 14, 2013, at A1.

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were between states, could be resolved under the Court's exclusive original jurisdiction—air pollution, a subject discussed in depth in Part V.¹²³ Consideration of other potential controversies is outside the scope of this Article, except for the observations below the line here.¹²⁴

123. *See generally* Washington v. General Motors Corp., 406 U.S. 109 (1972).

124. Speculative discussion of other environmental controversies that fall within these two categories that have not been litigated is limited to this footnote.

Apportionment of Wildlife. The recognition of a cause of action for equitable apportionment of interstate fisheries discussed above in Part III.A. suggests states might also seek equitable apportionment of interstate terrestrial and aerial game. Some states may desire to seek equitable apportionment not to obtain a fair share of the consumption of a species and to prevent tragedy of the commons diminution of populations below economically optimal levels but instead to conserve a species. For example two states with interstate wolf populations might have different views as to the importance of conserving wolves. This poses a somewhat different issue than the interstate allocation of game because applying the equal state dignity principle to perform the allocation requires evaluative judgments of the importance of conservation of wolves and of other affected interests. As discussed in Part III.A., *Wisconsin v. Illinois* posed a similar challenge to the court. The use of the water of Lake Michigan improved the health and welfare of the citizens of Chicago by disposing of significant quantities of sewage. But this use lowered the level of the Great Lakes and the connecting waterways thereby inhibiting navigation. The Court had to weigh these against one another, and reached the result that the injunction would be expanded to allow Chicago to construct some other manner of disposing of the waste. But unlike a species conservation controversy, both the sewage problem and the navigation problem could be resolved by the expenditure of monetary resources. That the Court held in favor of the complainant states suggests it determined that Illinois was imposing a far more expensive remediation burden on the other states than it would cost to construct the necessary sewage disposal facilities to obviate the need to withdraw the water from Lake Michigan. A species could become extinct unless a remedy is provided by the Court, for instance if a state permits destruction of the entirety of a necessary portion of a migratory species' habitat. In this instance the economic benefit of the development or other activity would have to be balanced against the non-consumptive enjoyment of the species by a neighboring state. The required balancing is a challenging problem for the Court, but not insurmountable. If the Court reaches the wrong balance and enjoins the inequitable conduct even though it is worth less to the citizens of the complainant state than the value of the enjoined conduct to the defendant state, the states can enter into an interstate compact. By recognizing the action and coming to some resolution, the Court incentivize states to negotiate compacts in the first instance and the compacting process is available to correct mistakes.

Species conservation controversies pose standing issues. One question is whether the citizen's interest in conservation of a species is of a type that gives rise to *parens patriae* standing in state controversy cases. *See infra* Part IV.A.d.

Alternatively, the state might have standing because the culling of its population of the animal is a direct injury to the state. *See id.* This is a plausible argument for standing in species conservation case, as the Court has held complete bans on the taking of species of wild animals within the borders of a state are constitutional because wild animals are the property of the state for purposes of a takings analysis. *See Ohio Oil Co. v. Indiana*, 177 U.S. 190, 208–09 (1900) (noting wild animals “belong to the ‘negative community;’ in other words, are public things subject to the absolute control of the State, which, although it allows them to be reduced to possession, may at its will not only regulate but wholly forbid their future taking.”) (quoting *Geer v. Connecticut*, 161 U.S. 519, 525 (1896)). As there are no similar state controversy cases in which a non-economic interest is advanced by a state, the particular problem addressed in this note is not elsewhere addressed in this Article.

Apportionment of Subsurface Oil and Gas. To date, the Court has settled two interstate oil and gas extraction controversies by resolving competing claims to territory. In *Texas v. Oklahoma* a discovery of oil and gas underlying a border river led to an explosive confrontation between the states. *Texas v. Oklahoma* (1920); *Oklahoma v. Texas*, 256 U.S. 70, 84 (1921) (“[B]ecause of the recent discovery and development of oil and gas deposits in the bed of the river adjacent to Wichita County, Tex., serious conflicts had arisen between parties claiming title from the State of Texas and others claiming title from the State of Oklahoma or under the mineral laws of the United States; and that there was . . . danger of armed conflict between rival claimants . . .”). And in *Mississippi v. Louisiana*, Mississippi claimed an oil well drilled in Louisiana bottomed out within Mississippi. In the former case, the Court resolved the territory dispute in favor of Oklahoma after first appointing a receiver to take possession of the disputed field to allow the court time to determine the territory controversy before private parties exhausted the oil and gas. In the latter case the Court held the well in fact bottomed out in Louisiana and therefore did not address Mississippi’s claims of subsurface trespass. The Court has also resolved several controversies over the interstate commerce of coal, oil, and gas. In no cases have states asserted rights against one another in the oil and gas arising out of the interstate nature of the pool akin to requesting the equitable apportionment of interstate waters and fisheries. Analogous to interstate water and anadromous fish, subsurface oil and gas migrate across state lines, and the exploitation activities on each side of the border affect one another. The adjacent sovereigns over an interstate oil and gas pool share a unity of interest in the manner in which the field is developed, akin to the unity of interest shared by adjacent owners of a subsurface resource pool. The Court has held that the unity of interest shared by adjacent owners legitimizes regulations by states on extraction of oil and gas. Having recognized the importance of state coordination of subsurface resource exploitation due to this unity of interest between adjacent landowners, the Court may recognize the importance of providing opportunities for coordination to states in a similar position. The potential need for these actions might be increased by the advent of horizontal slickwater hydrofracturing.

There are two jurisdictional issues here, one largely resolved and one less so. The first is whether a complainant state has standing to file a bill of complaint against a state for diminution of oil and gas resources. The Court has

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V. JUDICIAL POWER TO RESOLVE CONTROVERSIES BETWEEN STATES

This section examines three aspects of the Supreme Court's judicial power to resolve controversies between states. The first inquiry is jurisdictional: What constitutes a controversy between states upon which a complainant state may properly invoke the Court's judicial power by filing a bill of complaint against another state? The second inquiry is remedial: What relief may the Court grant a complainant state under its judicial power to resolve

issued several decisions on both the direct injury and *parens patriae* claims of standing to complain of injuries to coal, oil, and gas supplies arising out of restrictions on interstate commerce. *Pennsylvania v. West Virginia* (1919) (leave granted to seek injunction against statute requiring natural gas producers give West Virginia cutovers preference); *Maryland v. Louisiana* (1979) (leave granted to seek injunction against Louisiana tax on the first use of gas imported from the outer continental shelf); *Wyoming v. Oklahoma* (1988) (leave granted to seek injunction against Oklahoma statute requiring coal plants burn at least ten percent Oklahoma coal); *see infra* Part III.B.c. The second and less resolved issue is whether a state is responsible for diminutions caused by activities of private operators within the pool. Unlike the water cases, the number of citizens involved is far less than the water cases. But the issue is implicitly decided in *Idaho v. Oregon* because the states were responsible for the activities of their citizens who fished in the Columbia River. This theory of defendant state responsibility based on the equal state dignity principle is discussed below in depth. *See infra* Part III.A.. As for the common law treatment of subsurface oil and gas, see Peter M. Gerhart & Robert D. Cheren, *Recognizing the Shared Ownership of Subsurface Resource Pools*, 63 CASE W. RES. L. REV. 1044 (2013).

Interstate Disaster Risks. These controversies are foreshadowed by *North Dakota v. Wisconsin*. In some ways, the ditches in the interstate flooding cases are creating a risk of flooding rather than causing flooding. Along this line, a state might file a bill of complaint against another state for permitting interstate wildfire hazards. There are no cases yet, but this is a possibility the states annually ravaged by wild fires should consider. If the Court were to recognize its jurisdiction over such an action, beneficial compacts would result. That they are likely to do so is supported by the Court's statement that its jurisdiction extends where "there is no municipal code governing the matter." *Virginia v. West Virginia*, 202 U.S. 1, 27 (1911) (citing *Kansas v. Colorado II*, 206 U.S. 46, 82–84 (1907)).

Invasive Species. States have already brought suits related to invasive species, and this is another area that the Court's resolution may be available. However, the Court might be especially reluctant to require state regulation of wild animals, just as the common law courts refused to hear common law nuisance actions between neighbors when the harm flows through the activities of wild animals. *See generally* Robert D. Cheren, Note, *Tragic Parlor Pigs and Comedic Rascally Rabbits*, 63 CASE W. RES. L. REV. 555 (2012).

controversies between states? The third inquiry is justicial: What rule of decision applies to a controversy between states?

A. Jurisdiction Over Controversies Between States

The ninety-nine proper and thirty-six improper invocations of the Court's jurisdiction over "controversies between two or more states" demonstrate that a bill of complaint may be filed if (1) a state is injured directly or through its citizenry, (2) by the acts of another state or its citizenry, and (3) its resolution is an appropriate use of the Court's resources.¹²⁵ The Court's broad interpretation of the state controversy jurisdiction is a function of the manner in which the Court has posed and considered the question.

The Court answered an early challenge to its jurisdiction by holding that the states' adoption of the Constitution "waived their exemption from judicial power" as "they respectively made to the United States a grant of judicial power over controversies between two or more states" and that from this, the "Court . . . acquired jurisdiction."¹²⁶ Under this formulation, the jurisdictional power over the states was given by the states to the federal government. It would seem that the determination of what constitutes an Article III controversy between states would be based upon what the states intended to cede to the national government.

But the Court has instead taken the view that its jurisdiction to decide controversies between states is what the states received in exchange for giving up other sovereign rights to resolve controversies with other states. Thus, the Court's "power" over state controversies was "conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force."¹²⁷ Before the Constitution, the "independent and sovereign" states in controversy with other states "could seek a remedy by negotiation, and, that failing, by force," and as "[d]iplomatic powers and the right to make war" were "surrendered to the

125. See Appendix *infra*.

126. *Rhode Island v. Massachusetts*, 37 U.S. 657, 720 (1838).

127. *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923).

general government” in the adoption of the Constitution “it was to be expected that upon [general government] would be devolved the duty of providing a remedy” and that this remedy was provided by the “constitutional provisions” for the resolution of controversies between the states by the Supreme Court.¹²⁸ And since the purpose of the substitute is to provide a remedy in those instances in which the strictures removed the remedy that would otherwise be available, the absence of a remedy is a touchstone for the presence of jurisdiction.¹²⁹ The substitution conception of the Court’s jurisdiction stems from the Court’s consideration of the “history of the creation of the power.”¹³⁰ The Court also draws upon the specific history of the drafting of the text as is recounted in Part II.A, *supra*.¹³¹ The substitution model of the jurisdiction leads to a broad conception of what controversies may be brought.¹³²

There are two instances of language in the Court’s opinions that suggest limits based on the history and function of the state controversy provision. In one case, the Court noted that, as the power is a substitute for the surrendered diplomatic powers, “[t]he jurisdiction is therefore limited generally to disputes which, between States entirely independent, might be properly the

128. *Missouri v. Illinois*, 180 U.S. 108, 241 (1901).

129. *See id.* (“An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri.”).

130. *North Dakota v. Minnesota*, 263 U.S. 365, 372 (1923).

131. *Louisiana v. Texas*, 176 U.S. 1, 15 (1883) (“The reference we have made to the derivation of the words ‘controversies between two or more States’ manifestly indicates that the framers of the Constitution intended that they should include something more than controversies over ‘territory or jurisdiction’; for in the original draft as reported the latter controversies were to be disposed of by the Senate, and controversies other than those by the judiciary, to which by amendment all were finally committed.”).

132. *Missouri v. Illinois*, 180 U.S. 108, 240-41 (1901) (“[J]urisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.”).

subject of diplomatic adjustment.”¹³³ And the Court has reasoned that “the jurisdiction is of so delicate and grave a character that it” could not have been “contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable.”¹³⁴ But these limitations have no discernible impact on the formulation of the extent of the jurisdiction, which go to the limits of the judicial power itself.¹³⁵

The substitution conception of the Court’s role in resolving controversies between states yields a litmus test for the court’s jurisdiction: whether the actions complained of “would be grounds for war if the states were truly sovereign.”¹³⁶ If a state has *causa belli*, the Court has jurisdiction.

Thusly framed, the jurisdictional requirements of a controversy between two or more states are not entirely in line with other cases and controversies under Article III. Rather than shoehorn the analysis unnecessarily, it is best to consider the

133. *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923) (“The jurisdiction and procedure of this Court in controversies between States of the Union differ from those which it pursues in suits between private parties. This grows out of the history of the creation of the power, in that it was conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force. The jurisdiction is therefore limited generally to disputes which, between States entirely independent, might be properly the subject of diplomatic adjustment.”).

134. *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

135. *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939) (“To constitute [a controversy between the States], it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence.”); *Texas v. Florida* 306 U.S. 398, 405 (1939) (“[O]ur constitutional authority to hear the case and grant relief turns on the question whether the issue framed by the pleadings constitutes a justiciable ‘case’ or ‘controversy’ within the meaning of the constitutional provision, and whether the facts alleged and found afford an adequate basis for relief according to accepted doctrines of the common law or equity systems of jurisprudence, which are guides to decision of cases within the original jurisdiction of this Court.”) (internal citations omitted).

136. *South Carolina v. North Carolina*, 558 U.S. 256, 289 (2010) (“Our original jurisdiction over actions between States is concerned with disputes so serious that they would be grounds for war if the States were truly sovereign A dispute between States over rights to water fits that bill; a squabble among private entities within a State over how to divvy up that State’s share does not.”) (citing *Texas v. New Mexico*, 462 U.S. 554, 571 n.18).

issues from entirely within the decisions on real and purported state controversies litigated in the Supreme Court, rather than by reference to cases falling within different clauses of Article III, Section 2. The Court has not yet distilled the requirements into a set of necessary elements, so an attempt has been made here to induce them. This Article contends three elements are present in the court's decisions to date. First, the complainant state must be injured directly or through its citizenry. Second, this injury must be caused by the acts of another state or its citizenry. Third, the resolution of the matter must be an appropriate use of the Court's limited resources.

a. Injury of Complainant State

A complainant state must have suffered or be about to suffer a direct injury or an injury to its citizenry, and the suit may not be prosecuted to vindicate purely private grievances or national interests.

The injury requirement is most easily met if a state proprietary interest is threatened or harmed. The Court has recognized as sufficient states' proprietary interests as consumers in the marketplace and as revenue collectors. A state facing higher prices is sufficiently injured. For example, in *Pennsylvania v. West Virginia*, the complainant states sought to protect their interest "as the proprietor[s] of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current" by the operation of a West Virginia statute requiring producers to give preference to West Virginia customers.¹³⁷ The Court held that the threatened impairment of this interest was sufficient because the state would have to make "very large public expenditures" if the supply was reduced.¹³⁸ Likewise, in *Maryland v. Louisiana*, the complainant states argued that state consumers of natural gas faced higher prices for natural gas as a result of the

137. *Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923).

138. *Id.* at 592 ("Each State uses large amounts of the gas in her several institutions and schools — the greater part in the discharge of duties which are relatively imperative. A break or cessation in the supply will embarrass her greatly in the discharge of those duties and expose thousands of dependents and school children to serious discomfort, if not more.").

imposition of a tax on pipeline companies. The Court held this direct injury sufficient.¹³⁹

Injuries to a state's proprietary interest in its own property are also sufficient. In a water apportionment case, *Kansas v. Colorado*, the Court held that the "vindication of [Kansas's] alleged rights as an individual owner" for the deprivation of "the waters of the river accustomed to flow through and across the State" and the "destruction of the property of herself" was sufficient.¹⁴⁰

A state is also sufficiently injured if its tax receipts are reduced. For example, in *Wyoming v. Oklahoma*, Wyoming severance tax receipts were reduced by an Oklahoma statute requiring coal-fired electricity generating plants to use a mixture of at least ten percent Oklahoma coal, and the Court held this "loss of specific tax revenues" was sufficient.¹⁴¹

While direct injury to a state's proprietary interest is sufficient, it is by no means necessary because the Court recognizes another state interest that may be vindicated by suit in the Supreme Court against other states.

139. *Maryland v. Louisiana*, 451 U.S. 725, 736–37 (1981) ("It is clear that the plaintiff States, as major purchasers of natural gas whose cost has increased as a direct result of Louisiana's imposition of the First-Use Tax, are directly affected in a 'substantial and real' way so as to justify their exercise of this Court's original jurisdiction."); *id.* at 736 n.12 ("As alleged in the complaint, the annual increase in natural gas costs directly associated with the First-Use Tax with respect to each of the plaintiff States is as follows: Maryland (\$60,000); New York (\$300,000); Massachusetts (\$25,000); Rhode Island (\$25,000); Illinois (\$270,000); Indiana (\$70,000); Michigan (\$650,000); Wisconsin (\$70,000); New Jersey (\$20,000). . . . Total direct injuries to the plaintiff States was estimated to be \$1.5 million . . .").

140. *Kansas v. Colorado*, 206 U.S. 46, 99 (1907).

141. *Wyoming v. Oklahoma*, 502 U.S. 437, 438 (1992); *id.* at 442 n.3 ("In 1988, just over 163.8 million tons of Wyoming coal was mined. Only 14.6% of Wyoming's coal production was sold in-state. Oklahoma purchased 8% of the coal mined, making it the third largest out-of-state consumer, behind Texas at 19.7% and Kansas at 8.3%."); *id.* at 445 ("Unrebutted evidence demonstrates that, since the effective date of the Act, Wyoming has lost severance taxes in the amounts of \$535,886 in 1987, \$542,352 in 1988, and \$87,130 in the first four months of 1989."); *id.* at 448-49 (agreeing with master's finding that an undisputed "a direct injury in the form of a loss of specific tax revenues" is sufficient for state standing (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977))).

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The original jurisdiction may be invoked “by the State as *parens patriae*, trustee, guardian or representative of all or a considerable portion of its citizens.”¹⁴² This *parens patriae* standing to vindicate injuries to the citizenry was first announced by the Court in *Kansas v. Colorado* in 1902.¹⁴³ There, the Court pointed to *Missouri v. Illinois* as precedent, as in that case “the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution.”¹⁴⁴ As for the case before the Court:

Kansas files her bill as representing and on behalf of her citizens . . . and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the State, and the consequent destruction of the property . . . of her citizens and injury to their health and comfort.¹⁴⁵

Twenty years later, the Court explicitly held that the pollution of a body of water to the injury of state citizens gives rise to *parens patriae* standing in *New York v. New Jersey*.¹⁴⁶ And in *Pennsylvania v. West Virginia* two years later, discussed above, the Court held the complainant states had, in addition to their proprietary interests in the controversy, *parens patriae* standing to represent the threats to the “health, comfort, and welfare” of its people posed by a reduction in the supply of

142. *Kansas v. Colorado*, 185 U.S. 125, 142 (1902) (“As will be perceived, the court there ruled that the mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriae*, trustee, guardian or representative of all or a considerable portion of its citizens.”).

143. *Id.*

144. *Id.*

145. *Id.*

146. *New York v. New Jersey*, 256 U.S. 296, 301–02 (1921) (“The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the State is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court under the provisions of the Constitution of the United States.”).

natural gas.¹⁴⁷ And in *Idaho v. Oregon*, Idaho properly invoked the Court's jurisdiction to redress a depletion of salmon returning to Idaho "to the detriment of Idaho fishermen."¹⁴⁸ Frequently the existence of *parens patriae* standing entails the existence of direct injury standing as well because the two are "indissolubly linked," such as in *Wyoming v. Colorado* where harm to the citizen's economic interests reduced the tax base of the complainant state.¹⁴⁹

The *parens patriae* standing doctrine has both an internal Article III and an external Eleventh Amendment requirement that a purported controversy between states not be in effect a suit for the vindication of purely private rights. For a suit to constitute a controversy between two or more states under Article III, it cannot really be a controversy between the citizens of a state and another state. This would be true whether or not the Eleventh Amendment were adopted. In *Pennsylvania v. New Jersey*, the Court denied Pennsylvania, Maine, Massachusetts, and Vermont leave to file bills of complaint against states seeking to recover unconstitutionally collected taxes on behalf of its citizens because the states had neither "sovereign nor quasi-sovereign interests" in recovering the funds for its citizens.¹⁵⁰ The Court did not rest this denial on the Eleventh Amendment, rather the Court pointed to the "critical distinction, articulated in

147. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) ("The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.").

148. *Idaho v. Oregon*, 444 U.S. 380, 385 (1980) ("In the present suit, Idaho alleges that nontreaty fishermen in Oregon and Washington take a disproportionate share of fish destined for Idaho, thereby depleting those runs to the detriment of Idaho fishermen. It seeks equitable apportionment of anadromous fish destined for Idaho in the Columbia River.").

149. *Wyoming v. Colorado*, 259 U.S. 419, 468 (1922) ("[T]he welfare, prosperity, and happiness of the people of the larger part of the Laramie valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that State. Thus the interests of the state are indissolubly linked with the rights of the appropriators.").

150. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665-66 (1976).

Art. III, § 2, of the Constitution, between suits brought by ‘Citizens’ and those brought by ‘States’ that “would evaporate” if such suits could be filed by states on behalf of their citizens.¹⁵¹ On its face, the Court’s language in this case would seem to cover many cases for which leave has been granted. This might suggest this case was really a discretionary denial, a practice discussed below in the section on appropriateness. The Court does refer to this as a “salutary rule” and notes concern over the docket being inundated, but the Court cites to a provision of the Constitution in its holding.¹⁵² The answer to this issue is probably found in *Maryland v. Louisiana*.¹⁵³ In that case, the Court speaks of an injury that “affects the general population of a State in a substantial way” and notes the state’s citizens are suffering “substantial economic injury” as a result of increased costs.¹⁵⁴ Thus, perhaps the problem is one of substantiality. Alternatively, the Court noted the absence of an option for individual redress in *Maryland v. Louisiana*, whereas in *Pennsylvania v. New Jersey*, the taxpayers each had a right to sue for a refund themselves.

The internal Article III limits on *parens patriae* are often eclipsed by the more stringent external limit of the Eleventh Amendment. The internal limit is only implicated if enough citizens of a state are affected so as to eliminate Eleventh Amendment problems. When enough citizens’ interests are implicated, the difficult question of distinguishing between the impermissible elements of *Pennsylvania v. New Jersey* and the permissible elements of *Maryland v. Louisiana* is implicated.

The Eleventh Amendment prohibition on suits “commenced or prosecuted against the United States by Citizens of another State”¹⁵⁵ limits the institution of *parens patriae* suits that are essentially litigated on behalf of private citizens. The constitutional standard seems to be the same as the standard for the establishment of agency—assent, benefit, and control. An early case suggested that the Eleventh Amendment would not be violated so long as the state was at least the nominal party in the

151. *Id.*

152. *Id.*

153. *Maryland v. Louisiana*, 451 U.S. 725 (1981).

154. *Id.* at 737-39.

155. U.S. CONST. amend. XI.

suit because the Amendment “left its exercise over [controversies] between states as free as it had been before.”¹⁵⁶ This statement omits the caveat that a suit filed by a state against another state is impermissible under the Eleventh Amendment if it is “a controversy in vindication of the grievances of particular individuals.”¹⁵⁷

In *New Hampshire v. Louisiana*, the Court held New Hampshire could not maintain a suit against Louisiana for the recovery of repudiated bonds because “[n]o one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons.”¹⁵⁸ Thus, the suit was impermissibly controlled by the bondholders. In *South Dakota v. North Carolina*, South Dakota was permitted to bring an action because the bonds “were given outright and absolutely to the state,” thus, even though much of the suit was instigated by the previous holder of the bonds, the prosecution of the suit only benefited the State as owner of the bonds.¹⁵⁹ In *North Dakota v. Minnesota*, the complainant state

156. *Rhode Island v. Massachusetts*, 37 U.S. 657, 731 (1838) (“[W]hile [the Eleventh Amendment] took from this Court all jurisdiction, past, present, and future . . . of all controversies between states and individuals; it left its exercise over those between states as free as it had been before.”).

157. *Louisiana v. Texas*, 176 U.S. 1, 16 (1900) (“In order, then, to maintain jurisdiction of this bill of complaint as against the state of Texas, it must appear that the controversy to be determined is a controversy arising directly between the state of Louisiana and the state of Texas, and not a controversy in vindication of the grievances of particular individuals.”); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (“[O]ur original jurisdiction is not affected by the provisions of the Eleventh Amendment which only withholds federal judicial power in suits against a State ‘by Citizens of another State, or by Citizens or Subjects of any Foreign State.’ Thus, an original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals.” (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258–59 n.12 (1972))).

158. *New Hampshire v. Louisiana*, 108 U.S. 76, 88–91 (1883).

159. *South Dakota v. North Carolina*, 192 U.S. 286, 310 (1904) (“Neither can there be any question respecting the title of South Dakota to these bonds. They are not held by the state as representative of individual owners, as in the case of *New Hampshire v. Louisiana*, 108 U.S. 76, for they were given outright and absolutely to the state.”). But South Dakota could not join the previous owner of the bonds who still held additional bonds and other citizen bondholders as defendants in the suit with the hope that the Court would order a proportional

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improperly sought money damages relief on behalf of farm owners injured by flooding that would be paid to them in proportion of their losses because the “power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state” was lost by the adoption of the Eleventh Amendment and that the injured farm owners had “contributed to a fund which has been used to aid in the preparation and prosecution” of the suit.¹⁶⁰ The Court’s most recent discussion of the Eleventh Amendment issue indicates that the recovery of funds proportionate to the aggregate of individual losses that ultimately will be paid out to citizens is permissible so long as the suit is really controlled by the state.¹⁶¹ The Court will deny leave to file bills of complaint where the motion for leave to file indicates that the vindication of a private right is the dominant purpose and stimulus for the suit.¹⁶²

In a recent dissent, Chief Justice Roberts argues that the presence of citizens joined as party plaintiffs might pose Eleventh Amendment issues.¹⁶³ Though the majority of the Court

distribution of recovered funds to all bondholders, the state as well as the citizen defendants. For this reason the court dismissed the citizen bondholders with costs to South Dakota. As the point of the suit was not to recover on South Dakota’s bonds but to recover on the citizen bonds, the victory for South Dakota was a hollow one. *Id.* at 313-14.

160. *North Dakota v. Minnesota*, 263 U.S. 365, 374-76 (1923).

161. *Kansas v. Colorado*, 533 U.S. 1, 7-9 (2001).

162. *Illinois v. Michigan*, 409 U.S. 36, 37 (1972) (“[I]t seems apparent from the moving papers and the response that Illinois, though nominally a party, is here ‘in the vindication of the grievances of particular individuals.’” (quoting *Louisiana v. Texas*, 176 U.S. 1, 16)).

163. *Alabama v. North Carolina*, 130 S. Ct. 2295, 2317-19 (2010) (Roberts, C.J., concurring in part and dissenting in part) (dissenting from deferral of motion of summary judgment motion that suit by Commission is barred by the Eleventh Amendment on the grounds that *Arizona v. California* wrongly decided and “[t]he Commission is not a sovereign State”). The dissent begins with three forceful sentences:

The parties to this case are Alabama, Florida, North Carolina, Tennessee, Virginia, and the Southeast Interstate Low-Level Radioactive Waste Management Commission. One of these things is not like the others: The Commission is not a sovereign State. The Court entertains its suit — despite North Carolina’s sovereign immunity — because the Commission “asserts the same claims and seeks the same relief as the other plaintiffs.” . . . Our Constitution does not countenance such “no harm, no foul” jurisdiction, and I respectfully dissent.

disagreed, it is inadvisable to join citizens as party plaintiffs in light of the Chief Justice's concerns when the benefits of party plaintiffs' status are limited to what can be had by *amicus curiae*.

b. Responsibility of Defendant State

Controversies between sovereigns do not require state action. Ordinarily, Article III requires a plaintiff's injury be fairly traceable to a defendant's conduct. But the Court has not adopted this formula for its state controversy jurisdiction. Rather, a state must answer for injuries to a complainant state or its citizenry that are fairly traceable to either (1) the sovereign actions of the state, or (2) the actions of the state's citizenry in which the state has a sufficient interest that it could bring a suit to protect the citizenry as *parens patriae*.

The states are subject to suit under Article III because, by adopting the Constitution, the states each consented to be sued by other states in the Supreme Court and waived sovereign immunity.¹⁶⁴ The Eleventh Amendment did not revoke this consent and waiver.

States are directly responsible for injuries fairly traceable to the laws of the state and the authorized actions of its agents. State responsibility for legislative enactments is borne out by the numerous challenges to laws restricting interstate commerce.¹⁶⁵ And states appear to be responsible for the official acts of

Id. at 2317; compare *id.*, with *SESAME STREET, ONE OF THESE THINGS IS NOT LIKE THE OTHERS* (Columbia Records 1970) ("One of these things is not like the others.").

164. *Virginia v. West Virginia* 206 U.S. 290, 319 (1907) ("Consent to be sued was given when West Virginia was admitted into the Union"); *Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934) ("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 Federalist, No. 80; Story on the Constitution, s 1679. With respect to such controversies, the States by the adoption of the Constitution, acting 'in their highest sovereign capacity, in the convention of the people,' waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established 'by their own consent and delegated authority' as a necessary feature of the formation of a more perfect Union.").

165. *E.g.*, *Pennsylvania v. West Virginia* (1919); *Maryland v. Louisiana* (1979).

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governors.¹⁶⁶ States are also responsible for the determinations of state tax assessors.¹⁶⁷ And states are responsible for the actions of corporate agents directed by the state, such as a state sewerage commission.¹⁶⁸ Conversely, states are not responsible directly for the unauthorized actions of state agents.¹⁶⁹ And states are not directly responsible for the undirected actions of political subdivisions.¹⁷⁰ The contours of direct responsibility are not well defined because there is a far broader theory of state responsibility that covers what would otherwise be questionable cases.¹⁷¹

In 1900, the Court appeared to suggest that states could only be sued for injuries that states are directly responsible for, that is, that there would be a “state action” requirement.¹⁷² But the

166. State governors can sue in their official capacity on a state’s behalf and may be sued in their official capacity on a state’s behalf. *See, e.g.,* Idaho v. Oregon (1975); Kentucky v. Dennison (1861).

167. Texas v. Florida (1937).

168. New York v. New Jersey, 256 U.S. 296, 302 (1921) (“[F]or the purpose of showing the responsibility of . . . New Jersey for the proposed action of the defendant, the Passaic Valley sewerage commissioners, the bill sets out, with much detail, the acts of the Legislature of that state authorizing and directing such action on their part. Of this it is sufficient to say that the averments of the bill, quite undenied, show that the defendant sewerage commissioners constitute such a statutory, corporate agency of the state that their action, actual or intended, must be treated as that of the state itself, and we shall so regard it.”).

169. Louisiana v. Texas, 176 U.S. 1, 22–23 (1900).

170. Thus, New Jersey was not directly responsible for the acts of the Passaic Valley Sewerage Commission merely because the sewerage commission was incorporated by the state legislature, but rather it mattered that its activities were directed by the state. New York v. New Jersey, 256 U.S. 296, 302 (1921).

171. Chief among the questionable cases are the activities of municipal corporations who are chartered by state legislatures and have powers both delegated by the state legislation and in many states powers of home rule delegated by state constitutions. Were it not for the theory of liability to be discussed below, there would be difficult questions as to how much state involvement in a particular project constitutes direction and authorization of the specific acts. But this question is avoided by the theory of liability first suggested in Missouri v. Illinois, as discussed *infra*.

172. Louisiana v. Texas, 176 U.S. 1, 22–23 (1900) (“[I]n order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. . . . [A] controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of

following term the Court announced a new theory of responsibility—state interest. In *Missouri v. Illinois*, though the Court found state action, the Court also suggested Illinois could be held accountable for the actions of the Chicago Sanitary District because “Illinois would have a right to appear and traverse the allegations” levied in a suit against the Chicago Sanitary District.¹⁷³ Illinois would have this right to intervene because an injunction against the Sanitary District would injure a proprietary interest of the State. Under this view, a state may be sued if the state has a sufficient interest in the outcome of the decision such that it would be able itself to file a complaint. This early hint of an important and broad conception of indirect state responsibility stemmed, as had *parens patriae*, from the Court’s analysis of the history of the provision.¹⁷⁴ The state interest theory justifies the scope of the injuries for which states have been held responsible, but the Court’s decisions along the way focused on a principle that itself is unacceptably broad—indirect liability for permitted activities.

Permitting first appeared one year after *Missouri v. Illinois*, in *Kansas v. Colorado*.¹⁷⁵ The Court held Colorado responsible for diversions of the waters of the Arkansas River for irrigation. Some of these diversions were directed by the state, but a great number of the diversions Kansas complained of were made by Colorado citizens who had obtained permits from the state.¹⁷⁶

as in themselves committing one State to a distinct collision with a sister state.”).

173. *Missouri v. Illinois*, 180 U.S. 208, 242 (1901) (“The object of the bill is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring state and its inhabitants. Surely, in such a case, . . . Illinois would have a right to appear and traverse the allegations of the bill, and, having such a right, might properly be made a party defendant.”).

174. *Id.* at 219 (“But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look not merely to its language but to its historical origin . . .”). This decision includes one of the most detailed reviews of the history of the “between two or more states” provision.

175. *Kansas v. Colorado*, 185 U.S. 125 (1902).

176. *Id.* at 137.

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The Court referenced these diversions in its holding summarizing the allegations of the bill:

The gravamen of the bill is that . . . Colorado, *acting directly herself, as well as through private persons thereto licensed*, is depriving and threatening to deprive the State of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas River through its channel on the surface, and through a subterranean course, across the state of Kansas¹⁷⁷

Like *Missouri v. Illinois*, this was not the only ground the complaint stood on, and the Court explicitly found state action.¹⁷⁸ But the cases that followed bore out the sufficiency of allegations of a state acting indirectly through private persons licensed by the state to engage in an activity.

As the foregoing demonstrates, the Court had two possible theories upon which to base an expansion of state responsibility in state controversy cases beyond state action. On the one hand, the Court hints in *Missouri v. Illinois* that state interest sufficient for state standing is also sufficient for state responsibility. And on the other hand, the Court hints in *Kansas v. Colorado* that permitting regimes are sufficient to impute responsibility for the permitted activity to the state. The firmer foundation is the former. If permitting is sufficient for indirect responsibility, a state could be sued whenever a driver licensed by a state damages the property of another state. The better view is that permitting is not relevant, and its frequent presence is only because state controversies are often over scarce resources that the states are likely to apportion amongst their citizens. Furthermore, permitting is beneficial to the conservation of interstate resources and the avoidance of state controversies, so holding states subject to responsibility for permitted activities that they would otherwise not be responsible for is inappropriate. The purpose of the state controversy provision is to resolve interstate conflict, not to impose disincentives for conservation. Though this Article takes the position in favor of the state

177. *Id.* at 145–46 (emphasis added).

178. *Id.* at 142 (“The action complained of is state action and not the action of state officers in abuse or excess of their powers.”).

interest theory, both permitting and state interest are present in the resolved controversies complaining of citizenry activities.

In *Wyoming v. Colorado*, the Court held Colorado responsible for substantial diversions of the Laramie River and its tributaries by two private corporations with the knowledge, consent, and cooperation of the state.¹⁷⁹ In *Washington v. Oregon* the Court evaluated claims by Washington against Oregon for the uses of water by private irrigators and farmers sinking wells.¹⁸⁰ In *Vermont v. New York*, one the most striking examples, the Court granted leave to file a bill of complaint against New York for the pollution of Lake Champlain and Ticonderoga Creek by the International Paper Co. and other private parties.¹⁸¹ And in *Idaho v. Oregon*, the Court granted Idaho leave to file a bill of complaint against Washington and Oregon for permitting their fishermen to take an inequitable portion of the anadromous fish

179. *Wyoming v. Colorado*, 259 U.S. 419, 456 (1922) (“[T]wo corporate defendants, acting under the authority and permission of Colorado, were proceeding to divert in that State a considerable portion of the waters of the river and to conduct the same into another watershed”); *Wyoming v. Colorado*, 286 U.S. 494, 509–10 (1932) (“The contention that the present bill shows that the acts complained of are not acts done by Colorado, or under her authority, but acts done by private corporations and individuals not parties to the present suit, is shown by the bill to be untenable. It is there alleged that Colorado in 1926 permitted a diversion from the Laramie through the Laramie-Poudre tunnel appropriation materially in excess of the 15,500 acre-feet specified in the decree; that in 1926, 1927 and 1928, with the knowledge, permission and co-operation of Colorado, diversions were made from the Laramie and its tributaries through the Skyline ditch appropriation in stated amounts materially in excess of the 18,000 acre-feet specified in the decree; that in 1926, 1927, 1928, and 1929, with the knowledge, consent and cooperation of Colorado, diversions were made from the Laramie and its tributaries through the meadow-land appropriations in various amounts pronouncedly in excess of the 4,250 acre-feet specified in the decree; and that Colorado has permitted other diversions from the Laramie and its tributaries in violation of the decree through the Bob Creek and other designated ditches, none of which were recognized or named in the findings or decree.”).

180. *Washington v. Oregon*, 297 U.S. 517, 523–25 (1936).

181. *Vermont v. New York*, 417 U.S. 270, 270 (1974) (“[W]e granted Vermont’s motion to file a bill complaint against New York and the International Paper Co. which alleged that as a result of discharge of wastes, largely from International’s mills, that company and New York are responsible for a sludge bed in Lake Champlain and Ticonderoga Creek that has polluted the water, impeded navigation, and constituted a public nuisance.”).

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in the Columbia River en route to spawning grounds in Idaho.¹⁸² These four cases are not justiciable under a state action rubric, but whether they are justiciable because the defendant states had a sufficient interest in the activities of the citizenry or because the state had enacted permitting regimes is an open question.¹⁸³

The theory upon which it is based aside, the provision for controversies between states on account of state injuries that are caused by the citizenry of other states plays an important role in the federal scheme of enumerated congressional powers, limits on state self-help, and mechanisms for coordination of states through compacts and submission of controversies to the Supreme Court. Congress's adoption of the cooperative federalism model for national regulation of the environment represents its considered judgment that state governments utilizing the police power and representing local constituencies are best fit to implement environmental regulations.¹⁸⁴ The alternative to cooperative federalism is regional environmental compacts under which state governments regulate utilizing the police power. These compacts, consented to by the states and Congress, are enforceable in the Supreme Court and by Congress. A compact is therefore a method of achieving directly what Congress achieves indirectly through cooperative federalism: state implementation of regulations set in consideration of the national interest. But compacting is probably among the most expensive and difficult legislative processes in the world. The existence of jurisdiction in the Supreme Court to resolve the most

182. *Idaho v. Oregon*, 444 U.S. 380, 385 (1980) ("In the present suit, Idaho alleges that nontreaty fishermen in Oregon and Washington take a disproportionate share of fish destined for Idaho, thereby depleting those runs to the detriment of Idaho fishermen. It seeks equitable apportionment of anadromous fish destined for Idaho in the Columbia River.").

183. It is possible that the Court is imposing both requirements, that is, the state must impose a permitting regime and have a *parens patriae* interest in the permitted activities. This is better than a permitting-only theory of responsibility, but still poses the problem of imposing greater liability on states that have taken the first step in resolving interstate resource scarcity or pollution problems by instituting permitting regimes, often at the behest of Congress.

184. Jason Scott Johnston offers a different view. Jason Scott Johnston, *A Positive Political Economic Theory of Environmental Federalization*, 64 CASE W. RES. L. REV. (forthcoming 2014).

egregious instances of inequitable interstate pollution gives downwind states leverage to negotiate compacts with upwind states. And the existence of jurisdiction in the Supreme Court to apportion scarce interstate resources gives the incentives to negotiate an apportionment by compact rather than leave the matter for the Court's resolution.

Under the substitution theory, the Court's jurisdiction over state controversies is an entitlement of the states in light of the loss of sovereign powers of self-help. Limiting constructions therefore do not benefit defendant states who themselves will have occasion to redress conflicts with other states. Indeed, this is probably why the requirements for defendant states are so unclear—states are rationally choosing not to advance limiting constructions on the requirements for state responsibility because those same states might soon be complainants. This is a symmetry not found in many private party cases litigating the extent of the Article III jurisdiction of the federal courts.

For these reasons, the only limit the Court has consistently imposed on the responsibility of defendant states is that the complainant state's injury must not be more fairly traceable to the activities of the complainant state than those of the defendant or its citizenry.¹⁸⁵

Even the statutory limit, for purposes of exclusivity of the Court's jurisdiction on attribution of political subdivision actions to states, is not a limit on state responsibility because all it requires is that the complainant name a state as a defendant in the bill rather than only its political subdivisions.¹⁸⁶

185. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) ("In neither of the suits at bar has the defendant State inflicted any injury upon the plaintiff States through the imposition of the taxes held . . . and alleged . . . to be unconstitutional. The injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures. Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey. No State can be heard to complain about damage inflicted by its own hand.").

186. *Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972) (holding "the term 'States'" in 28 U.S.C. § 1251(a)(1) does not "include their political subdivisions" and granting leave to states to file bills against political subdivisions of other states is therefore discretionary under 28 U.S.C. § 1251(b)(3)).

So long as a defendant state has a sufficient interest in the actions of its citizenry that are injuring the complainant state, the matter is justiciable under Article III as a controversy “between two or more states.”

c. Appropriateness of Controversy

Despite Chief Justice Marshall’s remonstrance that the Supreme Court has “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,”¹⁸⁷ the Court in the latter half of the twentieth century asserted its right to exercise discretion not only in granting leave to file bills of complaint under the Court’s non-exclusive original jurisdiction,¹⁸⁸ but in granting leave to file under the Court’s exclusive original jurisdiction over state controversies as well.¹⁸⁹ Therefore, complainant states must show that the determination of the controversy is an appropriate use of the Court’s resources. The doctrine of discretion over non-exclusive original jurisdiction was first announced by Justice Harlan in *Ohio v. Wyandotte Chemicals Corp.*, though, as Justice Harlan noted, Justice Hughes had discussed the need for the exercise of discretion in non-exclusive original jurisdiction cases three decades earlier.¹⁹⁰ The following term the Court again exercised its discretion in denying leave of Illinois to file against political subdivisions of Wisconsin.¹⁹¹

Unlike these non-exclusive original jurisdiction cases, the exercise of discretion in an exclusive original jurisdiction case would leave the complainant state without recourse in any court. Justice Frankfurter in 1939 had indicated concerns over the consequence of overly broad interpretations of the Court’s jurisdiction over state controversies, but he did not advocate discretionary denial of leave to file bills of complaint.¹⁹² The Court first extended the exercise of discretion in an exclusive

187. *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821) (Marshall, C. J.).

188. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).

189. *Arizona v. New Mexico*, 425 U.S. 794, 797-98 (1976).

190. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496-99 (1971).

191. *Illinois v. City of Milwaukee*, 406 U.S. 91, 108 (1972).

192. *Texas v. Florida*, 306 U.S. 398, 428 (1939) (Frankfurter, J., dissenting).

jurisdiction case in *Arizona v. New Mexico* by denying Arizona leave to file a bill challenging the assessment of a tax on Arizona electricity generating utilities located in New Mexico.¹⁹³ Justice Stevens concurred on the ground that Arizona did not have standing, but noted his disagreement with the extension of discretionary denials to exclusive jurisdiction cases.¹⁹⁴ When the Court summarily denied California leave to file a bill of complaint against West Virginia for breach of a contract between state universities to play a football game, Justice Stevens, in dissent, reiterated his view that Justice Harlan's reasoning in *Ohio v. Wyandotte Chemicals Corp.* is inapplicable to exclusive original jurisdiction cases.¹⁹⁵ Soon after he joined the Court, Justice Thomas indicated Justice Stevens may have had the better view.¹⁹⁶

In exercising its discretion, the Court examines a motion for leave to file to determine whether the controversy is appropriate for the Court's original jurisdiction.¹⁹⁷ Thus, in *Maryland v. Louisiana* the Court held that a challenge by nineteen states against the imposition of a first-use tax on natural gas imported into Louisiana from the outer continental shelf was appropriate.¹⁹⁸ And eleven years later in *Wyoming v. Oklahoma*,

193. *Arizona v. New Mexico*, 425 U.S. 794, 797-98 (1976) (per curiam) ("We . . . are not unmindful of Mr. Justice Harlan's cautionary advice in *Ohio v. Wyandotte Chemicals Corp.* . . .").

194. *Arizona v. New Mexico*, 425 U.S. 794, 798-99 (1976) (Stevens, J., concurring).

195. *California v. West Virginia*, 454 U.S. 1027-28 (1981) (Stevens, J., dissenting).

196. *Wyoming v. Oklahoma*, 502 U.S. 437, 474 n.* (1992).

197. *Mississippi v. Louisiana*, 506 U.S. 73, 76-77 (1992) ("Determining whether a case is 'appropriate' for our original jurisdiction involves an examination of two factors. First, we look to 'the nature of the interest of the complaining State,' focusing on the 'seriousness and dignity of the claim[.]' 'The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.' Second, we explore the availability of an alternative forum in which the issue tendered can be resolved.") (citations omitted).

198. *Maryland v. Louisiana*, 451 U.S. 725, 739-44 (1981). Justice Rehnquist dissented and argued that the case was inappropriate due to the nature of the interest involved and the availability of other forums. *Id.* at 760-71 (Rehnquist, J., dissenting).

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the Court held the exercise of its original jurisdiction appropriate to hear a challenge to an Oklahoma statute requiring coal-fired electricity generating plants use a mixture of ten percent Oklahoma coal that Wyoming alleged reduced its severance tax receipts by lessening demand for Wyoming coal.¹⁹⁹

d. Congressional Control of State Controversy Jurisdiction

Does Congress have the power to limit the Court's jurisdiction over state controversies? Probably not. There is a significant distinction between the jurisdiction of the Supreme Court and other federal courts.²⁰⁰ And the Court has forcefully suggested, but not yet held, that Congress may not limit the original jurisdiction of the Supreme Court.²⁰¹

199. *Wyoming v. Oklahoma*, 502 U.S. 437, 450–54 (1992). While Justice Thomas noted that perhaps discretion should not be exercised at all, assuming the existence of discretion he urged the Court to deny leave to file in cases in which the complainant state's injury is based on its status as tax collector and is wholly derivative of the injuries of private parties. *Id.* at 475–77 (Thomas, J., dissenting). Justice Thomas indicated a concern that the result of the Court's grant of leave would be a flood of litigation. But the feared flood of tax-collector status challenges under the Commerce Clause have not materialized. *See generally*, McKusick, *supra* note 5, at 199. This suggests that the states are not so easily moved to litigation as the private bar. It supports the view that the limited number of potential plaintiffs and defendants, constraints on state resources, and perhaps some reluctance by states to willingly subject themselves even as plaintiffs to the Court's jurisdiction and remedial powers ensures that what might otherwise be a flood is in practice only a trickle. This evident reality suggests the Court may not need to exercise discretion over its exclusive original jurisdiction because the states already exercise significant discretion in deciding which controversies are worth submitting to the Court. For more on discretion and concerns over floodgates. *See* McKusick, *supra* note 5.

200. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion . . .").

201. *California v. Arizona*, 440 U.S. 59, 64–66 (1979).

B. Remedial Power to Resolve Controversies Between States

The Court has extensive remedial powers to resolve controversies between states. These powers are proportional to the significant strictures the Constitution places on the states limiting their ability to treat with other states in order to resolve disputes:

If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering.²⁰²

The Court resolutely confirmed the existence of its remedial powers in 1918 in *Virginia v. West Virginia*.²⁰³ And the Court

202. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *see also* *Virginia v. West Virginia*, 246 U.S. 565, 599–600 (1918) (“Throwing this light upon the constitutional provisions, the conferring on this court of original jurisdiction over controversies between states, the taking away of all authority as to war and armies from the states and granting it to Congress, the prohibiting the states also from making agreements or compacts with each other without the consent of Congress, at once makes clear how completely the past infirmities of power were in mind and were provided against. This result stands out in the boldest possible relief when it is borne in mind that not a want of authority in Congress to decide controversies between states, but the absence of power in Congress to enforce as against the governments of the states its decisions on such subjects, was the evil that cried aloud for cure, since it must be patent that the provisions written into the Constitution, the power which was conferred upon Congress and the judicial power as to states created, joined with the prohibitions placed upon the states, all combined to unite the authority to decide with the power to enforce—a union which could only have arisen from contemplating the dangers of the past and the unalterable purpose to prevent their recurrence in the future The state, then, as a governmental entity, having been subjected by the Constitution to the judicial power under the conditions stated, and the duty to enforce the judgment by resort to appropriate remedies being certain even although their exertion may operate upon the governmental powers of the state . . .”).

203. *Virginia v. West Virginia*, 246 U.S. 565, 591 (1918) (“That judicial power essentially involves the right to enforce the results of its exertion is elementary And that this applies to the exertion of such power in controversies between states as the result of the exercise of original jurisdiction conferred upon this court by the Constitution is therefore certain.”).

reaffirmed the broad scope of these powers in 1987 in *Texas v. New Mexico*.²⁰⁴ Aside from these cases, the Court has said little regarding the scope of its remedial powers, but its orders speak volumes. This section gleans the constitutional scope of the Court's remedial powers to resolve state controversies by examining the history of their exercise.

a. Relief Afforded

To date, the Court has exercised its remedial power to issue injunctions, issue money judgments, award costs to prevailing states, award prejudgment interest, order state action, appoint enforcement officers, and even order foreclosure on state property. The Court has also held it has authority to issue writs of execution and hold states in contempt.

The court frequently issues injunctions binding upon states.²⁰⁵ These injunctions typically also bind the officers, agents, and citizens of the state from engaging in the proscribed conduct, and at least once to its attorneys.²⁰⁶ The Court has

204. *Texas v. New Mexico*, 482 U.S. 124, 128, 130–31 (1987) (“By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them, . . . and this power includes the capacity to provide one State a remedy for the breach of another The Court has recognized the propriety of money judgments against a State in an original action, *South Dakota v. North Carolina*, 192 U. S. 286 (1904); *United States v. Michigan*, 190 U. S. 379 (1903); and specifically in a case involving a compact, *Virginia v. West Virginia*, 246 U.S. 565 (1918). In proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State. *Maryland v. Louisiana*, 451 U. S. 725, 745, n. 21 (1981); *United States v. Mississippi*, 380 U. S. 128, 140 (1965); *South Dakota v. North Carolina*, [192 U.S. 286]. That there may be difficulties in enforcing judgments against States counsels caution but does not undermine our authority to enter judgments against defendant States in cases over which the Court has undoubted jurisdiction, authority that is attested to by the fact that almost invariably the ‘States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same.’ *Virginia v. West Virginia*, [246 U.S.] at 592.”).

205. *See, e.g.*, *Louisiana v. Mississippi* (1906); *Wyoming v. Colorado* (1917); *Pennsylvania v. West Virginia* (1919); *Oklahoma v. Texas* (1920); *Texas v. New Mexico* (1923); *Wisconsin v. Illinois* (1926); *Maryland v. Louisiana* (1979); *New Jersey v. New York* (1997); *Virginia v. Maryland* (2003).

206. *Louisiana v. Mississippi*, 202 U.S. 1, 58-59 (1906) (“Mississippi, its officers, agents and citizens”); *Oklahoma v. Texas*, 252 U.S. 372, 375 (1920) (“Texas, and . . . Oklahoma, and their respective officers, agents and employees,

enjoined states from disputing or asserting sovereignty over territory,²⁰⁷ and has done the same with respect to ownership of land.²⁰⁸ In one territory dispute, the Court enjoined a state from any purported disposition of oil rights or authorization of exploitation in an area the Court adjudged to lie within New Mexico.²⁰⁹ In another case, the Court enjoined the enforcement of the conditions on construction and water appropriation permits.²¹⁰ The Court has enjoined enforcement of state laws and the collection of state taxes.²¹¹ After interpreting a compact, the

and all persons now in possession of any of the said lands or claiming any right, title or interest therein"); *Oklahoma v. Texas*, 252 U.S. 372 (1920) ("Texas, her officers and agents"); *Pennsylvania v. West Virginia*, 262 U.S. 553, 624 (1923) ("the defendant State, and her several officers, agents and servants"); *Maryland v. Louisiana*, 452 U.S. 456, 457 (1981) ("Louisiana, its officers, agents, and employees"); *Texas v. New Mexico*, 482 U.S. 124, 135 (1987) ("New Mexico, its officers, attorneys, agents, and employees"). *But see* *New Jersey v. New York*, 526 U.S. 589 (1999) ("New York"); *Virginia v. Maryland*, 540 U.S. 56, 79–80 (2003) ("Maryland").

207. *See, e.g., Louisiana v. Mississippi*, 202 U.S. 58 (1906) ("It is further ordered, adjudged, and decreed that . . . Mississippi, its officers, agents, and citizens, be and they are hereby enjoined and restrained from disputing the sovereignty . . . of . . . Louisiana in the land and water territory south and west of said boundary line as laid down on the foregoing map."); *New Jersey v. New York*, 526 U.S. 589 (1999) ("New York is enjoined from enforcing her laws or asserting sovereignty over the portions of Ellis Island that lie within . . . New Jersey's sovereign boundary . . .").

208. *See, e.g., Louisiana v. Mississippi*, 202 U.S. 58 (1906) ("It is further ordered, adjudged, and decreed that . . . Mississippi, its officers, agents and citizens, be and they are hereby enjoined and restrained from disputing the . . . ownership of . . . Louisiana in the land and water territory south and west of said boundary line as laid down on the foregoing map.").

209. *Oklahoma v. Texas*, 252 U.S. 372 (1920) ("Texas, her officers and agents, are hereby enjoined from selling any purported rights or making or issuing any grants, licenses or permits to any person, corporation or association covering or affecting any lands, or any part of the bed of Red river, lying north of the line of the south bank of such river as said south bank existed at the date of the ratification of the Treaty of 1819 between the United States and Spain, that is to say, on the twenty-second day of February, 1821, and between the One Hundredth degree of West Longitude and the southeastern corner of the state of Oklahoma.").

210. *Virginia v. Maryland*, 540 U.S. 56, 79–80 (2003) ("Any conditions attached to the construction/water appropriation permit granted by Maryland to the Fairfax County Water Authority . . . are null and void and . . . Maryland is enjoined from enforcing them.").

211. *Pennsylvania v. West Virginia*, 262 U.S. 553, 624 (1923) ("[T]he defendant state, and her several officers, agents and servants, are hereby

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Court has issued an injunction ordering compliance with the compact according to specific performance standards determined and set by the Court.²¹² The Court has issued complex injunctions in water appropriation cases that require significant state regulation of water consumption.²¹³ When the Court issues injunctions against states apportioning resources or setting other limits, these injunctions bind the political subdivisions of the state and the state citizenry.²¹⁴

severally enjoined from enforcing, or attempting to enforce, that act”); *Maryland v. Louisiana*, 452 U.S. 456, 457 (1981) (“Louisiana, its officers, agents, and employees are permanently enjoined and prohibited from collecting the Louisiana First Use Tax.”).

212. *Texas v. New Mexico*, 482 U.S. 124, 135 (1987) (“It is Ordered, Adjudged, and Decreed that the State of New Mexico, its officers, attorneys, agents, and employees are hereby enjoined . . . [t]o comply with the Article III(a) obligation of the Pecos River Compact by delivering to Texas at state line each year an amount of water calculated in accordance with the inflow-outflow equation . . . [and t]o calculate the Index Inflow component of the inflow-outflow and channel-loss equations”).

213. *Wyoming v. Colorado*, 260 U.S. 1 (1922) (“It is considered, ordered and decreed that the defendants, their officers, agents and servants, be, and they are hereby, severally enjoined from diverting or taking from the Laramie River and its tributaries in the state of Colorado more than fifteen thousand five hundred (15,500) acre-feet of water per annum in virtue of or through what is designated in the pleadings and evidence as the Laramie-Poudre Tunnel appropriation in that state”); *Wyoming v. Colorado*, 298 U.S. 573, 586 (1936); *Nebraska v. Wyoming*, 325 U.S. 665, 665-66 (1945) (“Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined . . . [f]rom diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land . . . ; [f]rom storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes . . . ; [f]rom exporting . . . to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined . . . [f]rom diverting or permitting the diversion of water . . . for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season [:] . . . [f]rom storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes. . . .”); *Kansas v. Colorado*, 556 U.S. 98, 99 (2009).

214. *Wyoming v. Colorado*, 286 U.S. 494, 506-07 (1932); *see Oklahoma v. Texas*, 252 U.S. 372, 375 (1920) (“The defendant, . . . Texas, and the complainant, . . . Oklahoma, and their respective officers, agents and employees, and all persons now in possession of any of the said lands or claiming any right, title or interest therein, are . . . enjoined until the further order of this court from removing any of the property hereinbefore described from said lands and from conducting any oil or gas mining operations thereon save under the direction and supervision of the receiver and from interfering with the

The Court frequently orders states to pay the costs of prevailing states.²¹⁵ And the Court has issued money judgments in four controversies.²¹⁶ The Court ordered North Carolina to pay South Dakota \$27,400 due on repudiated bonds owned by South Dakota.²¹⁷ The Court ordered West Virginia to pay Virginia “\$12,393,929.50, with interest” from the date of judgment as owed under a compact settling West Virginia’s portion of Virginia’s debt at the time of secession.²¹⁸ The Court ordered New Mexico to pay Texas \$14,000,000 as damages for breach of the Pecos River Compact.²¹⁹ And the Court ordered Colorado to pay

possession, control or operations of the receiver.”); *Wisconsin v. Illinois*, 281 U.S. 696 (1930) (injunction against Illinois and Chicago withdrawing water from Lake Michigan beyond gradually decreasing limits).

215. *Wyoming v. Colorado*, 259 U.S. 496, 497 (1922) (“And it is also considered, ordered and decreed that the state of Wyoming do have and recover from the defendants her lawful costs herein.”), *modified by Wyoming v. Colorado*, 260 U.S. 1, 2-3 (1922) (“the costs of this suit be apportioned among and paid by the parties thereto as follows: The State of Wyoming one-third, the State of Colorado one-third, and the two corporate defendants jointly one-third.”); *North Dakota v. Minnesota*, 263 U.S. 583, 586 (1924) (awarding costs to Minnesota); *Massachusetts v. New York*, 271 U.S. 65, 96 (1926) (“[S]ince no public boundary or public ownership was involved, costs are awarded against the complainant.”); *Wisconsin v. Illinois*, 281 U.S. 179, 200 (1930) (“We see no reason why costs should not be paid by the defendants, who have made this suit necessary by persisting in unjustifiable acts.”); *Michigan v. Ohio*, 410 U.S. 420, 421 (1973) (“The costs of this suit, including the expenses of the Special Master, shall be borne by . . . Michigan.”); *Kansas v. Colorado*, 556 U.S. 98, 103–04 (2009) (“Costs through January 31, 2006, including reallocation of Kansas’ share of the Special Master’s fees and expenses, are awarded to Kansas in the amount of \$1,109,946.73. These costs were paid in full on June 29, 2006.”).

216. *South Dakota v. North Carolina* (1904); *Virginia v. West Virginia* (1907); *Texas v. New Mexico* (1975); *Kansas v. Colorado* (1986).

217. *South Dakota v. North Carolina*, 192 U.S. 286, 321 (1904) (“A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars (\$27,400) . . . no interest being recoverable . . . , shall order that the said State of North Carolina pay said amount with costs of suit to . . . South Dakota . . .”).

218. *Virginia v. West Virginia*, 238 U.S. 202, 242 (1915) (“It is therefore now here ordered, adjudged and decreed by this Court that the complainant, Commonwealth of Virginia, recover of and from the defendant, State of West Virginia, the sum of \$12,393,929.50, with interest thereon from July 1, 1915, until paid, at the rate of five per cent per annum.”);

219. *Texas v. New Mexico*, 494 U.S. 111, 111 (1990) (“New Mexico shall pay Texas \$14 million . . . by delivering a check or draft in that amount made payable to . . . Texas or transferring that amount to . . . Texas by electronic wire transfer.”).

Kansas “\$34,615,146.00 for damages and prejudgment interest” for violating the Arkansas River Compact.²²⁰

The Court frequently issues orders under its remedial power that require states to take action. The Court ordered states and citizens to surrender possession of property to a receiver pending determination of a territorial controversy.²²¹ The Court ordered states to keep records and permit other states to inspect those records.²²² The Court ordered specific performance of a contract between states to build an interstate bridge.²²³ And the Court ordered a state to provide an accounting of taxes unconstitutionally collected to complainant states and to refund the taxes.²²⁴

The Court has also required extensive state actions to effectuate the Court’s apportionments of interstate resources.²²⁵ In one typical case, the Court not only enjoined the state from withdrawing water but enjoined the state from permitting appropriations for irrigation beyond set thresholds, thereby requiring that the state implement a permitting regime to limit private appropriation.²²⁶ Further, the Court ordered the states to

220. *Kansas v. Colorado*, 556 U.S. 98, 103 (2009) (“Judgment is awarded in the amount of \$34,615,146.00 for damages and prejudgment interest, including the required adjustment for inflation, arising from depletions of usable streamflow of the Arkansas River at the Colorado-Kansas Stateline in the amount of 428,005 acre-feet of water during the period 1950-1996. The damages were paid in full on April 29, 2005.”).

221. *Oklahoma v. Texas*, 252 U.S. 372, 375 (1920).

222. *Nebraska v. Wyoming*, 325 U.S. 589, 656 (1945); *Nebraska v. Wyoming*, 325 U.S. 665, 670 (1945) (“Wyoming and . . . Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions . . . and such records shall be available for inspection at all reasonable times . . .”).

223. *Kentucky v. Indiana*, 281 U.S. 700, 701-02 (1930).

224. *Maryland v. Louisiana*, 452 U.S. 456 (1981).

225. *Colorado v. New Mexico*, 459 U.S. 176, 185 (1982) (“We have invoked equitable apportionment not only to require the reasonably efficient use of water, but also to impose on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream.”) (relying on *Wyoming v. Colorado*, 259 U.S. 419, 484 (1922)).

226. *Nebraska v. Wyoming*, 325 U.S. 665, 665–66 (1945) (“Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined . . . [f]rom diverting or permitting the diversion of water from the North

construct, at their mutual convenience, “gauging stations and measuring devices” near the state line as necessary to effectuate an apportionment decree.²²⁷ The Court has the authority to appoint masters to supervise states, and also to independently make the calculations required under its complex apportionment decrees.²²⁸ And in another instance, significantly touching on state sovereignty, Wyoming requested that the Court order Colorado to permit Wyoming to “install measuring devices at the places of diversion” of a river in Colorado.²²⁹ The Court indicated it had power to issue such an order but exercised its discretion not to issue the order unless it proved necessary to do so.²³⁰

The Court has similarly extensive power to require states to take specific steps to reduce activities interfering with the enjoyment of environmental resources by other states, though the Court prefers to issue orders setting required levels and leaving the details to the diligence of the states.²³¹ Dilly-dallying by a

Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land . . . ; [f]rom storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes . . . ; [f]rom exporting . . . to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years . . . Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined . . . [f]rom diverting or permitting the diversion of water . . . for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season [:] . . . [f]rom storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes . . .”).

227. *Nebraska v. Wyoming*, 325 U.S. 665, 669 (1945) (“Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others . . .”).

228. *Texas v. New Mexico*, 482 U.S. 124, 134 (1987).

229. *Wyoming v. Colorado*, 298 U.S. 573, 585 (1936).

230. *Id.* at 585–86.

231. *Wisconsin v. Illinois*, 289 U.S. 395, 406 (1933) (“The Court did not exhaust its power by the provisions enjoining the diversion according to the times and amounts prescribed. The Court omitted further specific requirements, not because of want of power, but in the expectation that the diligence of defendants in carrying out the program they had submitted to the Court would give no occasion for such specifications. In deciding this controversy between States, the authority of the Court to enjoin the continued perpetration of the wrong inflicted upon complainants, necessarily embraces the authority to require measures to be taken to end conditions, within the control of defendant State, which may stand in the way of the execution of the decree.”).

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state in meeting its remedial obligations has led to stern injunctive rebuke by the Court leaving no doubt of the Court's extensive authority under its remedial powers to order states to raise, appropriate, and spend funds to construct the required facilities.²³²

The Court has indicated it has the authority to find states in contempt, but has never done so, in part because no state has ever persisted in failing to comply with the Court's orders.²³³ Neither has the Court had to issue writs of execution. But in one case, this seems to have been avoided by deft work on the part of the Court.

To avoid the prospect of issuing a writ of execution against North Carolina to compel it to pay South Dakota amounts owed on repudiated civil war bonds, the Court issued a money judgment and directed the Marshal of the Court to foreclose on intangible property owned by the state that secured the bond obligation if the judgment was not paid by a specified date.²³⁴ As

232. *Wisconsin v. Illinois*, 289 U.S. 395, 411 (1933) ("[T]he State of Illinois is hereby required to take all necessary steps, including whatever authorizations or requirements, or provisions for the raising, appropriation and application of moneys, may be needed in order to cause and secure the completion of adequate sewage treatment or sewage disposal plants and sewers, together with controlling works to prevent reversals of the Chicago River, if such works are necessary, and all other incidental facilities, for the disposition of the sewage of the area embraced within the Sanitary District of Chicago so as to preclude any ground of objection on the part of the State or of any of its municipalities to the reduction of the diversion of the waters of the Great Lakes-St. Lawrence system or watershed to the extent, and at the times and in the manner, provided in this decree.").

233. *Wyoming v. Colorado*, 309 U.S. 572, 581-82 (1940) (considering but denying petition to find Colorado in contempt of Court's decree on the merits because of potential for misunderstanding and uncertainty but noting there would be "no ground for any possible misapprehension" going forward).

234. *South Dakota v. North Carolina*, 192 U.S. 286, 321 (1904) ("A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars (\$27,400), (no interest being recoverable . . .), and that the same are secured by one hundred shares of the stock of the North Carolina Railroad Company, belonging to the State of North Carolina, shall order that the said State of North Carolina pay said amount with costs of suit to the State of South Dakota on or before the 1st Monday of January, 1905, and that in default of such payment an order of sale be issued to the marshal of this court, directing him to sell at public auction all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company, such sale to be made at

North Carolina had never actually reduced the intangible property to paper certificates, no physical force or possession was required. The Marshal would simply auction the stock and the winner of the auction could then print certificates. Two points are worth noting about this incident. First, this indicates that the Marshal of the Supreme Court is the Sheriff of the United States. Second, the order unintentionally set up a humorous clash between the Court and the other branches. A federal law prohibited peddling from the steps of the Capitol and thus the Court issued an order that would require the Marshal to violate a federal law. Fortunately, or perhaps unfortunately depending on one's perspective, the issue never came to a head as North Carolina simply paid the amount owed to South Dakota.²³⁵

b. The Remedial Power to Commandeer

The foregoing demonstrates that the Supreme Court's remedial power to resolve "controversies between two or more states" is not circumscribed by the Tenth Amendment and is therefore distinct from Congress's enumerated powers that are circumscribed by the Tenth Amendment unless the controversy arises out of a compact.

The Court held in *New York v. United States* and in *Printz v. United States* that the Tenth Amendment's reservation of power to the states (or alternatively, limits on the Necessary and Proper Clause) prohibits Congress from issuing commands to state legislatures and executives.²³⁶ The second clause of the Tenth

the east front door of the Capitol building in this city, public notice to be given of such sale by advertisements once a week for six weeks in some daily paper published in the city of Raleigh, North Carolina, and also in some daily paper published in the city of Washington."); *Repudiated Bonds Made Good*, N.Y. TIMES, Apr. 6, 1904.

235. Robert G. Caldwell, *The Settlement of Inter-State Disputes*, 14 AM. J. INT'L L. 38, 62 (1920).

236. *New York v. United States*, 505 U.S. 144, 149, 176-77, 180 (1992) ("We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability to simply compel the States to do so. . . . While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under

Amendment provides support for the view that this reservation does not apply to the Supreme Court: “[t]he powers not delegated to the United States by the Constitution, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people.”²³⁷ The Constitution specifically makes states subject to the Court’s power to resolve “controversies between two or more states.” Justice O’Connor’s opinion in *New York v. United States* notes that the Supremacy Clause limits the applicability of the Tenth Amendment reservation to federal statutes enforceable in state courts and that the provisions of Article III enable the federal courts to order state officials to comply with federal law.²³⁸ The Court’s decision did not explicitly address the remedial power of the Court to resolve controversies between states as distinct from the other provisions of Article III, but it is a subset of the judicial power granted by Article III that is discussed. Moreover, the United States specifically argued that Congress had power to resolve controversies between states by issuing commands to state legislatures and pointed to the Court’s remedial power to issue commands to states in resolving controversies between states, an argument Justice O’Connor sets out in the opinion and rejects without explicitly drawing the crucial distinction between the Court’s remedial power and Congress’s power.²³⁹ Justice

the Articles of Confederation, the Framers did not intend that Congress should exercise that power through the mechanism of mandating state regulation.”).

237. U.S. CONST. amend. X (emphasis added).

238. *New York v. United States*, 505 U.S. at 178–79 (“Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate. Additional cases . . . discuss the power of federal *courts* to order state officials to comply with federal law. See . . . *Illinois v. City of Milwaukee*, 407 U.S. 91, 106–108 (1972) . . . Again, however, the text of the Constitution plainly confers this authority on the federal courts, the ‘judicial Power’ of which ‘shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . ; [and] to Controversies between two or more States; [and] between a State and Citizens of another State.’ U. S. Const., Art. III, § 2. The Constitution contains no analogous grant of authority to Congress. Moreover, the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply.”).

239. *New York v. United States*, 505 U.S. at 179–80 (“[T]he United States . . . argues that the Constitution envisions a role for Congress as an arbiter of

Stevens in dissent however does note that the decision creates a distinction between the Court's undoubted remedial power and Congress's power, though he argues that because the Court has the power so too must Congress.²⁴⁰ No Justice in *New York v. United States* or *Printz v. United States* ever even intimates that the Court's remedial powers are limited by the Tenth Amendment, for to do so would be to discount numerous remedial

interstate disputes. The United States observes that federal courts, and this Court in particular, have frequently resolved conflicts among States. See, e.g., *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). Many of these disputes have involved the allocation of shared resources among the States, a category perhaps broad enough to encompass the allocation of scarce disposal space for radioactive waste. See, e.g., *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Arizona v. California*, 373 U.S. 546 (1963). The United States suggests that if the Court may resolve such interstate disputes, Congress can surely do the same under the Commerce Clause. . . . While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise that power through the mechanism of mandating state regulation.”).

240. *New York v. United States*, 505 U.S. 144, 211 (1992) (Stevens, J., concurring in part and dissenting in part) (“The notion that Congress does not have the power to issue ‘a simple command to state governments to implement legislation enacted by Congress’, *ante*, at 2428, is incorrect and unsound. There is no such limitation in the Constitution. . . . The Constitution gives this Court the power to resolve controversies between the States. Long before Congress enacted pollution control legislation, this Court crafted a body of ‘interstate common law,’ *Illinois v. City of Milwaukee*, 406 U.S. 91, 106 (1972), to govern disputes between States involving interstate waters. See *Arkansas v. Oklahoma*, 503 U.S. 91, 98–99 (1992). In such contexts, we have not hesitated to direct States to undertake specific actions. For example, we have ‘impose[d] on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream.” *Colorado v. New Mexico*, 459 U.S. 176, 185 (1982) (citing *Wyoming v. Colorado*, 259 U.S. 419 (1922)). Thus, we unquestionably have the power to command an upstream state that is polluting the waters of a downstream State to adopt appropriate regulations to implement a federal statutory command. With respect to the problem presented by the case at hand, if litigation should develop between States that have joined a compact, we would surely have the power to grant relief in the form of specific enforcement of the take title provision. Indeed, even if the statute had never been passed, if one State’s radioactive waste created a nuisance that harmed its neighbors, it seems clear that we would have had the power to command the offending State to take remedial action. Cf. *Illinois v. City of Milwaukee*. . . . If this Court has such authority, surely Congress has similar authority.”).

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precedents set out above in which the Court issued commands to states.

However, *New York v. United States* and *Printz v. United States* do omit one important exception to the Tenth Amendment's prohibition on issuing commands to state legislatures and executives. As discussed in Part I, the Court in *Virginia v. West Virginia* held in no uncertain terms that Congress's power to issue commands to states to enforce compacts is plenary.²⁴¹ Thus, the effect of the Tenth Amendment is to limit congressional power to issue commands to state legislatures and executives only in the absence of a compact and does not in any way circumscribe the Court's authority to do so under its remedial powers over controversies between two or more states.

c. Congressional Control of the Court's Remediation Power

Judge Iredell, dissenting in *Chisholm v. Georgia*, suggests Congress controls the remedial power of the Court.²⁴² But there does not seem to be an instance of Congress doing so. When confronted with the suggestion that the Tax Injunction Act did so, the Court "note[d] in passing" that the argument was "lacking in merit" because "the Tax Injunction Act, which by its terms only applies to injunctions issued by federal district courts . . . is inapplicable in original actions."²⁴³ When confronted with the suggestion that 28 U.S.C. § 1821 statutorily set the witness fees that could be awarded as costs in original jurisdiction cases, the Court avoided the issue.²⁴⁴ Chief Justice Roberts however, joined by Justice Souter, squarely and succinctly reached the issue in a concurring opinion:

I join the opinion of the Court in full. I do so only, however, because the opinion expressly and carefully makes clear that it in no way infringes this Court's authority to decide on its own, in original cases, whether there should be witness fees and what they should be.

241. *Virginia v. West Virginia*, 246 U.S. 565, 601-02 (1918).

242. *Chisholm v. Georgia*, 2 U.S. 419, 432 (1793) (Iredell, J.).

243. *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981).

244. *Kansas v. Colorado*, 556 U.S. 98, 102 (2009).

Our appellate jurisdiction is, under the Constitution, subject to “such Exceptions, and . . . such Regulations as the Congress shall make.” Art. III, § 2. Our original jurisdiction is not. The Framers presumably “act[ed] intentionally and purposely in the disparate inclusion or exclusion” of these terms. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (internal quotation marks omitted).

It is accordingly our responsibility to determine matters related to our original jurisdiction, including the availability and amount of witness fees. For the reasons given by the Court, I agree that \$40 is a reasonable choice for the fees at issue here. But the choice is ours.²⁴⁵

As the Court’s interpretation of the state controversy provision, in light of its history and the Court’s obligation to provide remedies to states wronged by other states in light of their surrender of sovereign powers, supports Chief Justice Roberts’ position, this Article agrees.²⁴⁶

C. Rules of Decision in Controversies Between States

Rules of decision in controversies between states may stem from compacts, federal statutes, and federal common law, but not all sources of law are equal, and the source of law that controls depends on the matter to be decided. The priority of sources of law as rules of decision on a given matter in state controversies is a question of federal constitutional law. There must always be a rule of decision in a controversy between states properly brought before the Supreme Court for resolution. The Court “may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone”

245. *Kansas v. Colorado*, 556 U.S. 98, 109-10 (2009) (Roberts, C.J., concurring).

246. *See Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (“If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering”); Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 940-41 (1997) (excerpting same language).

and in those instances must craft a rule of decision.²⁴⁷ But there is no matter that may be brought before the Court that cannot be dealt with by Congress and the governments of both states acting together to form a compact because no principle of federalism restrains the operation of laws formed by the sovereign states acting in concert with Congress. The priority of sources of rules of decision on a given matter in state controversies is:

- (1) a compact between the contravening states on any matter;
- (2) a federal statute on a congressionally regulable matter; and
- (3) a federal common law rule in the absence of all of the above.

Compacts preempt all other rules of decision. Federal statutes on congressionally regulable matters displace federal common law. Federal common law controls unless preempted by compact or displaced by a federal statute on a congressionally regulable matter. Below, the terms of the Rule of Decision Act are adapted to show this constitutional rule of decision framework.

a. Compacts as Rules of Decision

Compacts between the several states assented to by Congress, except where the Constitution otherwise requires or provides, are the rule of decision in controversies between two or more states before the Supreme Court, in cases where they apply.

This principle of constitutional law has never been questioned and has always been followed by the Supreme Court, and Congress has at no time ever attempted to abrogate its application in any case. The assent of all relevant legislatures leaves no room, absent countervailing constitutional provisions, for independent judicial determination of the rule of decision where the matter is set forth in a compact between the state parties to the controversy.

The agreement of states without the assent of Congress does not supply the rule of decision in the Supreme Court in the

247. *Virginia v. West Virginia*, 220 U.S. 1, 27 (1911) (citing *Missouri v. Illinois*, 200 U.S. 496, 519-20 (1906); *Kansas v. Colorado II*, 206 U.S. 46, 82-84 (1907)).

resolution of controversies between states. Thus, states that enact reciprocal legislation gain no enforcement rights against one another before the Court, and their continued compliance is purely voluntary. State agreements do, however, bind individuals subject to the powers of the agreeing states without congressional assent because the Compact Clause limits only agreements enforceable on states in the Supreme Court, not concerted action. The key distinction for constitutional purposes is that the states can cease complying with an agreement that does not meet the requirements of the Compact Clause at any time.

b. Federal Statutes as Rule of Decision

The Acts of Congress, except where the Constitution or compacts otherwise require or provide, are the rule of decision in controversies between two or more states before the Supreme Court, in cases where they apply.

The Acts of Congress alone, without the assent of states, are sufficient to displace federal common law in controversies between states only as to matters within congressional power as circumscribed by the Tenth Amendment, the Revenue Clauses, and other provisions of the Constitution.²⁴⁸ That is to say, the Acts of Congress displace federal common law as far as they go. But the Acts of Congress may only go so far. And the matters involved in state controversies, more than in any other class of cases, are frequently outside of the constitutional competence of Congress to provide rules of decision without the concurrent assent of the states.

The sole Acts of Congress do have a significant role in providing rules of decision for the resolution of state controversies in theory. For example, were states ever to litigate a controversy that required a decision as to weights and measures, the Acts of Congress would provide a rule of decision. And likewise, Acts of Congress under other constitutional provisions would also provide a rule of decision. The dominant such provision is the

248. See U.S. CONST. amend. X; U.S. CONST. art. I, § 7, cl. 1.

Commerce Clause.²⁴⁹ Thus, the Acts of Congress are the rule of decision in controversies over the apportionment of any navigable waterway of the United States—resources wholly within the congressional regulatory ambit since *Gibbons v. Ogden*.²⁵⁰ Conversely the sole Acts of Congress are not rules of decision in controversies over territory because Congress may not adjust the boundaries between the several states without their consent.²⁵¹ And so along the Mississippi River there is a curious distinction between the applicability of the Acts of Congress as rules of decision in controversies between states, depending upon the question posed.²⁵² Congress may not alone determine the location of the river's boundary between two states, but may decide to dam the river, construct a bridge, or otherwise impact or adjust the waterway such that the federal common law determination of the border between the states will change according to the principles of thalweg, accretion, and avulsion.²⁵³

Another class of controversy to which the sole Acts of Congress may supply the rule of decision is commercial activities that fall within the domain of the Commerce Clause, as augmented by the Necessary and Proper Clause.²⁵⁴ Curiously, although the Supreme Court has frequently intimated that

249. U.S. CONST. art. I, § 8, cl. 3.

250. 22 U.S. 1, 22 (1824); see *Arizona v. California*, 373 U.S. 546, 564–65 (1963) (“We have concluded . . . that Congress in passing the Project Act intended to and did create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin’s share of the mainstream waters of the Colorado River, leaving each State its tributaries [A]ppportionment of the Lower Basin waters of the Colorado River is not controlled by the doctrine of equitable apportionment It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an ‘equitable apportionment’ for the apportionment chosen by Congress.”).

251. See generally, *Poole v. Fleege’s Lessee*, 36 U.S. 185, 191 (1837).

252. See e.g., *Iowa v. Illinois*, 147 U.S. 1 (1893), *Missouri v. Illinois*, 180 U.S. 208 (1901); *Arkansas v. Mississippi*, 250 U.S. 39 (1919); *Louisiana v. Mississippi*, 384 U.S. 24. (1966).

253. See e.g., *Arizona v. California*, 282 U.S. 795 (1930).

254. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. I, § 8, cl. 18.

Congress should supply the rule of decision in certain such controversies between states, in no commercial state controversy resolved by the Court has it found a ready-made rule of decision supplied by a sole Act of Congress. The exemplar of this circumstance is the Court's determination of escheat rights amongst the states in unconsummated interstate transactions.²⁵⁵

There are undoubtedly some areas of decision that themselves fall outside of the enumerated powers of Congress. To date, the Court has consistently assumed, without deciding, that Congress cannot regulate the nonnavigable waterways of the United States under its enumerated powers. And in the last two decades the Court has held that the sole Acts of Congress may not regulate the possession of guns in schools, violence against women, or inaction. There have been six state controversies over nonnavigable waterways.²⁵⁶ But Congress has never attempted to provide a rule of decision through a sole Act of Congress in any of these cases, and so the Court has not yet had occasion to declare the non-displacement of federal common law of apportionment of interstate waterways that are nonnavigable. But the Court's consistent designation in every waterway case as either navigable or nonnavigable, and the Court's holding of displacement in *Arizona v. California*, strongly suggest that the over 100 years of apportionment precedent indicate the Court's view of the significance of the regulability of the subject matter by sole Acts of Congress in determining whether or not federal common law is displaced.²⁵⁷

255. See *Delaware v. New York*, 507 U.S. 490, 510 (1993) ("If the States are dissatisfied with the outcome of a particular case, they may air their grievances before Congress. That body may reallocate abandoned property among the States without regard to this Court's interstate escheat rules. Congress overrode *Pennsylvania* by passing a specific statute concerning abandoned money orders and traveler's checks . . . and it may ultimately settle this dispute through similar legislation."); see generally *Texas v. New Jersey* (1965); *Pennsylvania v. New York* (1972).

256. See appendix *infra*.

257. *Arizona v. California*, 282 U.S. 795 (1930).

c. Federal Common Law as Rule of Decision

The federal common law, except where the Constitution, compacts, or Acts of Congress otherwise require or provide, is the rule of decision in controversies between two or more states before the Supreme Court.

Federal common law provides the rule of decision in controversies between states as to those matters in which it is not preempted by compact or displaced by Acts of Congress. That is, when all else fails, the Court determines the appropriate rule. The Court has never doubted its residual power to determine rules of decision in state controversies.²⁵⁸

When the Court is called upon to determine a rule of decision in a controversy between states, it applies an equal dignity principle, and over time, the Court's application to specific cases has generated a body of federal common law for state controversies. The Court succinctly explained this principle and this process of common law adjudication in *Kansas v. Colorado*:

One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri v. Illinois*, 180 U.S. 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes

258. *Kansas v. Colorado II*, 206 U.S. 46, 97 (1907) ("Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal."). Warren reports that Daniel Webster argued in *Rhode Island v. Massachusetts* that the Rules of Decision Act applied to state controversies, but the court evidently disagreed. WARREN, *supra* note 5, at 40-41.

and decisions this court is practically building up what may not improperly be called interstate common law.²⁵⁹

While this process is not wholly unlike ordinary common law, there are differences stemming from the nature both of the controversies and the parties.²⁶⁰ Federal common law in state controversies is not limited to the consideration of evaluating quasi-tortious state action. For example, the federal common law frequently provides rules of decision in territorial controversies. And the Court also has been forced by congressional inaction to fashion rules for the priority of escheat claims by the states to abandoned property.²⁶¹

In fashioning federal common law rules of decision in state controversies, the Court looks to many sources of law for inspiration. The Court has repeatedly looked to principles of international law in the determination of state boundaries.²⁶²

259. *Kansas v. Colorado II*, 206 U.S. 46, 97-98 (1907).

260. *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (“We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi-sovereignties bound together in the Union.”).

261. *Texas v. New Jersey*, 379 U.S. 675, 677 (1965) (“With respect to tangible property, real or personal, it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat. But intangible property, such as a debt which a person is entitled to collect, is not physical matter which can be located on a map. The creditor may live in one State, the debtor in another, and matters may be further complicated if, as in the case before us, the debtor is a corporation which has connections with many States and each creditor is a person who may have had connections with several others and whose present address is unknown. Since the States separately are without constitutional power to provide a rule to settle this interstate controversy and since there is no applicable federal statute, it becomes our responsibility in the exercise of our original jurisdiction to adopt a rule which will settle the question of which State will be allowed to escheat this intangible property.”).

262. *See, e.g., Indiana v. Kentucky*, 136 U.S. 479, 511 (1890) (citing *EMMERICH DE Vattel*, *LAW OF NATIONS*, Book 2, c. 11, §149); *Iowa v. Illinois*, 147 U.S. 1, 8 (1893) (applying international law principle of *thalweg* with general citation to “recognized treatises on international law, of modern times”); *Virginia v. Tennessee*, 148 U.S. 503, 524 (1893) (citing *HENRY WHEATON*, *ELEMENTS OF INTERNATIONAL LAW* part II, c. 4, §164 (Richard Henry Dana, Jr. ed., Little Brown & Co. 8th ed. 1866)); *Louisiana v. Mississippi*, 202 U.S. 1, 49–53 (1906)

(reviewing international law principle of *thalweg* and applying the rule to determine the boundary); *Virginia v. West Virginia*, 220 U.S. 1, 27 (1911) (“The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy”); *Maryland v. West Virginia*, 217 U.S. 1, 44 (1910) (citing 1 LASSA OPPENHEIM, INTERNATIONAL LAW § 243 for prescriptive acquisition of territory); *Arkansas v. Tennessee*, 246 U.S. 158, 170 (1918) (reaffirming *thalweg* principle); *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926) (citing HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (5th ed. 1916); 1 JOHN MOORE, INTERNATIONAL LAW DIGEST, 294 *et seq.*) (“That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well . . . and, *a fortiori* to the quasi-sovereign states of the Union.”); *New Jersey v. Delaware*, 291 U.S. 361, 379 (1934) (Cardozo, J.) (“International law today divides the river boundaries between states by the middle of the main channel, when there is one, and not by the geographical centre, half way between the banks The *Thalweg*, or downway, is the track taken by boats in their course down the stream, which is that of the strongest current.”) (citing (1 HALLECK, INTERNATIONAL LAW 182 (4th ed. 1878); 1 MOORE, DIGEST INTERNATIONAL LAW 617 (1906); 1 WESTLAKE, INTERNATIONAL LAW 144 (1910); ORBAN, ETUDE DE DROIT FLUVIAL INTERNATIONAL 343 (1896); KAECKENBECK, INTERNATIONAL RIVERS 176 (1918); HYDE, INTERNATIONAL LAW 244 (1922); FIORE, INTERNATIONAL LAW CODIFIED § 1051 (1918); CALVO, DICTIONNAIRE DE DROIT INTERNATIONAL (1885)); *id.* at 381 (tracing development of *Thalweg*) (citing 1 HYDE, INTERNATIONAL LAW § 137 (1922); 1 NYS, DROIT INTERNATIONAL 425–26; GROTIUS, DE JURE BELLI AC PACIS (1631); VATTTEL, LAW OF NATIONS (1797); ENGELHARDT, DU REGIME CONVENTIONNEL DES FLEUVES INTERNATIONAUX 72 (1879); 5 KOCH, HISTOIRE DES TRAITES DE PAIX 156 (1838); KAECKENBECK, INTERNATIONAL RIVERS 176 (1918); ADAMI, NATIONAL FRONTIERS 17 (Behrens trans. 1927)); *id.* at 383 (discussing adjudicatory determination of rules of decision in the absence of treaties and conventions) (citing LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 52, 60, 70, 85, 100, 110–11, 255, 404, 432 (1933)); *id.* at 383–84 (discussing affect of international law principles that have “only a germinal existence”) (citing HALL, INTERNATIONAL LAW 7, 12, 15–16 (8th ed. 1880); LAUTERPACHT at 110, 255; JENKS, THE NEW JURISPRUDENCE 11–12 (1916); VINOGRADOFF, CUSTOM AND RIGHT 21 (1925)). Justice Cardozo in *New Jersey v. Delaware* provides the following excerpt from an international law case in a footnote:

International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles This is the method of jurisprudence; it is the method by which law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.

Id. at 416 n.7 (quoting *Eastern Extension, Australasia and China Telegraph Company, Ltd. (Gr. Br.) v. United States*, 6 R.I.A.A. 17, 114 (1923)).

Recently the Court has extensively consulted state common law in applying federal common law to the interpretation of a compact.²⁶³ In another recent instance, the Court fashioned its determination of witness fees in a costs judgment in the same manner as Congress provided for in a statute that the Court noted did not control.²⁶⁴ And state law is “an important consideration” in fashioning federal common law rules of decision in equitable apportionment of water between states.²⁶⁵

As noted above, federal common law is the applicable rule of decision unless preempted or displaced. But as to some matters, the sole Acts of Congress are insufficient to supply a rule of decision because the matter is beyond congressional powers. This may be because the matter is not within the enumerated powers of Congress, as the Court has assumed but not held in nonnavigable waters cases, or because the Tenth Amendment, or another constitutional limitation on the exercise of its enumerated powers, prohibits congressional regulation of the matter. This results in a sort of pre-eminence of federal common law as to certain matters over the Acts of Congress, though not over compacts, as these always preempt federal common law rules of decision. And this constitutional pre-eminence in certain matters has not gone unrecognized by the Court:

As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of Government is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that

263. *Alabama v. North Carolina*, 130 S. Ct. 2295, 2309 (2010) (consulting Restatement of Contracts in interpretation of compact).

264. *Kansas v. Colorado*, 556 U.S. 98, 102-03 (2009).

265. *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) (“Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream. . . . The laws of the contending States concerning intrastate water disputes are an important consideration governing equitable apportionment.”).

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power in a variety of instances, determining in the several instances the justice of the dispute.²⁶⁶

And in another case, the Court reiterated that the Court “may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone.”²⁶⁷

In these matters, the Court supplies the rule of decision unless there is a compact. There are several areas in which this is so. First, matters must be decided by the court or compacts if the subject matter is outside of the enumerated powers of Congress, such as nonnavigable rivers.²⁶⁸ Second, matters must be decided by the Court or compacts if the resolution of the controversy requires the issuance of commands to state governments, as commandeering state legislatures and executives is beyond the power of Congress.²⁶⁹ Third, matters must be decided by the Court or compacts if the adequate resolution of the controversy by Congress would require an unapportioned requisition from a state’s treasury in violation of the Revenue Clauses, though no such case has been brought to date.

In light of this pre-eminence of federal common law over Acts of Congress as to certain matters, the Court has adopted and

266. *Kansas v. Colorado II*, 206 U.S. 46, 97 (1907).

267. *Virginia v. West Virginia*, 220 U.S. 1, 27 (1911) (citing *Kansas v. Colorado II*, 206 U.S. 46, 82–84 (1907)).

268. *Kansas v. Colorado II*, 206 U.S. 46, 95-96 (1907) (“Now the question arises between two States, one recognizing generally the common law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court.”).

269. *See Missouri v. Illinois*, 180 U.S. 208, 240-241 (1901) (“An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri.”).

applies a precautionary principle to all state controversy cases. This doctrine was first announced by Justice Holmes in *Missouri v. Illinois*.²⁷⁰ Justice Holmes noted concern over the class of cases that,

[do] not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States sanctioned by the legislature of the United States.²⁷¹

Such cases pose “difficulties in the way of establishing such a system of law” that, while they would “not be insuperable, . . . would be great and new.”²⁷² Accordingly, the Court adopted the requirement that in all state controversy cases “[b]efore this court . . . intervene[s] the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.”²⁷³

270. *Missouri v. Illinois*, 200 U.S. 496, 519-522 (1906).

271. *Id.* at 520; see Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 941 (1997) (“Essentially, Holmes concluded that the only possible source of law was the provision of the Constitution granting jurisdiction to the Court over such disputes, and the necessity of applying legal rules which would not be subject to revision by the legislatures of either state.”).

272. *Missouri v. Illinois*, 200 U.S. at 520.

273. *Id.* at 521; see, e.g., *New York v. New Jersey*, 256 U.S. 296, 309 (1921) (“[W]e come to consider the evidence introduced, but subject to the rule that the burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.” (citing *Missouri v. Illinois*, 200 U.S. 496)); *New York v. New Jersey*, 256 U.S. 296, 312-13 (1921) (“Considering all of this evidence, and much more which we cannot detail, we must conclude that the complainants have failed to show by the convincing evidence which the law requires that the sewage which the defendants intend to discharge into Upper New York Bay, even if treated only in the manner specifically described in the stipulation with the United States Government, would so corrupt the water of the Bay as to create a public nuisance by causing offensive odors or unsightly deposits on the surface or that it would seriously add to the pollution of it.”).

Rather than attempting to apply Justice Holmes's precautionary principle to only those classes of cases in which the rule announced could not be displaced by the sole Act of Congress, the Court seems to apply the principle unless it is absolutely clear that the only issue to be decided is one for which Congress can displace the Court's decision. Thus, in the nonnavigable water appropriation cases, the Court has not determined whether Congress does or does not have the power to apportion nonnavigable waters. Rather, the Court proceeds as if the Court is fashioning law that may only be preempted by compact. In contrast, the Court resolved the three escheat property cases without any special precaution because Congress could obviously supplant the Court's decisions (and indeed in one instance did so).²⁷⁴

The Court also adopts another measure of precaution aside from that suggested by Justice Holmes. The Court consistently urges states to form compacts to resolve disputes.²⁷⁵ Indeed, one gets the sense from the cases that once states began to heed this advice the Court has relaxed its application of the precautionary principle in reliance on the availability of compact. This is sensible because the Court was uncertain at the time of *Missouri*

274. *Delaware v. New York*, 507 U.S. 490, 510 (1993); *Texas v. New Jersey*, 379 U.S. 674 (1965); *Pennsylvania v. New York*, 407 U.S. 206 (1972) (decision overruled by 12 U.S.C. §§ 2501-2503 as discussed in *Delaware v. New York*, 507 U.S. 490, at 510).

275. See, e.g., *Colorado v. Kansas*, 320 U.S. 383, 392 (1943) ("The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power."); *Washington v. Oregon*, 214 U.S. 205, 218 (1909) ("We submit to the States of Washington and Oregon whether it will not be wise for them to pursue the same course, and, with the consent of Congress, through the aid of commissioners, adjust, as far as possible, the present appropriate boundaries between the two States and their respective jurisdiction.").

v. Illinois whether compacts preempt federal common law, as Justice Holmes noted, and this is now well established.

VI. AIR POLLUTION CONTROVERSIES BETWEEN STATES

This final Section addresses the prospects of filing an interstate air pollution complaint in the Supreme Court for resolution under the Court's original and exclusive jurisdiction to resolve "controversies between two or more states" similar to a case unsuccessfully brought against individual sources by North Carolina in *North Carolina v. Tennessee Valley Authority*.²⁷⁶ No controversy between states over air pollution has ever been litigated. Nevertheless, application of the forgoing analysis of the Court's plenary jurisdiction over state controversies demonstrates that states may bring air pollution suits against other states and that only compacts can displace these interstate actions.

A. Downwind States May Bring Air Pollution Controversy Suits

Air pollution travels across state boundaries. Emissions of sulfur dioxide and nitrogen oxides into the atmosphere in one state can lead to acid rain in other states. Emissions of mercury and particulate matter in one state can lead to negative health consequences and environmental impacts in other states. And the prevailing winds leave some states more subject to interstate air pollution than others, the so-called downwind states, and others less subject to interstate air pollution, the so-called upwind states.²⁷⁷ The Court has consistently recognized state actions seeking protection of environmental resources.²⁷⁸ To date, the Court has recognized its jurisdiction over suits seeking judicial protection of navigation, land, and water—the protection of air is no great leap; however, no state has ever filed a bill of complaint against another state for air pollution. Rather, states have so far

276. 615 F.3d 291 (2010).

277. Robert De C. Ward, *The Prevailing Winds of the United States*, 6 ANNALS ASS'N AM. GEOGRAPHERS 99, 103, 106 (1916) (showing several states are generally downwind in both summer and winter).

278. See *supra* Part III.B.

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filed two suits under the Court's non-exclusive original jurisdiction against individual emitters.²⁷⁹

In the first state suit against individuals under the Court's original jurisdiction, Georgia filed a bill of complaint against the Tennessee Copper Company and the Ducktown Sulphur, Copper, & Iron Company seeking "to enjoin the defendant copper companies from discharging noxious gas from their works in Tennessee over the plaintiff's territory."²⁸⁰ The Court, per Justice Holmes, held Georgia properly stated a claim under federal common law because,

[i]t is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.²⁸¹

On the merits the Court held against the copper companies and awarded Georgia injunctive relief.²⁸² In the second suit against

279. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238-39 (1907) (holding copper companies liable for sulphur dioxide emissions); *see also* *Georgia v. Tenn. Copper Co.*, 237 U.S. 474 (1915); *Georgia v. Tenn. Copper Co.*, 237 U.S. 678 (1915); *Georgia v. Tenn. Copper Co.*, 240 U.S. 650 (1916); *Georgia v. Tenn. Copper Co.*, 304 U.S. 546 (1938); *Georgia v. Tenn. Copper Co.*, 305 U.S. 565 (1938); *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 116 (1972) (discretionary denial of leave to file).

280. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907).

281. *Id.* at 238.

282. *Id.* at 238-39 ("[T]he defendants generate in their works near the Georgia line large quantities of sulphur dioxide which becomes sulphurous acid by its mixture with the air. It hardly is denied, and cannot be denied with success, that this gas often is carried by the wind great distances and over great tracts of Georgia land. On the evidence the pollution of the air and the magnitude of that pollution are not open to dispute . . . [W]e are satisfied, by a preponderance of evidence, that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within [Georgia], as to make out a case within the requirements of *Missouri v. Illinois* . . .").

individuals, the Court exercised its discretion to deny leave to file a bill under the Court's nonexclusive jurisdiction.²⁸³

The state air pollution plaintiff record is one win on the merits and one discretionary denial of leave to file a bill. The outcome in the first suit strongly indicates that a federal common law air quality protection suit may be brought under the Court's plenary state controversy jurisdiction. And as lower courts do not have jurisdiction over controversies between states, discretionary denial is far less likely in a suit brought by states against states than in a suit brought by states against individuals. The Court recently held that the Clean Air Act displaces federal common law air quality protection suits brought by states against individuals.²⁸⁴ This Article argues below in Part V.B. that this holding does not apply to controversies between states and for now proceeds on this assumption.

A recent unsuccessful state law nuisance suit filed by North Carolina against the Tennessee Valley Authority in a federal district court demonstrates the demand for, and amplifies the importance of, the Supreme Court as a forum for the resolution of interstate air pollution controversies.²⁸⁵ North Carolina's suit alleged the Tennessee Valley Authority's emissions of sulfur dioxide, nitrogen oxides, mercury, and particulate matter from its coal plants constituted a public nuisance under state law and sought an injunction requiring emissions reductions.²⁸⁶ The district court granted an injunction, but the Court of Appeals for the Fourth Circuit reversed on appeal in 2010. The Fourth Circuit held that the Clean Air Act preempts downwind state nuisance law and that a defendant's compliance with permits issued under state implementations of the Clean Air Act is a bar to claims under source state nuisance law absent a showing of negligence.²⁸⁷ The merits of the decision of the Fourth Circuit in

283. *Washington v. Gen. Motors Corp.*, 406 U.S. at 116.

284. See *North Carolina v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010).

285. *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010).

286. Complaint at 1, 4, *North Carolina v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486 (W.D.N.C. 2006) (No. 1:06CV20). The bill of complaint in *Wisconsin v. Illinois* served as a model for the last two sentences.

287. *North Carolina v. Tenn. Valley Auth.*, 615 F.3d at 308-10.

this case are beyond the scope of this Article, but its decision—when combined with the Supreme Court’s holdings that the Clean Air Act displaces federal common law suits against individual sources—leaves the downwind states in the Fourth Circuit without recourse against individual sources of air pollution in upwind states apart from federal statutory remedies under the Clean Air Act.²⁸⁸ Those remedies are of little use to North Carolina and other downwind states that seek greater protection from air pollution than the Clean Air Act offers.²⁸⁹

This Section will briefly outline how to refashion North Carolina’s complaint in *North Carolina v. Tennessee Valley Authority* into a viable bill of complaint against other states seeking protection of a downwind state’s air quality from interstate pollution. For North Carolina and other downwind states to obtain judicial protection of its air quality from interstate pollution under federal common law in the Supreme Court, the states must (1) allege great loss or serious injury;²⁹⁰ (2) file a bill alleging facts clearly sufficient to call for relief;²⁹¹ (3) demonstrate an Article III, Section 2 controversy between states;²⁹² (4) seek relief against and for states, not just individuals;²⁹³ and (5) prove the claim clearly and fully.²⁹⁴

288. *North Carolina v. Tenn. Valley Auth.*, 439 F. Supp. at 497.

289. See *North Carolina v. Tenn. Valley Auth.*, 615 F.3d at 307 (“North Carolina is seeking a Court order requiring TVA to control its emissions to levels similar to those required for coal-fired power plants in North Carolina by the North Carolina Clean Smokestacks Act on a similar timetable.” (quoting a press release from 2006)).

290. *Missouri v. Illinois*, 200 U.S. 496, 521 (1906) (“Before this court ought to intervene the case should be of serious magnitude”); *Alabama v. Arizona*, 291 U.S. 286, 291-292 (1934) (“Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent The facts alleged are not sufficient to warrant a finding that the enforcement of the statutes of any defendant would cause Alabama to suffer great loss or any serious injury.”).

291. *Alabama v. Arizona*, 291 U.S. at 291-292 (1934) (“A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor.”).

292. See *supra* Part IV.A.a–b.

293. *Id.*

294. *Missouri v. Illinois*, 200 U.S. 521. (1906) (“Before this court ought to intervene the case should be . . . clearly and fully proved”).

Using the bill of complaint filed in *Wisconsin v. Illinois* and the complaint in *North Carolina v. Tennessee Valley Authority*, and in light of the nature of a downwind state's suit against upwind states, an appropriately modest prayer for relief at the outset of a bill of complaint would be as follows:

Plaintiff, the State of ____ ("the State"), respectfully requests leave to file this bill of complaint in equity against defendant ____ ("the Defendant") to address emissions of air pollution from coal-fired electric generating units ("EGUs") installed in electric generating stations ("power plants") located in the Defendant's territory that have in the past significantly contributed, and continue to significantly contribute, to substantial adverse effects on the health and welfare of citizens of the State, damage to the State's natural resources and economy, and harm to the State's finances. The Defendant is inequitably permitting the emission of excessive quantities of air pollution into the atmosphere thereby threatening great losses upon the State and violating the State's sovereign rights. The State prays that this Court issue necessary and appropriate orders to gradually restore the just rights of the State in order to avoid so far as might be the possible the economic consequences which the Defendant has subjected itself and its citizens by permitting the expenditures of great sums on the construction of power plants within its territory.²⁹⁵

States can file bills of complaint on their own behalf as well as on behalf of the citizenry of the states as *parens patriae*.²⁹⁶ In its complaint against the Tennessee Valley Authority, North Carolina filed its claim in just these terms:

North Carolina is a sovereign State of the United States of America. It brings this cause of action on its own behalf to protect State property, resources, and revenue, as *parens patriae* on behalf of its citizens and residents to protect their health and

295. See Complaint at 1, *North Carolina v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486 (W.D.N.C. 2006) (No. 1:06CV20).

296. See *supra* Part IV.A.a. The requirements for state and citizenry injury in an air pollution suit are discussed *infra* Part V.A.d.

well-being, and to protect those natural resources held in trust by the State.²⁹⁷

In filing against upwind states, this portion can be used nearly verbatim, substituting only the name of the downwind state, though additional pleading will be necessary as discussed below.

States can file bills of complaint against other states for the other states' own actions, as well as the actions of the other states' citizenry.²⁹⁸ For displacement reasons, downwind states should not bring suit against upwind states in their capacities as owners and commercial operators of any of the listed facilities, but downwind states should still assert both state action and citizenry action to properly affect the substitution of states for individual sources. For both assertions, the bill must identify the upwind states and the sources of air pollution in their respective territories.²⁹⁹ A downwind state should then assert its claims against the upwind states as (1) issuers of permits to the listed facilities; and (2) *parens patriae* of the listed facilities.³⁰⁰ The requirements to plead state responsibility are addressed below, but this will suffice for the description of the state defendants in the bill of complaint. Downwind states should consider filing

297. Complaint at 2, *North Carolina v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486 (W.D.N.C. 2006) (No. 1:06CV20). The bill of complaint in *Wisconsin v. Illinois* served as a model for the last two sentences.

298. See *supra* Part IV.A.b. The requirements for state responsibility in an air pollution suit are discussed *infra* Part V.A.d.

299. In its complaint against the Tennessee Valley Authority, North Carolina lists only the entity's facilities located in the three states. Complaint at 3, *North Carolina v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486 (W.D.N.C. 2006) (No. 1:06CV20). To this, North Carolina should add additional private and state owned facilities.

300. As discussed *supra* in Part IV.A.b. and *infra* in Part V.A.d., it is unclear whether the Court recognizes jurisdiction in cases like *Idaho v. Oregon* and *Vermont v. New York* on account of state permitting or on a theory of *parens patriae* state responsibility. This Article argues the latter is the better theory, but the matter should be pressed in the alternative until explicitly decided. On the permitting score, see *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 309-10 (4th Cir. 2010) ("TVA's electricity-generating operations are expressly permitted by the states in which they are located. . . . An activity that is explicitly licensed and allowed by Tennessee law cannot be a public nuisance.").

separate suits against each upwind state rather than joining the suits together to avoid multifariousness problems.³⁰¹

As for the Court's jurisdiction, a downwind state's bill of complaint should state that the Court has original and exclusive jurisdiction over this "controversy between two or more states" under Article III, Section 2, Clause 2 and 28 U.S.C. 1251(a). The North Carolina complaint against the Tennessee Valley Authority included pleadings on venue, but this is superfluous in the Supreme Court, as would be any allegations of personal jurisdiction such as those included in the *American Electric Power Co. v. Connecticut* complaint.³⁰² But, in order to make out a claim of the existence of a controversy "between two or more states" within the meaning of the Constitution, a downwind state's bill of complaint must allege that the downwind state is injured directly or through its citizenry by the acts of the upwind defendant states or through their respective citizenry.³⁰³

In its litigation against the Tennessee Valley Authority, North Carolina pled injury both directly and through its citizenry, and a downwind state can make the same allegations of injury in a bill of complaint against states filed in the Supreme Court. North Carolina generally alleged that the emissions of sulfur dioxide, nitrogen oxides, mercury, and particulate matter "harm human health, safety, comfort, the environment, and the economy . . . in North Carolina" and resulted in "increased financial burdens to the State."³⁰⁴ The state specifically alleged the following:

(1) the emissions are "prejudicial to the health, comfort, safety, and property of North Carolina's citizens at large and to the economy, finances, and natural resources of the State of North Carolina;"

301. *Alabama v. Arizona*, 291 U.S. 286, 290–91 (1934) (holding bill against states with differing statutes on Commerce Clause grounds for restricting the sale of convict labor multifarious).

302. Complaint, *North Carolina v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486 (W.D.N.C. 2006) (No. 1:06CV20).

303. See *supra* Part IV.A.a–b; U.S. CONST. art. III, § 2, cl. 2.

304. Complaint at 4, *North Carolina v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486 (W.D.N.C. 2006) (No. 1:06CV20).

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(2) the fine particulate matter emissions cause “citizens of North Carolina” to suffer from “premature death, cardiovascular disease (including heart attacks and cardiac arrhythmia), aggravation of respiratory disease (including asthma), decreased lung function, changes to lung tissue and structure, and other respiratory effects;”

(3) the emissions of nitrogen oxides contribute “to the formation of ground-level ozone, which causes North Carolina citizens to experience adverse health effects, including chest pains, aggravated asthma, shortness of breath, reduced lung function, coughing, and throat irritation;”

(4) emissions of mercury eventually contaminate “lakes, rivers, and estuaries in North Carolina” where they “chemically transform into methylmercury” that “becomes increasingly concentrated as it travels up the food chain, reaching concentrations in fish tissue that can be toxic to those who consume affected fish” because they may cause “a variety of developmental neurological abnormalities;”

(5) the negative health consequences of the emissions lead to “increased costs to the citizens of the State from increased hospital visits and other medical costs and from absence from work.”

(6) the emissions of sulfur dioxide, nitrogen oxides, and particulate matter “contribute to haze that markedly decreases visibility in North Carolina, including in the State’s treasured State parks” and “degrades the quality of the environment for the citizens of North Carolina and visitors to the State;”

(7) the emissions of sulfur dioxide and nitrogen oxides “contribute to the deposition of acid compounds in North Carolina” that “causes the acidification of surface waters, including lakes, streams and ponds, and damages forests in North Carolina;”

(8) these emissions “contribute to loss of revenue for the State and a substantial increase in expenditures for the State to combat and remedy the effects” of the emissions.³⁰⁵

The sufficiency of these harms for a controversy between states is evidenced by the Court’s recognition of jurisdiction over the controversies in *Idaho v. Oregon*, the suit on behalf of Idaho salmon fisherman, and *Vermont v. New York*, the suit alleging

305. *Id.* at 4-6.

pollution of Lake Champlain and Ticonderoga Creek.³⁰⁶ As for the sufficiency of air pollution injuries to states, the bill of complaint in *Georgia v. Tennessee Copper Co.* included a subset of these alleged injuries and the Court recognized its jurisdiction to resolve the controversy between the state and the source of the emissions on the ground that “the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain” and “has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”³⁰⁷ And the harms alleged by North Carolina are more immediate than the threatened loss of sovereign territory caused by global warming that five Justices recognized as sufficient in *Massachusetts v. EPA*.³⁰⁸

The substantive sufficiency of these alleged injuries to a downwind state and its citizenry is, however, a different matter than the way in which they must be pled. The Court has long required that bills of complaint in state controversies allege facts that “are clearly sufficient,” akin to the *Twombly-Iqbal* heightened pleading standard.³⁰⁹ This presumably applies to all necessary components of a state controversy complaint, including injury. Therefore, downwind states should offer greater specificity and detail of its injury, perhaps by offering quantitative measures of the harms as previous successful state complaints have.³¹⁰

306. *Idaho v. Oregon* (1975); *Vermont v. New York* (1971).

307. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

308. *Massachusetts v. EPA*, 549 U.S. 497, 518–19 (2007).

309. *Alabama v. Arizona*, 291 U.S. 286, 291–92 (1934) (“A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor.”).

310. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 736 n.12 (1981) (“As alleged in the complaint, the annual increase in natural gas costs directly associated with the First-Use Tax with respect to each of the plaintiff States is as follows: Maryland (\$60,000); New York (\$300,000); Massachusetts (\$25,000); Rhode Island (\$25,000); Illinois (\$270,000); Indiana (\$70,000); Michigan (\$650,000); Wisconsin (\$70,000); New Jersey (\$20,000) . . . Total direct injuries to the plaintiff States was estimated to be \$1.5 million, and injury to the citizen consumers was estimated at \$120 million.”); *see also* Brief for Fourteen States as Amici Curiae Supporting Petitioner, *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291 (2010) (No. 10-997) (noting “that emissions from the plants at issue

As demonstrated in Part IV.A.b, states must answer for injuries to a complainant state or its citizenry that are fairly traceable to either the sovereign actions of the state, or the actions of the state's citizenry in which the state has a sufficient interest that it could bring a suit to protect the citizenry as *parens patriae*. As discussed below, downwind state suits against upwind states in their capacity as owners and operators of sources of emissions are probably preempted by the Clean Air Act. But this still leaves open suits against upwind states as (1) issuers of permits; and (2) *parens patriae* of the emissions of the citizenry.

This Article takes a dim view of the permitting theory of liability, but downwind states cannot afford to omit this theory in a bill of complaint unless it is explicitly rejected by the Court. Accordingly, downwind states should include allegations of state permitting of the emissions. Taking the statement discussed above in the Court's summary of the bill of complaint in *Colorado v. Kansas* as a model, downwind state complaints should allege that upwind states are "acting . . . through private persons thereto licensed" to emit air pollutants that have caused the downwind state's injuries.³¹¹

The better argument for upwind state responsibility for downwind state injuries is that the upwind states have significant *parens patriae* interests in the emissions activity of their respective citizenry. As discussed in Part IV.A.b, this theory of defendant state responsibility was first suggested in *Missouri v. Illinois* and seems to underlie the Court's recognition of the state responsibility for private appropriation of water in *Wyoming v. Colorado*, private well boring and irrigation in *Washington v. Oregon*, private water pollution in *Vermont v. New York*, and private fishing in *Idaho v. Oregon*.³¹² Of these, the

annually result in the premature deaths of 99 North Carolinians, 49 New Yorkers, and 27 Marylanders").

311. *Kansas v. Colorado*, 185 U.S. 125, 145-46 (1902). As there are significant arguments against this theory of defendant state responsibility, it should be clearly set apart from other theories of defendant state responsibility.

312. *Missouri v. Illinois*, 180 U.S. 208, 242 (1901); *Wyoming v. Colorado*, 259 U.S. 419, 456 (1922); *Washington v. Oregon*, 297 U.S. 517, 523-25 (1936); *Vermont v. New York*, 417 U.S. 270 (1974); *Idaho v. Oregon*, 444 U.S. 380, 385 (1980).

facts of *Vermont v. New York* are especially compelling — the Court recognized its jurisdiction to resolve a controversy between the states primarily over emissions from just one private entity, the International Paper Company. According to the theory of these cases, upwind states may be sued so long as they have a sufficient interest in the activities of their respective citizenry that result in emission that cause injury to states downwind.

It would be difficult to conceive of how an upwind state could disclaim its significant interests in the activities that result in interstate air pollution. Emission controls are costly, and these costs are passed on to consumers, including the state itself. If the market will not bear these cost increases, production may be reduced. For these reasons, Alabama, an upwind state, successfully intervened on appeal in *North Carolina v. Tennessee Valley Authority*, and its arguments in favor of intervention are equally valid in favor of holding states responsible for the emissions of their citizenry.³¹³

B. Only Individual Source Suits Are Displaced by the Clean Air Act

As there are no air pollution compacts in force between the states, federal common law air pollution controversy suits are not displaced and may be filed in the Supreme Court by downwind states against upwind states, notwithstanding the Clean Air Act and the Court's 2011 holding in *American Electric Power Co. v. Connecticut* that suits by states against individual sources are displaced by the Clean Air Act.

Suits that might otherwise be maintained under federal common law may be displaced by compacts and Acts of Congress that supply the rule of decision in the underlying controversy between the states. As discussed in Part IV.C, compacts entered into by states with the assent of Congress *always* provide the rule of decision in controversies between compacting states in those matters to which they pertain but the unilateral Acts of Congress

313. State of Alabama's Motion to Intervene, *North Carolina v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623) ("Alabama has important sovereign interests at stake"); *North Carolina v. Tennessee*, No. 09-1623 (4th Cir. July 20, 2009) (granting Alabama's motion to intervene).

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only *sometimes* provide the rule of decision in controversies between states. Thus, for Acts of Congress to displace suits between states, there is a threshold inquiry regarding the constitutional power of Congress to supply the rule of decision.³¹⁴

Congress may constitutionally regulate the emissions of individual sources of interstate air pollution under the Commerce Clause and does so by way of the provisions of the Clean Air Act. After *Garcia* reversed *National League of Cities*, Congress may even regulate the proprietary emissions of individual state sources. But under the Court's interpretation of the Constitution in *New York v. United States* and *Printz v. United States*, Congress may not commandeer the states by directly compelling the states to regulate air pollution. Thus, the rule of decision in a suit between a downwind state and an upwind state for the latter's proprietary emissions may be supplied by the unilateral Acts of Congress. For this reason, federal common law of nuisance suits even between states are vulnerable to displacement, and the Court's recent decision in a federal common law of nuisance suit between states and private sources of emissions suggests they have indeed been displaced by the Clean Air Act.³¹⁵

In *American Electric Power Co. v. Connecticut*, California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin joined with New York City,³¹⁶ together

314. As for air pollution compacts, there are none. See CAROLINE N. BROWN, ET. AL., *THE EVOLVING USE AND CHANGING ROLE OF INTERSTATE COMPACTS* 311, § 9.4.5 (2006) (noting failed attempts to enact interstate air pollution compacts). This is so despite great scholarly interest in the potential of compacts to resolve air pollution controversies in the late 1960s. See generally, *Interstate Agreements for Air Pollution Control*, 1968 WASH. U. L. REV. 260 (1968); *A Model Interstate Compact for the Control of Air Pollution*, 4 HARV. J. LEGIS. 369 (1966–1967); Lewis C. Green, *State Control of Interstate Air Pollution*, 33 LAW & CONTEMP. PROBS. 315 (1968); Leonard A. Weakley, *Interstate Compacts in the Law of Air and Water Pollution*, 3 NAT. RESOURCES LAW. 81 (1970).

315. However, as will be seen in a moment, this does not apply when the suit seeks relief from the aggregate emissions of the respective upwind states, not individual sources, because Congress cannot supply the rule of decision, and in the alternative, because Congress cannot afford the “same relief” as the Court and compacts can.

316. New Jersey and Wisconsin stopped participating before the case reached the Court presumably because new governors were elected.

with three land trusts who had filed a separate complaint,³¹⁷ filed a complaint against American Electric Power Company, Inc., a wholly owned subsidiary, Southern Company, Xcel Energy Inc., Cinergy Corporation, and the Tennessee Valley Authority.³¹⁸ The plaintiffs alleged the defendants “are the five largest emitters of carbon dioxide in the United States” and that “[t]heir collective annual emissions of 650 million tons constitute 25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities, . . . and 2.5 percent of all anthropogenic emissions worldwide.”³¹⁹ The plaintiffs claimed that “[b]y contributing to global warming, the plaintiffs asserted, the defendants’ carbon-dioxide emissions created a ‘substantial and unreasonable interference with public rights,’ in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law.”³²⁰ The plaintiffs requested “injunctive relief requiring each defendant ‘to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.’”³²¹

On appeal of the Second Circuit’s holding that the claims could proceed, the Supreme Court unanimously reversed and held the federal common law nuisance claim by the states, a city, and three land trusts against the four private parties and the Tennessee Valley Authority was displaced by the provisions of the Clean Air Act because “[t]he Act itself . . . provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law,” and “[t]here is no room for a parallel track.”³²² This displacement holding would extend to a suit by a state against another state for the upwind state’s proprietary emissions from individual sources.

317. *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2533 n.3 (2011) (“Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire.”).

318. *Id.* at 2534 n.5.

319. *Id.* at 2534.

320. *Id.* at 2534.

321. *Id.* at 2534.

322. *American Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. at 2530–31.

But the Court's holding of displacement does not limit the right of states to bring suits against one another under federal common law so long as the suit is not seeking injunctions against individual sources and instead seeks protection from the excessive aggregate emissions of the defendant upwind state. The Clean Air Act displaces federal common law resolution of controversies between states challenging emissions of individual sources, but not entire states because there are constitutional limits on congressional power recognized in *New York v. United States* and *Printz v. United States*.³²³ As "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States," Congress may not supply the rule of decision in a controversy between states unless the Congress has plenary power over the subject matter, whether that be navigable waters or proprietary emissions.³²⁴ Accordingly, the effect of the Clean Air Act is limited to displacement of suits for individual emissions, not state-wide emissions.

Air pollution controversy suits are not displaced by the Clean Air Act even if the Court were to hold that Congress could supply the rule of decision. The displacement doctrine articulated by Justice Ginsburg in *American Electric Power Co. v. Connecticut* in an opinion joined by every participating justice would not reach a suit between states over aggregate upwind state emissions because the Court can provide remedies that Congress may not under *New York v. United States*.³²⁵ As Justice Stevens noted in dissent in *New York v. United States*, that decision holds Congress may not provide—in the words of Justice Ginsburg in *American Electric Power Co. v. Connecticut*—"the same relief" that state plaintiffs may seek from the Supreme Court.³²⁶ Thus, the *New York v. United States* limit on the power of Congress to regulate states also limits the displacement of federal common law in cases "between two or more states" in which states seek

323. *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

324. *New York v. United States*, 505 U.S. 144, 166 (1992).

325. *Id.* at 145.

326. *New York v. United States*, 505 U.S. 144, 212 (1992) (Stevens, J., dissenting).

relief that Congress may not constitutionally provide.³²⁷ But the simpler route to the same conclusion is discussed above: namely that Congress does not have the constitutional power to supply the rule of decision, so displacement is not possible as a threshold matter.

VII. CONCLUSION

Suits between states in the Supreme Court seeking resolution of environmental controversies have already played a significant role in the apportionment and protection of this nation's natural resources. For the Court to play a greater role in the future, the states for whom this forum was provided in exchange for surrender of important sovereign powers must invoke the jurisdiction in novel controversies. If past cases are any indication, the Court will heed the call.

327. *New York v. United States*, 505 U.S. 144, 179 (1992).

APPENDIX OF SUITS BETWEEN TWO OR MORE STATES

This appendix attempts, as others have before, to document in one place the reported history of controversies between states litigated in the Supreme Court.³²⁸ It follows the practice of previous compilations of omitting “[m]inor procedural orders such as allowance of additional time in which to plead,” assignment of masters, receipt of records from masters, and “receipt of post-decree progress reports.”³²⁹ The cases are separated between those properly brought and those in which the court denied leave to file a bill or dismissed the bill on demurrer. The cases are dated and ordered according to first reported entry in the United States Reports except that cases after October of 1961 are ordered by docket number.³³⁰ Supplemental and contextual information not contained within the decisions and notable commentary is provided in footnotes when appropriate. It is worth recompiling these cases as there is no widely available comprehensive

328. JAMES BROWN SCOTT, *JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION: AN ANALYSIS OF CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES*, at 537–41 (controversies between states organized by state through 1918); CHARLES WARREN, *THE SUPREME COURT AND SOVEREIGN STATES*, at 113–15 (controversies between states through 1923); Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 MAIN L. REV. 185, 216–42 (1992) (all original jurisdiction litigation between 1961 and 1992); Note, *The Original Jurisdiction of the Supreme Court*, 11 STAN. L. REV. 665, 701-19 (1959) (all original jurisdiction litigation through 1958). There have been two compilations of opinions. SCOTT, *ANALYSIS* (select opinions through 1918); JAMES BROWN SCOTT, *JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION: CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES* (1918) (all cases through 1918). Several authors have summarized many of the cases. SCOTT, *ANALYSIS*; WARREN; JOSEPH F. ZIMMERMAN, *INTERSTATE DISPUTES: THE SUPREME COURT'S ORIGINAL JURISDICTION* (2006). Zimmerman, a Professor of Political Science, erroneously asserts at the outset of his contribution that “no book and relatively few articles have been published on the subject of the court’s original jurisdiction.” ZIMMERMAN at x. Another author has attempted to compile a win-loss record for each state. JAY WEXLER, *THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS* (2012).

329. *The Original Jurisdiction of the Supreme Court*, *supra* note 328, at 701.

330. When the first reported entry is a procedural matter that would otherwise be excised, it has been included.

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appendix of the cases. Further, this appendix uses a tabular display to allow more in depth summaries than are provided when the information is provided in citation parentheticals. Interested parties and future compilers may contact the author to obtain the data contained herein in an easily accessible format.

A. Controversies Between States Properly Brought Before the Court

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| 1 | New York v. Connecticut | 4 U.S. 1 (1799) | New York filed a bill of complaint against Connecticut and private landowners seeking an injunction against Connecticut ejectment proceedings on the ground that the land belonged to New York in consequence of a 1683 agreement between the two states. The Court denied the injunction because “New York was not a party to the [ejectment] suits below nor interested in the decision of those suits.” ³³¹ |
| | | 4 U.S. 3 (1799) | |
| | | 4 U.S. 6 (1799) | |
| 2 | New Jersey v. New York | 28 U.S. 461 (1830) | New Jersey filed a bill of complaint against New York disputing the “title to and sovereignty over the waters of New York Harbor and Hudson River.” ³³² After a heated jurisdictional dispute, the states “settled their dispute by a compact assented to by Congress.” ³³³ |
| | | 30 U.S. 284 (1831) | |
| | | 31 U.S. 323 (1832) | |
| 3 | Rhode Island v. Massachusetts | 32 U.S. 651 (1833) | Rhode Island filed a bill of complaint against Massachusetts seeking settlement of its northern boundary. The Court decided in favor of Massachusetts on the merits of the boundary dispute after an extensive resolution of the Court’s power to decide the boundary. |
| | | 36 U.S. 226 (1837) | |
| | | 37 U.S. 657 (1838) | |
| | | 37 U.S. 755 (1838) | |
| | | 38 U.S. 23 (1839) | |
| | | 39 U.S. 210 (1840) | |
| | | 40 U.S. 233 (1841) | |
| | | 45 U.S. 591 (1846) | |

331. *New York v. Connecticut*, 4 U.S. 3, 4 (1799). Connecticut did not appear because the legislature had not met, rather the attorney for the individual plaintiffs in the ejectment case appeared and defended Connecticut court proceedings.

332. WARREN, *supra* note 328, at 39 (“This dispute had given rise to much bitterness of feeling and retaliatory legislation between the States; and there had been forcible seizures and practically armed conflict over the rights of various steamboat owners to run their boats upon these waters—so that William Wirt, in arguing the great Steamboat Monopoly Case in 1824, said: ‘Here are three States almost on the eve of war,’ and that if the Court did not interpose its friendly hand, ‘there would be civil war.’”).

333. WARREN, *supra* note 328, at 40.

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| 4 | Missouri v. Iowa | 48 U.S. 660 (1849) | Missouri filed a bill of complaint against Iowa seeking settlement of its northern boundary. The Court decided in favor of Iowa on the merits of the dispute. The Court perpetually enjoined and restrained each state from exercising jurisdiction beyond the boundary the Court established and appointed commissioners to mark the line the court established and to plant cast iron pillars every ten miles along the borders. ³³⁴ |
| | | 51 U.S. 1 (1850) | |
| | | 160 U.S. 688 (1896) | |
| | | 165 U.S. 118 (1897) | |
| 5 | Florida v. Georgia | 52 U.S. 293 (1850) | Florida filed a bill of complaint against Georgia seeking settlement of a portion of its northern boundary. The United States sided with Florida as to the location of the boundary and the attorney general moved “for leave to be heard on behalf of the United States.” This led to a heated split decision granting the motion to be heard. No further proceedings in this controversy are evident in the reports. |
| | | 58 U.S. 478 (1854) | |
| 6 | Alabama v. Georgia | 64 U.S. 505 (1859) | Alabama filed a bill of complaint against Georgia seeking settlement of its Chattahoochee River border with Georgia. The dispute turned on the interpretation of words of a contract of cession to the United States. The Court decided in Georgia’s favor. ³³⁵ |
| 7 | Kentucky v. Dennison | 65 U.S. 66 (1860) | Kentucky filed a bill of complaint against the governor of Ohio in his official capacity seeking a writ of mandamus commanding him to deliver a Cincinnati man indicted for assisting in the escape of a Kentucky slave. The Court held that the governor of Ohio could not be compelled to do so. |
| 8 | Virginia v. West Virginia | 78 U.S. 39 (1870) | Virginia filed a bill of complaint against West Virginia seeking to settle its boundary by attacking the validity of its purported cession of Berkeley and Jefferson counties to West Virginia on the grounds that Congress never expressly assented. The Court found Congress impliedly assented and held in favor of West Virginia. |

334. WARREN, *supra* note 328, at 41 (“Missouri at one time had called out 1500 troops and Iowa 1100, to defend their respective alleged rights. The conflict of claims was more serious, by reason of the fact that if Missouri prevailed, these 2000 square miles would become additional slave territory; if Iowa won, they would be free.”).

335. WARREN, *supra* note 328, at 42–43 (“[T]he Southern States, though having little confidence at that time in the political branches of the Government, were entirely content to leave the decision of some of their sovereign rights as States to the Supreme Judiciary. Hence, we have the remarkable spectacle of two states who, less than one year from the date of the decision, were to secede from the Union, accepting the decision of a Court under a Constitution which they were so soon to repudiate.”).

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| 9 | Missouri v. Kentucky | 78 U.S. 395 (1870) | Missouri filed a bill of complaint against Kentucky seeking to settle its Mississippi River boundary at Wolf Island. The Court held in favor of Kentucky. |
| 10 | South Carolina v. Georgia | 93 U.S. 4 (1876) | South Carolina filed a bill of complaint against Georgia, Secretary of War Alonzo Taft, and the chief and a lieutenant-colonel of the Army Corps of Engineers seeking an injunction against the obstruction of a channel of the Savannah River. The Court held the obstruction authorized by Congress under its commerce power notwithstanding pre-Constitution compact between the states prohibiting obstructions of the river. |
| 11 | Indiana v. Kentucky | 136 U.S. 479 (1890) | Indiana filed a bill of complaint against Kentucky seeking settlement of a portion of its southern border with Kentucky. Indiana and Kentucky each claimed jurisdiction over a two thousand acre tract north of the Ohio River. Kentucky claimed the tract was at one time an island in the Ohio River and Indiana claimed only a bayou had separated the tract from the mainland to the north. The Court held in favor of Kentucky. |
| | | 159 U.S. 275 (1895) | |
| | | 167 U.S. 270 (1897) | |
| 12 | Nebraska v. Iowa | 143 U.S. 359 (1892) | Nebraska filed a bill of complaint against Iowa seeking to settle its Missouri River boundary near Omaha where there were marked changes in the course of the main channel. The Court held that principles of accretion and avulsion apply and found on the merits that the sudden shift of the Missouri River was avulsion and the boundary did not change as a result. |
| | | 145 U.S. 519 (1892) | |
| 13 | Iowa v. Illinois | 147 U.S. 1 (1893) | Iowa filed a bill of complaint against Illinois seeking settlement of its Mississippi River boundary. Iowa argued the boundary to be the geometric middle and Illinois argued it to be the middle of the main channel. The Court held in favor of Illinois. |
| | | 151 U.S. 238 (1894) | |
| | | 202 U.S. 58 (1906) | |
| 14 | Virginia v. Tennessee | 148 U.S. 503 (1893) | Virginia filed a bill of complaint against Tennessee seeking to settle its southern boundary. Virginia claimed the boundary to be "on the parallel of thirty-six degrees and thirty minutes north" and Tennessee claimed the states had agreed to a different boundary without express congressional consent. The Court held in favor of Tennessee that Congress impliedly assented and the Court appointed commissioners to mark the boundary. The states then entered into a compact adjusting the line. |
| | | 158 U.S. 267 (1895) | |
| | | 177 U.S. 501 (1900) | |
| | | 190 U.S. 64 (1903) | |
| 15 | Missouri v. Illinois | 180 U.S. 208 (1901) | Missouri filed a bill of complaint against Illinois and the Sanitary District of Chicago complaining of the construction of an artificial channel from the Chicago River to the Des Plaines River such that sewage and waste from the Chicago River would ultimately |
| | | 200 U.S. 496 (1906) | |
| | | 202 U.S. 598 (1906) | |

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| | | | discharge into the Mississippi River to the injury of Missouri. The Court overruled a demurrer but dismissed the bill without prejudice after taking evidence and awarded costs to Illinois. |
| 16 | Kansas v. Colorado | 185 U.S. 125 (1902) 206 U.S. 46 (1907) | Kansas filed a bill of complaint against Colorado claiming its rights by prior appropriation to the use and enjoyment of Arkansas River water. The Court recognized the action in two opinions, but ultimately dismissed the petition without prejudice and invited Kansas to institute new proceedings “whenever it shall appear that, through a material increase in the depletion of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river.” ³³⁶ |
| 17 | South Dakota v. North Carolina | 192 U.S. 286 (1904) | South Dakota filed a bill of complaint against North Carolina, Simon Rothschilds, and Charles Salter seeking payment on ten repudiated state bonds issued by North Carolina secured by the stock of the North Carolina Railroad Company or in lieu of payment foreclosure on the stock. Private parties had donated the ten bonds to South Dakota with the hopes that a successful original suit would convince North Carolina to pay its obligations to private bond holders. The private defendants represented private owners of the bonds. North Carolina alleged they were included in the complaint as defendants as a means of evading the Eleventh Amendment. The Court held the private defendants were not necessary parties and were entitled to no relief. The Court held in favor of South Dakota and ordered North Carolina to pay the amount owed on the ten bonds, \$27,400, by the end of the year or the Marshall of the Supreme Court would foreclose the North Carolina Railroad Company Stock by sale from the United States Capitol steps. |
| 18 | Missouri v. Nebraska | 196 U.S. 23 (1904) 197 U.S. 577 (1905) | Missouri filed a bill of complaint against Nebraska seeking settlement of its Missouri River boundary. The dispute arose out of shift in the Missouri River over a twenty-four hour period. The Court held the shift was an avulsion and did not change the |

336. *Kansas v. Colorado II*, 206 U.S. 46, 117-18 (1907). WARREN *supra* note 28, at 47–48 (“[A] momentous question as to how far a State by instituting extensive irrigation works within its boundary could deprive another State of the water of a non-navigable river flowing from one State into the other, and could thus reduce much arable land in a neighboring State to a desert condition”).

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| | | | boundary between the states. |
| 19 | Louisiana v. Mississippi | 202 U.S. 1 (1906) 202 U.S. 58 (1906) | Louisiana filed a bill of complaint against Mississippi seeking settlement of its coastal boundary. The dispute arose out of conflicting congressional grants first giving Louisiana all islands within nine miles of its coast and then giving Mississippi all islands within eighteen miles of its shore. The Court held in favor of Louisiana. ³³⁷ |
| 20 | Virginia v. West Virginia | 206 U.S. 290 (1907) 220 U.S. 1 (1911) 231 U.S. 89 (1913) 234 U.S. 117 (1914) 238 U.S. 202 (1915) 241 U.S. 531 (1916) 246 U.S. 565 (1918) | Virginia filed a bill of complaint against West Virginia seeking a decree for an equitable proportion of the public debt of Virginia owed by West Virginia. The Court held that the Court had power to issue a remedy equivalent to execution of judgment but as Congress also has this power under the Compact Clause when the execution is in accord with a compact that it is the better course to give Congress the opportunity to exercise its power. |
| 21 | Washington v. Oregon | 211 U.S. 127 (1908) 214 U.S. 205 (1909) | Washington filed a bill of complaint against Oregon seeking settlement of its Columbia River boundary. The Court held in favor of Oregon that the center of the north channel continued to serve as the boundary. ³³⁸ |
| 22 | Missouri v. Kansas | 213 U.S. 78 (1908) | Missouri filed a bill of complaint against Kansas seeking settlement of a portion of its western boundary. Missouri claimed sovereignty over a four hundred acre island in the Missouri River west of its main channel on the ground that it lay east of the meridian boundary that existed before Congress extended Missouri's jurisdiction to the river. The court held that the intent of the adjustment was to make the river the boundary and so the accretion resulted in the cession of the territory to Kansas. |
| 23 | Maryland v. West Virginia | 217 U.S. 1 (1910) 217 U.S. 577 (1910) | Maryland filed a bill of complaint against West Virginia seeking settlement of its meridian boundary. The Court determined the boundary is the historically recognized albeit inaccurate line. |

337. WARREN *supra* note 328, at 43–44 (“By far the most important boundary case . . . involved great Financial interests—the oyster fisheries in the waters between the two States. The controversy had been pending for ten years; each State had appointed armed patrols, and by law and force sought to exclude fishermen of the other States . . . The situation was precisely that of an economic conflict in mutually claimed territory, which, if occurring between nations of Europe or elsewhere, would be very probable cause of war.”)

338. WARREN *supra* note 328, at 44 (“[A] suit . . . involving the channel of the Columbia River presented [an] inflamed boundary question, the decision of which might leave one or the other State in control of the very valuable salmon fisheries.”). The controversy was ultimately settled by compact.

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| 24 | Arkansas v. Tennessee | 32 S.Ct. 836 (1912) | Arkansas filed a bill of complaint against Tennessee seeking settlement of its Mississippi River boundary. The Court held in favor of Arkansas that the recognition of the principle of thalweg does not limit the application of the principle of avulsion. |
| | | 246 U.S. 158 (1918) | |
| | | 247 U.S. 461 (1918) | |
| 25 | North Carolina v. Tennessee | 235 U.S. 1 (1914) | North Carolina filed a bill of complaint against Tennessee Seeking a settlement of its eastern boundary. The Court determined and recognized the boundary established by the commissioners that were appointed by the states in 1821. |
| | | 240 U.S. 652 (1916) | |
| 26 | Wyoming v. Colorado | 243 U.S. 622 (1917) | Wyoming filed a bill of complaint against Colorado asserting appropriation rights against a diversion of the nonnavigable Laramie River and sought an injunction against Colorado and two corporate defendants. The Court held the rule of appropriation applies and entered an injunction against Colorado limiting the diversion of water to 15,500 acre-feet of water per year. Wyoming subsequently asserted Colorado was not complying with the Court's decree and successfully obtained an injunction ordering adherence to the decree. |
| | | 259 U.S. 419 (1922) | |
| | | 259 U.S. 496 (1922) | |
| | | 42 S. Ct. 587 (1922) | |
| | | 260 U.S. 1 (1922) | |
| | | 286 U.S. 494 (1932) | |
| | | 287 U.S. 579 (1932) | |
| | | 298 U.S. 573 (1936) | |
| | | 309 U.S. 627 (1940) | |
| | | 309 U.S. 572 (1940) | |
| | | 353 U.S. 953 (1957) | |
| 27 | New York v. New Jersey | 249 U.S. 202 (1919) | New York filed a bill of complaint against New Jersey and the Passaic Valley Sewerage Commissioners seeking an order enjoining the discharge of sewage into the Upper Bay of New York Harbor. The Court dismissed the bill without prejudice on the merits for failure to prove threat of injury by clear and convincing evidence. |
| | | 256 U.S. 296 (1921) | |
| 28 | Arkansas v. Mississippi | 250 U.S. 39 (1919) | Arkansas filed a bill of complaint against Mississippi seeking settlement of its Mississippi River boundary. The Court determined the boundary between the states to be the center of the main channel of the Mississippi River as it was prior to 1848 avulsion. |
| | | 252 U.S. 344 (1920) | |
| | | 40 S. Ct. 585 (1920) | |
| | | 256 U.S. 28 (1921) | |
| 29 | Georgia v. South Carolina | 39 S. Ct. 258 (1919) | Georgia filed a bill of complaint against South Carolina seeking settlement of its Savannah River, Tugaloo River, and Chatooga River boundary. The Court interpreted Article II of the Beaufort Convention to define the boundary between the states not according to the principle of thalweg but rather as the geometric middle of the stream where there are no islands and the geometric midway between islands and the South Carolina shore where there |
| | | 253 U.S. 477 (1920) | |
| | | 257 U.S. 516 (1922) | |
| | | 259 U.S. 572 (1922) | |

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| | | | are islands. The Court also determined that the islands of the Chattooga River are within Georgia's jurisdiction. ³³⁹ |
| 30 | Pennsylvania v. West Virginia | 39 S. Ct. 490 (1919) | Pennsylvania and Ohio each filed a bill of complaint against West Virginia seeking an injunction against enforcement of a West Virginia statute requiring producers of natural gas to give preference to West Virginia customers as a violation of the Commerce Clause. The Court entered the requested injunction over the objections of Holmes and Brandeis on the merits and McReynolds and Brandeis on jurisdiction. |
| | | 252 U.S. 563 (1920) | |
| | | 257 U.S. 620 (1922) | |
| | | 262 U.S. 553 (1923) | |
| | | 262 U.S. 623 (1923) | |
| | | 263 U.S. 350 (1923) | |
| | | 263 U.S. 671 (1923) | |
| 31 | Minnesota v. Wisconsin | 252 U.S. 273 (1920) | Minnesota filed a bill of complaint against Wisconsin seeking settlement of its Upper St. Louis Bay and Lower St. Louis Bay boundary. The Court held in favor of Minnesota that the principal and not the deepest channel is the main channel under the principle of thalweg. |
| | | 254 U.S. 14 (1920) | |
| | | 258 U.S. 149 (1922) | |
| 32 | Oklahoma v. Texas | 252 U.S. 372 (1920) | Oklahoma filed a bill of complaint against Texas contending the southern bank of the Red River constituted the boundary between the two states as determined by the court in <i>United States v. Texas</i> , 162 U.S. 1. The Court first granted the motion of the United States to intervene, issued an injunction, and appointed a receiver over disputed property between the main channel of the Red River and its southern bank in light of potential armed conflict between Oklahoma and Texas after the discovery of oil and gas deposits in the bed of the river. The Court then held the boundary <i>res judicata</i> . Texas counterclaimed as to another portion of the boundary. The Court held this portion of the boundary not <i>res</i> |
| | | 40 S. Ct. 394 (1920) | |
| | | 40 S. Ct. 580 (1920) | |
| | | 40 S. Ct. 582 (1920) | |
| | | 253 US 465 (1920) | |
| | | 254 U.S. 609 (1920) | |
| | | 254 U.S. 280 (1920) | |
| | | 254 U.S. 603 (1920) | |
| | | 256 U.S. 70 (1921) | |
| | | 261 U.S. 340 (1923) | |
| | | 262 U.S. 505 (1923) | |

339. *Georgia v. South Carolina*, 257 U.S. 516, 174 (1922) ("The taxation of dams and hydro-electric plants, already constructed and hereafter to be constructed, in the boundary rivers, renders the decision of the questions involved of importance to the two States.").

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| | | 265 U.S. 493 (1924) | <i>judicata</i> and resolved the claim on the merits. ³⁴⁰ |
| | | 265 U.S. 500 (1924) | |
| | | 265 U.S. 505 (1924) | |
| | | 265 U.S. 513 (1924) | |
| | | 267 U.S. 452 (1925) | |
| | | 269 U.S. 314 (1926) | |
| | | 269 U.S. 539 (1926) | |
| | | 272 U.S. 21 (1926) | |
| | | 273 U.S. 93 (1927) | |
| | | 274 U.S. 714 (1927) | |
| | | 276 U.S. 596 (1928) | |
| | | 281 U.S. 109 (1930) | |
| 33 | North Dakota v. Minnesota | 256 U.S. 220 (1921) | North Dakota filed a bill of complaint against Minnesota for the construction of drainage ditches that allegedly increased the flow of the Mustinka River such that it raised the level of Lake Traverse and caused its outlet, the Bois de Sioux River, to overflow in North Dakota and flood adjacent properties and sought money damages on behalf of North Dakota property owners and an injunction. The Court held it had jurisdiction over the claim for an injunction, but not over the claim for damages on behalf of North Dakota property owners because of the Eleventh Amendment. The Court found for Minnesota on the merits and dismissed the bill without prejudice with costs taxed against North Dakota. |
| | | 263 U.S. 365 (1923) | |
| | | 263 U.S. 583 (1924) | |
| 34 | New Mexico v. Texas | 264 U.S. 574 (1923) | New Mexico filed a bill of complaint against Texas seeking settlement of a portion of its boundary. The Court determined the boundary by finding the location of the middle channel of the Rio Grande River in 1850. |
| | | 45 S. Ct. 127 (1924) | |
| | | 266 U.S. 586 (1924) | |
| | | 267 U.S. 583 (1925) | |
| | | 271 U.S. 650 (1926) | |

340. After resolving the boundary dispute, the court had to resolve the proprietary claims over the land in question between the United States, Oklahoma, and individual claimants and also to resolve the receivership. Those decisions and orders are at 256 U.S. 602 (1921); 257 U.S. 609 (1921); 257 U.S. 611 (1921); 257 U.S. 616 (1921); 257 U.S. 308 (1921); 42 S. Ct. 96 (1921); 257 U.S. 621 (1922); 258 U.S. 606 (1922); 258 U.S. 574 (1922); 259 U.S. 565 (1922); 42 S. Ct. 587 (1922); 260 U.S. 705 (1922); 260 U.S. 711 (1923); 261 U.S. 606 (1923); 261 U.S. 345 (1923); 262 U.S. 724 (1923); 263 U.S. 681 (1923); 265 U.S. 76 (1924); 265 U.S. 573 (1924); 265 U.S. 490 (1924); 266 U.S. 583 (1924); 267 U.S. 7 (1925); 268 U.S. 252 (1925); 268 U.S. 676 (1925); 268 U.S. 678 (1925); 268 U.S. 680 (1925). Texas also claimed the receiver was obligated to pay certain taxes to Texas. 266 U.S. 298 (1924); 266 U.S. 303 (1924); 268 U.S. 472 (1925).

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| | | 274 U.S. 716 (1927) | |
| | | 275 U.S. 279 (1927) | |
| | | 276 U.S. 557 (1928) | |
| | | 276 U.S. 558 (1928) | |
| | | 283 U.S. 788 (1931) | |
| | | 51 S. Ct. 357 (1931) | |
| | | 51 S. Ct. 363 (1931) | |
| 35 | New Mexico v. Colorado | 267 U.S. 30 (1925) | New Mexico filed a bill of complaint against Colorado seeking settlement of its thirty-seventh parallel of north latitude boundary. The Court held that regardless of its accuracy, the historically recognized survey of the thirty-seventh parallel governed. |
| | | 267 U.S. 582 (1925) | |
| | | 268 U.S. 108 (1925) | |
| | | 357 U.S. 934 (1958) | |
| 36 | Vermont v. New Hampshire | 46 S. Ct. 16 (1925) | Vermont filed a bill of complaint against New Hampshire seeking settlement of its Connecticut River boundary. The Court held in favor of Vermont. |
| | | 282 U.S. 796 (1930) | |
| | | 50 S. Ct. 462 (1930) | |
| | | 51 S. Ct. 18 (1930) | |
| | | 52 S. Ct. 124 (1931) | |
| | | 289 U.S. 593 (1933) | |
| | | 53 S. Ct. 788 (1933) | |
| | | 290 U.S. 589 (1933) | |
| | | 290 U.S. 602 (1933) | |
| | | 290 U.S. 579 (1934) | |
| | | 298 U.S. 642 (1936) | |
| | | 57 S. Ct. 192 (1936) | |
| | | 299 U.S. 519 (1936) | |
| | | 57 S. Ct. 428 (1937) | |
| | | 300 U.S. 636 (1937) | |
| | | 57 S. Ct. 491 (1937) | |
| 37 | Michigan v. Wisconsin | 270 U.S. 295 (1926) | Michigan filed a bill of complaint against Wisconsin seeking settlement of its complex boundary. The Court held that the boundaries were settled by adverse possession of sovereignty. |
| | | 272 U.S. 398 (1926) | |
| 38 | Wisconsin v. Illinois | 270 U.S. 631 (1926) | Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania, and New York filed a bill of complaint against Illinois and the Sanitary District of Chicago seeking an injunction against the withdrawal of 8,500 cubic feet of water per second from Lake Michigan by pump into a canal on the grounds that it lowered the levels of other Great Lakes and connecting waterways to their injury. The Court first held Illinois and "its creature the Sanitary District were reducing the level of the Great Lakes, were inflicting great losses upon the |
| | | 270 U.S. 634 (1926) | |
| | | 273 U.S. 637 (1926) | |
| | | 273 U.S. 642 (1926) | |
| | | 273 U.S. 644 (1926) | |
| | | 274 U.S. 488 (1927) | |
| | | 278 U.S. 367 (1929) | |
| | | 279 U.S. 821 (1929) | |

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| | | 281 U.S. 179 (1930) | complainants and were violating their rights” but “the restoration of the just rights of the complainants was made gradual rather than immediate” and the Court referred the case for consideration of the proper remedy to the master. The Court then entered an injunction against Chicago and its Sanitary District setting gradually decreasing limits to withdrawals. After concerns regarding the pace of work to enable the Sanitary District to meet the requirements of the injunction the Court strengthened decree to require Illinois “to take all necessary steps” in order to secure adequate sewage facilities so as to reduce the need to withdrawal water from Lake Michigan. The Court’s supervision of withdrawal of water from Lake Michigan continued by Illinois continued for decades. ³⁴¹ |
| | | 281 U.S. 696 (1930) | |
| | | 287 U.S. 578 (1932) | |
| | | 289 U.S. 395 (1933) | |
| | | 289 U.S. 710 (1933) | |
| | | 309 U.S. 569 (1940) | |
| | | 309 U.S. 636 (1940) | |
| | | 311 U.S. 107 (1940) | |
| | | 340 U.S. 858 (1950) | |
| | | 352 U.S. 945 (1956) | |
| | | 352 U.S. 947 (1957) | |
| | | 352 U.S. 983 (1957) | |
| | | 352 U.S. 984 (1957) | |
| | | 361 U.S. 956 (1960) | |
| | | 388 U.S. 426 (1967) | |
| | | 449 U.S. 48 (1980) | |
| 39 | Massachusetts v. New York | 271 U.S. 65 (1926) | Massachusetts filed bill of complaint against New York, the city of Rochester, and several corporations and individuals asserting private title over a twenty-five acre strip of property fronting Lake Ontario within the city limits of Rochester and sought to enjoin Rochester from taking it by eminent domain. Massachusetts claimed to own the land by virtue of the 1786 Treaty of Hartford under which Massachusetts had given up its sovereignty claims over land which is now part of western New York in exchange for pre-emptive rights of private ownership over land then in possession of Native Americans. Massachusetts conveyed its interest in the Territory in 1788. Thereafter the shoreline receded and brought the land now in dispute above water. The Court held Massachusetts did not obtain title to the land through the treaty and even if it did it had conveyed that interest. |
| | | 271 U.S. 636 (1926) | |

341. Interestingly, then former Associate Justice and former Secretary of State Charles Evans Hughes was appointed Special Master on June 7, 1926 and delivered the first report in the case to the Supreme Court on November 23, 1927. He had resigned from the court to run for president in 1916. By the time the Court heard arguments on his second report, Hughes had been appointed Chief Justice. Naturally, he “took no part in the consideration or decision” of the Court’s consideration of his second report. *Wisconsin v. Illinois*, 281 U.S. 179, 202 (1930). But by 1932 whatever concerns the Court may have had about his prior service appear to have faded, as he delivered an opinion of the court in the case. *Wisconsin v. Illinois*, 289 U.S. 395 (1933).

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| 40 | Kentucky v. Indiana | 278 U.S. 571 (1928) | Kentucky filed a bill of complaint against Indiana seeking an order of specific performance of a contract between Kentucky and Indiana for the construction of an interstate bridge after Indiana refused to proceed when citizens filed a suit in Indiana state court challenging the project. The Court held for Kentucky and ordered specific performance of the contract because Indiana conceded its obligations. |
| | | 49 S. Ct. 478 (1929) | |
| | | 50 S. Ct. 68 (1929) | |
| | | 281 U.S. 163 (1930) | |
| | | 281 U.S. 700 (1930) | |
| 41 | New Jersey v. New York | 279 U.S. 823 (1929) | New York filed a bill of complaint seeking to enjoin New York and New York City from diverting water from the Delaware River and its tributaries to the Hudson River watershed for the purpose of increasing New York City's water supply. The Court entered a decree permitting New York to divert up to 440 million gallons of water daily without restriction. The Court enjoined diversions in excess of that amount unless (a) New York provided for treatment of sewage and industrial waste entering the rivers according to minimum standards set by the Court in the decree; (b) New York ensured the stage of the Delaware River would not fall below 0.50 c. s. m. at Port Jervis, New York, and Trenton; and (c) New York afforded New Jersey and Pennsylvania specified rights of inspection. The Court adjusted the terms of its decree upon petition of New York City in 1954. |
| | | 280 U.S. 528 (1930) | |
| | | 283 U.S. 336 (1931) | |
| | | 283 U.S. 805 (1931) | |
| | | 345 U.S. 369 (1953) | |
| | | 346 U.S. 853 (1953) | |
| | | 347 U.S. 941 (1954) | |
| | | 347 U.S. 995 (1954) | |
| 42 | New Jersey v. Delaware | 279 U.S. 825 (1929) | New Jersey filed a bill of complaint seeking a determination of its Delaware Bay and River boundary with Delaware. New Jersey claimed the boundary to be the center of the main channel according to thalweg. Delaware claimed sovereignty to the midway between the banks and shores except over one segment in which it claimed sovereignty over the entire riverbed. The Court upheld Delaware's claim of title to the entire riverbed of the segment and applied thalweg to the remainder. |
| | | 280 U.S. 529 (1930) | |
| | | 291 U.S. 361 (1934) | |
| | | 295 U.S. 694 (1935) | |
| | | 304 U.S. 590 (1937) | |
| | | 305 U.S. 576 (1938) | |
| 43 | Arizona v. California | 282 U.S. 795 (1930) | Arizona filed a bill of complaint against the Secretary of the Interior and signatories to the Colorado River Compact—California, Nevada, Utah, New Mexico, Colorado, and Wyoming—challenging construction of Hoover Dam as an unconstitutional attempt to enforce a compact as against Arizona that it refused to ratify. The Court held the construction of the dam was a valid exercise of congressional power because the Colorado River is navigable (the Court took judicial notice of navigability though it was denied by Arizona). |
| | | 283 U.S. 423 (1931) | |
| 44 | Arizona v. | 344 U.S. 919 (1953) | Arizona filed a bill of complaint against California and seven |

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| | California | 345 U.S. 914 (1953) | California agencies over the apportionment of the water of the Colorado River and its tributaries. Nevada, New Mexico, Utah, and the United States joined. The Court determined that the Boulder Canyon Project Act controlled and determined the rights of the parties to water accordingly. |
| | | 347 U.S. 985 (1954) | |
| | | 350 U.S. 880 (1955) | |
| | | 350 U.S. 114 (1955) | |
| | | 368 U.S. 917 (1961) | |
| | | 373 U.S. 546 (1963) | |
| | | 376 U.S. 340 (1964) | |
| | | 383 U.S. 268 (1966) | |
| | | 439 U.S. 419 (1979) | |
| | | 460 U.S. 605 (1983) | |
| | | 466 U.S. 144 (1984) | |
| | | 493 U.S. 886 (1989) | |
| | | 530 U.S. 392 (2000) | |
| | | 531 U.S. 1 (2000) | |
| | | 547 U.S. 150 (2006) | |
| 45 | Connecticut v. Massachusetts | 282 U.S. 660 (1931) 283 U.S. 789 (1931) | Connecticut filed a bill of complaint against Massachusetts seeking to enjoin the diversion of waters from the Connecticut River watershed. The Court held Connecticut failed to show it was entitled to relief. |
| 46 | Washington v. Oregon | 283 U.S. 801 (1931) 297 U.S. 517 (1936) | Washington filed a bill of complaint against Oregon seeking judicial apportionment of the waters of the nonnavigable Walla Walla River. The Court held Washington failed to show it was entitled to relief. |
| 47 | Wisconsin v. Michigan | 287 U.S. 571 (1932) 295 U.S. 455 (1935) 297 U.S. 547 (1936) | Wisconsin filed a bill of complaint against Michigan alleging mistakes in the Court's decree issued in its determination of the border between the states. The Court issued a corrected decree. |
| 48 | Nebraska v. Wyoming | 293 U.S. 523 (1934) 295 U.S. 40 (1935) 296 U.S. 553 (1935) 304 U.S. 545 (1938) 325 U.S. 589 (1945) 345 U.S. 981 (1953) 507 U.S. 584 (1993) 515 U.S. 1 (1995) 534 U.S. 40 (2001) | Nebraska filed a bill of complaint against Wyoming seeking equitable apportionment of the waters of the nonnavigable North Platte River. The Court established interstate priorities and apportioned the water used for irrigation purposes amongst the three states and issued an extensive decree that required the states to limit the quantities of water used for irrigation within their respective jurisdictions and required the states to keep records of water used in irrigation. |
| 49 | Arkansas v. Tennessee | 296 U.S. 545 (1935) 310 U.S. 563 (1940) 311 U.S. 1 (1940) | Arkansas filed a bill of complaint against Tennessee seeking determination of a portion of their boundary along a portion of the Mississippi River shifted by avulsion in 1821. The Court held that |

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| | | 312 U.S. 664 (1941) | the avulsion did not change the boundary, but that Tennessee's undisputed possession over the territory ripened into sovereignty. |
| 50 | Texas v. Florida | 300 U.S. 642 (1937) | Texas filed a bill of complaint against Florida, New York, Massachusetts, and the wife and sister of a decedent alleging that his domicile at the time of his death was Texas. The Court determined that the domicile at the time of death was Massachusetts. |
| | | 300 U.S. 643 (1937) | |
| | | 302 U.S. 662 (1938) | |
| | | 306 U.S. 398 (1939) | |
| 51 | Kansas v. Missouri | 310 U.S. 614 (1940) | Kansas filed a bill of complaint against Missouri seeking determination of the boundary along the Missouri River claiming sovereignty over about 2,000 acres of land resulting from an alleged combination of accretions and avulsions of the Missouri River. The Court held Kansas failed to prove its case. |
| | | 322 U.S. 213 (1944) | |
| | | 322 U.S. 654 (1944) | |
| | | 340 U.S. 859 (1950) | |
| 52 | Colorado v. Kansas | 316 U.S. 645 (1942) | Colorado filed a bill of complaint against Kansas and the Finney County Water Users' Association seeking an injunction against private litigation brought by Kansas appropriators of the waters of the Arkansas basin private against Colorado appropriators to establish interstate priorities. The Court granted the injunction. ³⁴² |
| | | 320 U.S. 383 (1943) | |
| | | 322 U.S. 708 (1944) | |
| 53 | Texas v. New Mexico | 343 U.S. 932 (1952) | Texas filed a bill of complaint against New Mexico. Five years later the Court denied leave to amend the bill of complaint and granted a motion to dismiss the bill of complaint for the absence of the United States as an indispensable party. |
| | | 352 U.S. 991 (1957) | |
| 54 | Mississippi v. Louisiana | 346 U.S. 862 (1953) | Mississippi filed a bill of complaint against Louisiana disputing the river boundary. The court adopted the master's report and decree. |
| | | 350 U.S. 5 (1955) | |
| 55 | Virginia v. Maryland | 355 U.S. 3 (1957) | Virginia filed a bill of complaint against Maryland seeking an order enjoining "enforcement of [a] Maryland statute regulating fishin, oystering, and crabbing on and in the Potomac River." ³⁴³ The Court dismissed the bill after the parties reached a settlement. |
| | | 355 U.S. 269 (1957) | |
| | | 371 U.S. 943 (1963) | |
| 56 | Texas v. New Jersey | 369 U.S. 869 (1962) | Texas filed a bill of complaint against New Jersey, Pennsylvania, and the Sun Oil Company seeking an injunction and declaration of jurisdiction to escheat the debts owed by the Sun Oil Company. The Court established a federal common law rule to resolve escheat of debt controversies. The Court held the state of the creditor's last known address as shown by the debtor's books may escheat the |
| | | 370 U.S. 929 (1962) | |
| | | 371 U.S. 873 (1962) | |
| | | 372 U.S. 926 (1963) | |
| | | 372 U.S. 973 (1963) | |
| | | 379 U.S. 674 (1965) | |

342. *Colorado v. Kansas*, 320 U.S. 383, 389 (1943) ("The evidence consists of some seven thousand typewritten pages of testimony and 368 exhibits covering thousands of pages.").

343. *McKusick*, *supra* note 328, at 218.

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| | | 380 U.S. 518 (1965) | debt. |
| 57 | Louisiana v. Mississippi | 375 U.S. 803 (1963) | Louisiana filed a bill of complaint against Mississippi disputing the boundary at Deadman's Bend on the Mississippi River. The Court held the border to be the thalweg. |
| | | 375 U.S. 950 (1963) | |
| | | 384 U.S. 24 (1966) | |
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| 58 | Nebraska v. Iowa | 379 U.S. 876 (1964) | Nebraska filed a bill of complaint against Iowa seeking to resolve a controversy over the ownership of thirty separate areas of land according to the terms of the Iowa-Nebraska Boundary Compact of 1943. The Court interpreted the compact and issued a decree declaring the ownership of the disputed areas. |
| | | 379 U.S. 911 (1964) | |
| | | 379 U.S. 996 (1965) | |
| | | 406 U.S. 117 (1972) | |
| | | 409 U.S. 285 (1973) | |
| 59 | Illinois v. Missouri | 379 U.S. 952 (1965) | Mississippi filed a bill of complaint against Louisiana disputing the boundary. The Court adopted upon the agreement of the parties the master's findings of fact, conclusions of law, and proposed decree. |
| | | 380 U.S. 901 (1965) | |
| | | 380 U.S. 969 (1965) | |
| | | 382 U.S. 803 (1965) | |
| | | 382 U.S. 1022 (1966) | |
| | | 399 U.S. 146 (1970) | |
| 60 | Ohio v. Kentucky | 384 U.S. 982 (1966) | Ohio filed a bill of complaint against Kentucky seeking a declaration of the boundary line and concurrent jurisdiction over the Ohio River. The Court determined that the boundary is the 1792 lower water mark of the northern side of the Ohio River. |
| | | 410 U.S. 641 (1973) | |
| | | 440 U.S. 902 (1979) | |
| | | 444 U.S. 335 (1980) | |
| | | 445 U.S. 941 (1980) | |
| | | 456 U.S. 958 (1982) | |
| | | 471 U.S. 153 (1985) | |
| | | 474 U.S. 1 (1985) | |
| 61 | Texas v. Colorado | 386 U.S. 901 (1967) | Texas and New Mexico filed a bill of complaint against Colorado seeking enforcement of the Rio Grande Compact provision requiring Colorado "to deliver water in the Rio Grande at the Colorado-New Mexico state line." ³⁴⁴ The Court granted a stipulated motion to dismiss the bill with prejudice. |
| | | 389 U.S. 1000 (1967) | |
| | | 390 U.S. 933 (1968) | |
| | | 391 U.S. 901 (1968) | |
| | | 474 U.S. 1017 (1985) | |
| 62 | Michigan v. Ohio | 386 U.S. 1001 (1967) | Mississippi filed a bill of complaint against Louisiana disputing the boundary in Lake Erie. The Court entered a decree establishing the boundary and charging costs to Michigan. |
| | | 410 U.S. 420 (1973) | |
| 63 | Missouri v. Nebraska | 389 U.S. 1001 (1967) | Missouri filed a bill of complaint against Nebraska seeking settlement of its Missouri River boundary. ³⁴⁵ The Court dismissed the bill upon motion of the parties. |
| | | 417 U.S. 904 (1974) | |
| | | 417 U.S. 959 (1974) | |
| 64 | Arkansas v. | 389 U.S. 1026 (1968) | Arkansas filed a bill of complaint against Tennessee to settle a |

344. McKusick, *supra* note 328, at 220.345. McKusick, *supra* note 328, at 221.

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| | Tennessee | 397 U.S. 88 (1970) | boundary dispute over five thousand acres along the west bank of the Mississippi River. The Court determined the boundary to be the main channel as it existed prior to an avulsion. |
| | | 397 U.S. 91 (1970) | |
| | | 399 U.S. 219 (1970) | |
| 65 | Texas v. Louisiana | 397 U.S. 931 (1970) | Texas filed a bill of complaint against Louisiana seeking a declaration that the boundary at the Sabine Pass, Lake, and River is the geographic middle and not the main channel. The Court held the boundary to be the geographic middle of the Sabine. |
| | | 410 U.S. 702 (1973) | |
| | | 414 U.S. 1107 (1973) | |
| | | 416 U.S. 965 (1974) | |
| | | 426 U.S. 465 (1976) | |
| | | 431 U.S. 161 (1977) | |
| 66 | Pennsylvania v. New York | 398 U.S. 956 (1970) | Pennsylvania filed a bill of complaint against New York seeking a determination of the jurisdiction to escheat unclaimed funds paid to Western Union. Connecticut, California, and Indiana intervened as plaintiffs and Florida and Arizona intervened as defendants. The Court held the rule of <i>Texas v. New Jersey</i> controlled. |
| | | 400 U.S. 811 (1970) | |
| | | 400 U.S. 924 (1970) | |
| | | 400 U.S. 1019 (1971) | |
| | | 401 U.S. 931 (1971) | |
| | | 407 U.S. 206 (1972) | |
| | | 407 U.S. 223 (1972) | |
| 67 | Mississippi v. Arkansas | 400 U.S. 1019 (1971) | Mississippi filed a bill of complaint against Arkansas seeking a determination of the boundary line to determine the sovereignty over an island formed by changes in the location of the Mississippi River. The Court held the changes were the result of accretion and not avulsion and accordingly the island belonged to Mississippi. |
| | | 415 U.S. 289 (1974) | |
| | | 415 U.S. 302 (1974) | |
| | | 419 U.S. 375 (1974) | |
| 68 | Vermont v. New York | 402 U.S. 940 (1971) | Vermont filed a bill of complaint against New York and International Paper Co. alleging discharges of waste into Lake Champlain and Ticonderoga Creek created a sludge bed that polluted the water and impeded navigation. After the Court granted leave and some but not all the evidence was taken by a master the parties requested the court issue a consent decree appointing a river lake master. The Court rejected this application and subsequently dismissed the bill under Rule 60. |
| | | 405 U.S. 983 (1972) | |
| | | 406 U.S. 186 (1972) | |
| | | 417 U.S. 270 (1974) | |
| | | 419 U.S. 955 (1974) | |
| 69 | New Hampshire v. Maine | 413 U.S. 918 (1973) | New Hampshire filed a bill of complaint against Maine seeking determination of the lateral marine boundary between the states. The parties applied before trial by a master for entry of a consent decree defining the terms necessary to resolve the dispute. The Court held the entry of the proposed decree consonant with the Court's Article III powers and granted the request. ³⁴⁶ |
| | | 414 U.S. 810 (1973) | |
| | | 426 U.S. 363 (1976) | |
| | | 434 U.S. 1 (1977) | |

346. *New Hampshire v. Maine*, 426 U.S. 364, 372 n. 1 (1976) ("The controversy arose out of a dispute over lobster fishing in the seabed. Maine's regulatory laws, if applicable, are more restrictive than those of New Hampshire. For

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| 70 | Texas v. New Mexico | 421 U.S. 927 (1975) | Texas filed a bill of complaint against New Mexico alleging breach of the Pecos River Compact by permitting excessive depletion of water in the Pecos River and seeking an order of compliance with the Compact. The Court held it had jurisdiction to determine and remedy noncompliance with the Compact. The Court determined New Mexico breached the compact and was therefore required to compensate Texas. The Court also issued an injunction requiring future compliance with the Compact. |
| | | 423 U.S. 1085 (1976) | |
| | | 446 U.S. 540 (1980) | |
| | | 462 U.S. 554 (1983) | |
| | | 467 U.S. 1238 (1984) | |
| | | 482 U.S. 124 (1987) | |
| 71 | Idaho v. Oregon | 494 U.S. 111 (1990) | |
| | | 423 U.S. 813 (1975) | Idaho filed a bill of complaint against Oregon and Washington claiming fishermen in those states were taking disproportionate shares of anadromous fish destined for Idaho in the Columbia River and seeking an equitable apportionment of this resource. The Court held Idaho stated a claim for relief but failed to prove by clear and convincing evidence real and substantial injury and dismissed the bill without prejudice. |
| | | 429 U.S. 163 (1976) | |
| | | 444 U.S. 380 (1980) | |
| | | 462 U.S. 1017 (1983) | |
| 72 | South Dakota v. Nebraska | 429 U.S. 810 (1976) | South Dakota filed a bill of complaint against Nebraska disputing the boundary between them regarding Rush Island after the initiation of conflicting quiet title proceedings in each state. The Court entered a consent decree settling the dispute and appointing a Joint State Boundary Commission to settle any further disputes. |
| | | 434 U.S. 948 (1977) | |
| | | 458 U.S. 276 (1982) | |
| 73 | California v. Nevada | 433 U.S. 918 (1977) | California filed a bill of complaint against Nevada in the nature of a quiet title action “precipitated by growing doubts about the geographic accuracy of the existing line” as determined by surveys in the nineteenth century. The Court held that Nevada had acquiesced to the recognized boundary. ³⁴⁷ |
| | | 438 U.S. 913 (1978) | |
| | | 447 U.S. 125 (1980) | |
| | | 456 U.S. 867 (1982) | |
| 74 | Georgia v. South Carolina | 434 U.S. 917 (1977) | Georgia filed a bill of complaint against South Carolina disputing the boundary “along the lower beaches of the Savannah River . . . and at the river’s mouth” as it affected emerging islands. The Court held that the Barnwell Islands belonged to South Carolina by prescription. The Court also held that new islands did not affect the boundary line between states as set by the Treaty of Beaufort. The Court determined other aspects of the boundary as well. |
| | | 497 U.S. 376 (1990) | |
| 75 | Tennessee v. | 439 U.S. 812 (1978) | Texas filed a bill of complaint against Arkansas disputing the |

example, Maine requires a license, available only to Maine residents, for the taking of lobsters in Maine waters. . . . Maine also imposes stricter minimum- and maximum-size requirements. . . . Before the original action was filed, efforts to settle the dispute failed, and violence over lobster fishing rights in the area was threatened.”).

347. Apparently this suit establishes the angle of the border over Lake Tahoe.

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| | Arkansas | 454 U.S. 809 (1981) | boundary line. The Court summarily adopted a master's report and entered a decree settling the boundary line. |
| | | 454 U.S. 351 (1981) | |
| 76 | California v. Arizona | 439 U.S. 812 (1978) | California filed a bill of complaint against Arizona and the United States claiming to own lands outside of its jurisdiction as determined by the Interstate Compact Defining the Boundary Between the States of Arizona and California. The Court entered a decree awarding some of the land underlying the Colorado River. |
| | | 440 U.S. 59 (1979) | |
| | | 452 U.S. 431 (1981) | |
| 77 | Oklahoma v. Arkansas | 439 U.S. 812 (1978) | Oklahoma filed a bill of complaint against Arkansas seeking a determination of the boundary. The Court summarily adopted the report of a master and entered a decree in favor of Arkansas. |
| | | 469 U.S. 1083 (1984) | |
| | | 469 U.S. 1101 (1985) | |
| | | 473 U.S. 610 (1985) | |
| 78 | Colorado v. New Mexico | 439 U.S. 975 (1978) | Colorado filed a bill of complaint against New Mexico seeking an equitable apportionment of the non-navigable Vermejo River, the waters of which had to date been fully appropriated by New Mexico users. The Court held Colorado failed to meet its burden and dismissed the bill. |
| | | 459 U.S. 176 (1982) | |
| | | 467 U.S. 310 (1984) | |
| 79 | Maryland v. Louisiana | 442 U.S. 937 (1979) | Maryland, Illinois, Indiana, Massachusetts, Rhode Island, and Wisconsin filed a bill of complaint challenging the constitutionality of a Louisiana tax on the first use of natural gas imported into Louisiana that was not subject to taxation by another state or the United States. The United States and several pipeline companies intervened. New Jersey, the United States, the Federal Energy Regulatory Commission, and seventeen pipeline companies intervened as plaintiffs. The Court held the tax unconstitutional. |
| | | 451 U.S. 725 (1981) | |
| | | 452 U.S. 456 (1981) | |
| | | 454 U.S. 809 (1981) | |
| 80 | Texas v. Oklahoma | 444 U.S. 1065 (1980) | Texas filed a bill of complaint against Oklahoma disputing the boundary along the Red River. The Court ordered a consent decree resolving the boundary. |
| | | 450 U.S. 1038 (1981) | |
| | | 457 U.S. 172 (1982) | |
| 81 | Louisiana v. Mississippi | 445 U.S. 957 (1980) | Louisiana filed a bill of complaint against Mississippi and Avery B. Dille, Jr. disputing the boundary along a portion of the Mississippi River. After Mississippi claimed the main channel migrated westerly so that the bottom hole of an oil well drilled under the terms of a lease granted by the state of Louisiana was now in Mississippi. The Court held the bottom hole of the well was in Louisiana. |
| | | 466 U.S. 96 (1984) | |
| | | 466 U.S. 921 (1984) | |
| 82 | California v. Texas | 457 U.S. 164 (1982) | California filed a bill of complaint against Texas seeking a determination of the domicile of Howard Hughes at the time of his death. The case was dismissed on stipulation pursuant to Rule 53.1. |
| | | 458 U.S. 1119 (1982) | |
| | | 459 U.S. 1067 (1982) | |
| | | 459 U.S. 1083 (1982) | |
| | | 459 U.S. 1096 (1983) | |

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| | | 471 U.S. 1050 (1985) | |
| | | 471 U.S. 1051 (1985) | |
| 83 | Arkansas v. Mississippi | 456 U.S. 912 (1982) 471 U.S. 377 (1985) | Arkansas filed a bill of complaint against Mississippi disputing the boundary along a portion of the Mississippi River. The Court adopted the report of a master and entered a decree resolving the dispute. |
| 84 | New Jersey v. Nevada | 474 U.S. 917 (1985) 487 U.S. 1211 (1988) | New Jersey filed a bill of complaint against Nevada and others seeking an order enjoining “interference with New Jersey’s contract with [a] private firm for disposal of New Jersey waste in Nevada.” ³⁴⁸ The Court dismissed the bill of complaint under Rule 53. |
| 85 | Kansas v. Colorado | 475 U.S. 1079 (1986) 514 U.S. 673 (1995) 533 U.S. 1 (2001) 543 U.S. 86 (2004) 556 U.S. 98 (2009) | Kansas filed a bill of complaint against Colorado alleging violations of the Arkansas River Compact. The Court held Colorado violated the Compact, issued a judgment for money damages and enjoined Colorado to comply with the Compact. |
| 86 | Illinois v. Kentucky | 479 U.S. 879 (1986) 500 U.S. 380 (1991) | Illinois filed a bill of complaint against Kentucky disputing the boundary along the Ohio River. |
| 87 | Oklahoma v. New Mexico | 484 U.S. 808 (1987) 501 U.S. 221 (1991) | Oklahoma and Texas filed a bill of complaint against New Mexico over a dispute regarding the interpretation of the Canadian River Compact. The Court interpreted the Compact. |
| 88 | Delaware v. New York | 486 U.S. 1030 (1988) 489 U.S. 1005 (1989) 507 U.S. 490 (1993) | Delaware filed a bill of complaint against New York to resolve the rights to escheat unclaimed distributions made by issuers of securities. The Court held the state in which the debtor is incorporated is entitled to escheat when the creditor’s address is unknown. |
| 89 | Wyoming v. Oklahoma | 487 U.S. 1231 (1988) 488 U.S. 921 (1988) 502 U.S. 437 (1992) | Wyoming filed a bill of complaint against Oklahoma challenging the constitutionality of an Oklahoma statute requiring coal-fired electric generating plants burn a mixture of coal containing at least ten percent coal mined from Oklahoma and seeking an injunction against enforcement. The Court held the Oklahoma statute unconstitutional. |
| 90 | Connecticut v. New Hampshire | 502 U.S. 1069 (1992) 504 U.S. 983 (1992) 507 U.S. 1026 (1993) | Connecticut filed a bill of complaint against New Hampshire. The Court dismissed the bill under Rule 46.1 after the states reached a settlement prior to oral argument on exceptions to a master’s report. ³⁴⁹ |
| 91 | Louisiana v. | 510 U.S. 941 (1993) | Louisiana filed a bill of complaint against Mississippi disputing the |

348. McKusick, *supra* note 328, at 230.

349. McKusick, *supra* note 328, at 185.

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| | Mississippi | 510 U.S. 1036 (1994) 516 U.S. 22 (1995) 516 U.S. 122 (1995) | Mississippi River boundary. The Court held in Mississippi's favor. ³⁵⁰ |
| 92 | New Jersey v. New York | 523 U.S. 767 (1998) 526 U.S. 589 (1999) | New Jersey filed a bill of complaint against New York asserting sovereignty over 24.5 acres added to Ellis Island by the United States subsequent to the 1834 compact granting sovereignty over Ellis Island to New York despite its location on the New Jersey side of the boundary settled by the compact. The Court held New Jersey sovereign over the additional land. |
| 93 | Kansas v. Nebraska | 525 U.S. 805 (1998) 525 U.S. 1101 (1999) 527 U.S. 1020 (1999) 530 U.S. 1272 (2000) 538 U.S. 720 (2003) | Kansas filed a bill of complaint against Nebraska. The Court summarily approved a final settlement stipulation accompanying a master's report and dismissed the bill. |
| 94 | Virginia v. Maryland | 530 U.S. 1201 (2000) 531 U.S. 1140 (2001) 540 U.S. 56 (2003) | Virginia filed a bill of complaint seeking a declaration of its rights to withdraw water from the Potomac River and to construct improvements on the Virginia shore without obtaining permits from Maryland despite the terms of an arbitration award which was made binding as a compact. The Court interpreted the award as affording Virginia these rights and issued a declaratory judgment to that effect and enjoined enforcement of any condition of a permit issued to a Virginia Municipality. |
| 95 | New Hampshire v. Maine | 530 U.S. 1272 (2000) 532 U.S. 742 (2001) | New Hampshire filed a bill of complaint against Maine claiming sovereignty over the entirety of the Piscataqua River and Portsmouth Harbor. The Court held New Hampshire judicially estopped from disputing the boundary by New Hampshire's position in the litigation leading to the 1977 entry of a consent judgment settling the boundary. |
| 96 | Alabama v. North Carolina | 537 U.S. 806 (2002) 539 U.S. 925 (2003) 130 S. Ct. 2295 (2010) | Alabama, Florida, Tennessee, Virginia, and the Southeast Interstate Low-Level Radioactive Waste Management Commission filed a bill of complaint alleging breach of an interstate compact for radioactive waste management, breach of contract, unjust enrichment, promissory estoppel, and money had and received and seeking declaratory judgment of the validity and enforceability of |

350. On the thicket of litigation in this controversy, Justice Kennedy quipped: "Like the shifting river channel near the property in dispute, this litigation has traversed from one side of our docket to the other." *Louisiana v. Mississippi*, 516 U.S. 22, 23 (1995). McKusick again served as master. *Id.* at 24.

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| | | | the Commission's sanctions resolution against North Carolina, damages, costs, and other relief. The Court has so far held North Carolina did not breach the compact. |
| 97 | New Jersey v. Delaware | 546 U.S. 1147 (2006) 552 U.S. 597 (2008) | New Jersey filed a bill of complaint seeking a declaration that a 1905 compact established New Jersey's exclusive jurisdiction to regulate construction of improvements on the New Jersey shore. The Court held that under the compact Delaware could not impede New Jersey riparian owners from ordinary and usual exercises of the right to wharf out from the shore, but that the planned construction was neither ordinary nor usual and was therefore subject to regulation by Delaware. ³⁵¹ |
| 98 | Montana v. Wyoming | 550 U.S. 932 (2007) 552 U.S. 1175 (2008) 131 S. Ct. 442 (2010) 131 S. Ct. 1765 (2011) | Montana filed a bill of complaint against Wyoming alleging breach of the Yellowstone River Compact by permitting pre-1950 appropriators to increase consumption by improving the efficiency of their irrigation systems which reduces the amount of wastewater return to the river. The Court has so far held the permits do not violate the compact because the conserved water is used to irrigate the same acreage. |
| 99 | South Carolina v. North Carolina | 552 U.S. 804 (2007) 558 U.S. 256 (2010) 131 S. Ct. 855 (2010) | South Carolina filed a bill of complaint against North Carolina seeking equitable apportionment of the waters of the Catawba River basin. The Court dismissed the complaint under Rule 46.1. |

351. New Jersey v. Delaware, 552 U.S. 597, 602 (2008) ("The controversy . . . was sparked by Delaware's refusal to grant permission for construction of a liquefied natural gas . . . unloading terminal that would extend some 2,000 feet from New Jersey's shore into territory *New Jersey v. Delaware II* adjudged to belong to Delaware.").

B. Denials of Leave to File and Dismissals on Demurrer

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| 1 | New Hampshire v. Louisiana | 108 U.S. 76 (1883) | New Hampshire and New York each filed a bill of complaint against Louisiana and officers of Louisiana's board of liquidation seeking a decree enforcement of the terms of repudiated state bonds that were assigned to New Hampshire and New York for the purpose of seeking enforcement of the bonds in the Supreme Court. The Court held the litigation was really brought by the private parties and was therefore prohibited by the Eleventh Amendment. |
| 2 | Louisiana v. Texas | 176 U.S. 1 (1900) | Louisiana filed a bill of complaint against Texas, the governor of Texas, and a Texas health officer for embargoing interstate commerce between New Orleans. ³⁵² The Court sustained a demurrer on the ground that the bill only alleged the maladministration of Texas laws and failed to set up facts to show the alleged actions of the health officer were attributable to the state of Texas. |
| 3 | Alabama v. Arizona | 291 U.S. 286 (1934) | Alabama moved for leave to file a bill of complaint against nineteen states (reduced by amendment to Arizona, Idaho, Montana, New York, and Pennsylvania) seeking an injunction against state laws prohibiting the sale of articles produced by convict labor on the grounds that they violated the Commerce Clause. The Court denied leave to file because (1) the bill was multifarious for naming states with differing schemes without valid justification; and (2) the bill wanted equity for failing to sufficiently make out that Alabama would suffer great loss or serious injury. |
| 4 | Arizona v. California | 298 U.S. 558 (1936) | Arizona moved for leave to file a bill of complaint against California, Colorado, New Mexico, Utah, Wyoming, and Nevada seeking a judicial apportionment of the waters of the Colorado River Basin. The Court denied leave because, if filed, the bill would have to be dismissed for failure to join the United States. |
| 5 | Texas v. New York | 300 U.S. 642 (1937) | Motion for leave summarily dismissed but granted on refile. ³⁵³ |
| 6 | Massachusetts v. | 308 U.S. 1 (1939) | Massachusetts moved for leave to file a bill of complaint against |

352. WARREN, *supra* note 328, at 45 (Texas "by statute had given to her officials wide powers to enforce very drastic quarantine regulations and to detain vessels, persons and property coming into Texas. In 1899, a health officer of Texas took advantage of a single case of yellow fever in New Orleans to lay an embargo on all commerce between that city and the State of Texas, and the embargo was enforced by armed guards posted at the frontier.").

353. Texas v. Florida (1937).

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| | Missouri | | Missouri for Missouri's assessment of an inheritance tax on a citizen of Massachusetts despite reciprocal legislation enacted by both designed to avoid multiple taxation. The Court denied leave to file the bill because Missouri's imposition of the tax did not impair Massachusetts ability to levy a separate tax and reciprocal legislation does not give rise to contractual rights to sue amongst states because it does not comply with the Compact Clause. |
| 7 | Alabama v. Texas | 347 U.S. 272 (1954) | Alabama and Rhode Island moved for leave file a bill of complaint against the United States and several states challenging the constitutionality of the Submerged Lands Act. The Court denied leave because challenges to the congressional disposition of the property of the United States are foreclosed by Article IV, § 3, Cl. 2. |
| 8 | Arizona v. California | 377 U.S. 926 (1964) | Arizona moved for leave to file a bill of complaint "against California and [a] California citizen to recover workers' compensation benefits paid by Arizona state fund to Arizona citizen injured in auto accident allegedly caused by defect on San Francisco-Oakland Bridge and to assert tort claims assigned to Arizona by injured Arizonan and his employer." ³⁵⁴ The Court summarily denied leave with a citation to <i>Massachusetts v. Missouri</i> , 308 U.S. 1 (1939). |
| 9 | Kansas v. Colorado | 382 U.S. 801 (1965) | Kansas moved for leave to file a bill of complaint against Colorado. The motion was dismissed under Rule 60. |
| 10 | Wisconsin v. Minnesota | 382 U.S. 935 (1965) | Wisconsin moved for leave to file a bill of complaint against Minnesota seeking an order enjoining "Minnesota from permitting Northern States Power Company to build dam and coal-fired steam generating plant on St. Croix River, allegedly creating nuisance and impeding recreational use of river." ³⁵⁵ Motion for leave to file summarily denied. |
| 11 | Delaware v. New York | 385 U.S. 895 (1966) | The Court summarily denied a motion for leave to file a bill of complaint "against all 50 States and the District of Columbia to enjoin use of the 'state-unit' (winner-take-all) system to cast electoral votes for presidential and vice presidential candidates." ³⁵⁶ |
| 12 | New Jersey v. New York | 390 U.S. 1000 (1968) | New Jersey moved for leave to file a bill of complaint "against New York and private company, Hudson Rapid Tubes Corp., to enforce agreement between New Jersey and New York as to [the] |

354. McKusick, *supra* note 328, at 210.

355. *Id.* at 207.

356. *Id.* at 210.

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| | | | condemnation value of [a] railway allegedly violated by decision of New York's highest court.” ³⁵⁷ The Court summarily denied leave. |
| 13 | Illinois v. City of Milwaukee | 406 U.S. 91 (1972) | Illinois moved for leave to file a bill of complaint against four Wisconsin cities and two Wisconsin sewerage commissions alleging pollution of Lake Michigan by the discharge of over 200 million gallons of sewage and waste daily. The Court held “the term ‘States’ as used in 28 U.S.C. § 1251 (a)(1) [does not] include their political subdivisions” and exercised its discretion to deny leave to file a bill under 28 U.S.C. § 1251(b)(3). |
| 14 | Illinois v. Michigan | 409 U.S. 36 (1972) | Illinois moved for leave to file a bill of complaint against Michigan for violation of a reciprocal treaty by allowing recovery against an Illinois re-insurance company in a case brought by two injured workmen. The Court denied leave because (1) Illinois as a party to the decision complained of failed to file a timely petition for writ of certiorari; and (2) Illinois was only a nominal plaintiff because it filed the complaint to vindicate the grievances of particular individuals. |
| 15 | Pennsylvania v. New York | 410 U.S. 977 (1973) | The Court summarily denied a motion for leave to file a “against 25 states to challenge constitutionality of states’ liquor ‘price affirmation’ policy, requiring liquor vendors to give states lowest available price”. ³⁵⁸ |
| 16 | Nevada v. California | 414 U.S. 810 (1973) | Nevada moved for leave to file a bill of complaint seeking a “declaration that Nevada state employee’s operation of state-owned vehicle in California did not constitute Nevada’s consent to suit in California state courts.” ³⁵⁹ |
| 17 | Arizona v. New Mexico | 425 U.S. 795 (1976) | Arizona moved for leave to file a bill of complaint against New Mexico for imposing an allegedly discriminatory tax on Arizona electricity generating utilities operating in New Mexico. The Court denied leave because the pending state court challenge to the tax filed by the utilities in New Mexico provided an appropriate forum to resolve the issues with an available appeal to the Supreme Court. |
| 18 | Pennsylvania v. New Jersey | 426 U.S. 660 (1976) | Pennsylvania moved for leave to file a bill of complaint against New Jersey and Maine, Massachusetts, and Vermont move for leave to file a bill of complaint against New Hampshire challenging the constitutionality of commuter income taxes. The Court denied |

357. *Id.*, at 209.

358. *Id.* at 209.

359. *Id.* at 210.

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| | | | leave per curiam by a vote of 4-2 on the grounds that no sovereign or quasi-sovereign interests were implicated by New Jersey and New Hampshire's collection of commuter income taxes. |
| 19 | New York v. New Jersey | 429 U.S. 810 (1976) | New York moved for leave to file a bill of complaint against New Jersey challenging the constitutionality of commuter income taxes. ³⁶⁰ The Court summarily denied leave with a citation to <i>Pennsylvania v. New Jersey</i> , 426 U.S. 660 (1976). |
| 20 | California v. Texas | 437 U.S. 601 (1978) | The Court denied leave to file a bill of complaint to determine the domicile of Howard Hughes after his death for tax purposes per curiam with concurring opinions by Justice Brennan (noting that statutory interpleader was available to resolve dispute), Justice Powell (same), and by Justice Stewart with Justice Stevens (noting statutory interpleader was available and that <i>Texas v. Florida</i> was wrongly decided). The Court granted leave upon refile. ³⁶¹ |
| 21 | New Mexico v. Texas | 444 U.S. 895 (1979) | New Mexico moved for leave to file a bill of complaint against Texas seeking "to enjoin enforcement of a Texas PUC order prohibiting any Texas electric utility from interconnecting in interstate commerce unless specifically allowed by the Texas PUC or FERC." ³⁶² The Court summarily denied leave. |
| 22 | California v. Texas | 450 U.S. 977 (1981) 450 U.S. 1038 (1981) | California moved for leave to file a bill of complaint against Texas seeking "to enjoin Texas from quarantining California fruits and vegetables because of [a] Mediterranean fruit fly infestation" and moved for a temporary restraining order. ³⁶³ The Court first granted the temporary restraining order but then summarily denied leave and vacated the temporary restraining order. |
| 23 | California v. Texas | 454 U.S. 886 (1981) | California moved for leave to file a bill of complaint against Texas, Florida, Alabama, Mississippi, and South Carolina seeking to enjoin those states from "quarantining California fruits and vegetables because a of Mediterranean fruit fly infestation." ³⁶⁴ The Court summarily denied leave to file. |
| 24 | California v. West Virginia | 454 U.S. 1027 (1981) | California moved for leave to file a bill of complaint against West Virginia "to establish breach of contract covering football games |

360. *Id.* at 208.

361. McKusick, *supra* note 328, at 208; *California v. Texas*, 457 U.S. 164 (1982).

362. *Id.* at 209–10.

363. *Id.* at 210 .

364. *Id.* at 210.

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| | | | between San Jose State University and the University of West Virginia.” ³⁶⁵ The Court summarily denied leave to file. Justice Stevens dissented from the denial because the Justice Harlan’s reasoning in <i>Ohio v. Wyandotte Chemicals Corp.</i> that the original jurisdiction over controversies between states and citizens of others states is discretionary does not apply to controversies between states. |
| 25 | Oklahoma v. Arkansas | 460 U.S. 1020 (1983) | Oklahoma moved for leave to file a bill of complaint “Arkansas and various municipalities and private companies to enjoin discharge of waste into Illinois River.” ³⁶⁶ The Court summarily denied leave. |
| 26 | Puerto Rico v. Iowa | 464 U.S. 1034 (1984) | Puerto Rico moved for leave to file a bill of complaint against Iowa seeking a writ of mandamus to compel “extradition of a Puerto Rican fugitive.” ³⁶⁷ The Court summarily denied leave. |
| 27 | Arkansas v. Oklahoma | 465 U.S. 1018 (1984) | Arkansas moved for leave to file a bill of complaint against Oklahoma challenging the “constitutionality of ‘retaliatory’ highway use tax on Arkansas-based motor carriers operating in Oklahoma.” ³⁶⁸ The Court summarily denied leave. |
| 28 | Pennsylvania v. Oklahoma | 465 U.S. 1097 (1984) | Pennsylvania moved for leave to file a bill of complaint against Oklahoma challenging the “constitutionality of ‘retaliatory’ highway use tax on Pennsylvania-based motor carriers operating in Oklahoma.” ³⁶⁹ The Court summarily denied leave. |
| 29 | Pennsylvania v. Alabama | 472 U.S. 1015 (1985) | Pennsylvania moved for leave to file a bill of complaint “against 38 states to challenge their liquor ‘price affirmation’ systems.” ³⁷⁰ The Court summarily denied leave. |
| 30 | South Dakota v. Nebraska | 485 U.S. 902 (1986) | South Dakota moved for leave to file a bill of complaint against Nebraska, Iowa, and Missouri “in nature of a quiet title action’ to determine rights of South Dakota to waters of Missouri River as against Nebraska, Iowa, and Missouri.” ³⁷¹ The Court summarily denied leave. |
| 31 | Louisiana v. Mississippi | 488 U.S. 990 (1988) | Louisiana moved for leave to file a bill of complaint against Mississippi seeking settlement of a portion of its Mississippi River boundary. ³⁷² The Court summarily denied leave over Justice |

365. *Id.* at 209.

366. *Id.* at 209.

367. *Id.* at 209.

368. McKusick, *supra* note 328, at 208.

369. *Id.* at 229.

370. *Id.* at 210.

371. *Id.* at 207.

372. *Id.* at 207.

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| | | | White's impassioned dissent lamenting that "this is no way to treat a sovereign State that wants its dispute with another State settled in this Court." |
| 32 | Arkansas v. Oklahoma | 488 U.S. 1000 (1989) | Arkansas moved for leave to file a bill of complaint against Oklahoma seeking "to enjoin application of Oklahoma's water quality standards to point sources within Arkansas." ³⁷³ The Court summarily denied leave. |
| 33 | Texas v. Louisiana | 515 U.S. 1184 (1995) | Texas moved for leave to file a bill of complaint against Louisiana. The Court summarily denied leave. |
| 34 | Southeast Interstate Low-Level Radioactive Waste Management Commission v. North Carolina | 533 U.S. 926 (2001) | The Southeast Interstate Low-Level Radioactive Waste Management Commission moved for leave to file a bill of complaint against North Carolina for breach of an interstate compact for radioactive waste management compact and seeking to enforce its sanctions against North Carolina. The Court summarily denied leave. The Court granted leave in the controversy upon its refile by Alabama, Florida, Tennessee, Virginia and the Commission. ³⁷⁴ |
| 35 | Arkansas v. Oklahoma | 546 U.S. 1166 (2006) | Arkansas moved for leave to file a bill of complaint against Oklahoma. The Court summarily denied leave. |
| 36 | Mississippi v. Memphis | 130 S. Ct. 1317 (2010) | Mississippi moved for leave to file a bill of complaint against the city of Memphis. The Court summarily denied leave with citations to <i>Virginia v. Maryland</i> , 540 U.S. 56, 74 n.9 (2003); <i>Colorado v. New Mexico</i> , 459 U.S. 176, 187 n.13 (1982). |

373. McKusick, *supra* note 328, at 210.

374. *Alabama v. North Carolina*, 130 S. Ct. 2295, 2304–05 (2010) ("In July 2000, seeking to enforce its sanctions resolution, the Commission moved for leave to file a bill of complaint under our original jurisdiction. . . . North Carolina opposed the motion on the grounds that the Commission could not invoke this Court's original jurisdiction, and we invited the Solicitor General to express the views of the United States. . . . The Solicitor General filed a brief urging denial of the Commission's motion on the grounds that the Commission's bill of complaint did not fall without our exclusive original jurisdiction over 'controversies between two or more States.' § 1251(a). We denied the commission's motion.").