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ON NOT RESOLVING INTERSTATE DISPUTES

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ABSTRACT: The Supreme Court of the United States bills itself as an appellate tribunal whose function is to resolve issues of federal law. That is accurate—for the most part. For even today, the Supreme Court still hears trials as a Court of Original Jurisdiction, where it primarily resolves interstate disputes relating to sovereignty over land or water.

Almost invariably, writers assume that the Court has authority under its Original Jurisdiction Clause to actually award the land or water at issue. This Article argues that the Court has no direct constitutional authority to award the land or water in Original Jurisdiction cases. Rather, the Court has direct constitutional authority to remedy breaches of interstate peace. The Court may, as a prophylactic remedy, award the land or the water. But expansive prophylactic remedies are disfavored, as they prevent much conduct that is

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constitutionally permissible. To establish the appropriateness of such a remedy, facts must exist which show that the remedy is required to prevent further breaches of defendant's duty, that less intrusive forms of equitable relief would be futile, and that even granting these points the injunction is not too intrusive.

The Article further argues that, at least in the case of interstate water disputes, the presumption cannot be rebutted. Far from preventing interstate aggression, the Court's resolution of the disputes induces the states to take aggressive measures to protect themselves against a threat of suit. Further, the Court's resolution discourages states from resolving the disputes themselves, rather than having the Court resolve it for them. Finally, the Court's remedy encourages states to waste precious time waiting for a judicial windfall, time that could be spent negotiating in earnest for a compromise solution—as is well illustrated by the recent Asian Carp invasion of Lake Michigan. The Article concludes that, at least in the case of interstate water rights, the Court's decision to actually allocate is both unwise and contrary to the grant of Original Jurisdiction.

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INTRODUCTION

The Supreme Court’s Original Jurisdiction over suits brought by one state against another¹ (“sister-state suits”) sets the stage for one of the more interesting contrasts between a legal doctrine and its application. Sister-state suits call for the greatest “delicacy”;² always over the decisionmaker’s shoulder is the risk of civil war.³ Only the Supreme Court can be trusted with them. Indeed, even compared with the Court’s regular docket, not noted for its triviality, there is a “special drama”⁴ attendant to

¹ The Court has Original Jurisdiction “[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party.” U.S. CONST. art. III, § 2, cl. 2.

² William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an “Essential Role,”* 100 YALE L.J. 1013, 1014 (1991).

³ *United States v. Texas*, 143 U.S. 621, 641 (1892). See also Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court’s Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, 186 (1993).

⁴ McKusick, *supra* note 3, at 185.

sister-state suits. When the Supreme Court decides sister-state suits it is conducting judicial diplomacy, albeit at a national rather than international level.⁵ In a recent dissent, Chief Justice Roberts observed that “[o]ur original jurisdiction over actions between States is concerned with disputes so serious they would be grounds for war if the States were Sovereign.”⁶

What are these mysterious cases? Today, they are chiefly disputes about the precise delimitation of boundaries, the allocation of water from rivers, or the interpretation of dusty agreements between states called “Compacts”.⁷ Indeed, one scholar notes that, far from presenting a “special drama”, Original cases – and the Clause itself – are of “relative obscurity”.⁸ Knight-errants of the legal academy propose to rescue the Court’s original docket from its suspended animation.⁹ Few who have taken the time to consider the Court’s original docket are satisfied with what they have found.¹⁰

The Court itself treats the docket as little more than an antiquated embarrassment. When the Court takes jurisdiction over an original action, it promptly shunts it off to a Special Master

⁵ Thomas H. Lee, *The Supreme Court of the United States as a Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765 (2004).

⁶ *South Carolina v. North Carolina*, 130 S. Ct. 854, 876 (2010) (Roberts, CJ, dissenting).

⁷ 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.”).

⁸ James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 555 (1994).

⁹ See, e.g., *id.* at 555 (forum for federal government to sue to have constitutionality of its laws established as against all states); Lee, *supra* note 6, at 1765 (quasi-international tribunal). Akhil Amar has also presented a justification of the Clause. See Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 472 (1989). His account, however, is that the Clause was put into the Constitution because of geographic concerns. Since the Court sits in Washington, states could conveniently be represented by their Senators, also in Washington. That is, to put it mildly, not how things are done today. Thus, it is less a proposal to rescue the clause, as a proposal that it be decently buried.

¹⁰ See Amar, *supra* note 9, at 472.

for fact finding.¹¹ For years, the Court has no further dealings with the case except to periodically authorize the Special Master's expenses. The Special Master conducts hearings, receives evidence, and diligently prepares transcripts thousands or tens of thousands of pages long. After a respectably laconic trial, the Special Master files a report making recommendations on the disposition of the dispute. The Supreme Court receives the report. After some months' delay during which the Court in theory reviews the record (tens of thousands of pages) *de novo* it dutifully schedules oral arguments. Over at most a few hours' questioning, the Court rehears (*de novo*) what took the Special Master a number of years to hear. Having heard arguments, the Court issues a decree. Typically it just orders the implementation of the Special Master's report.

And the parties immediately renegotiate it. Nor do they, at last, leave the Court alone. Rather they bicker over who must pay the cost for their recent legal squabble, involving the Court in yet more determinations. For a decree of any importance, time and good lawyering will show that the terms are ambiguous. Then the parties must relitigate the issue; again, before the Supreme Court.

Take the dispute between Colorado and Kansas over allocation of the flow of the Arkansas River. The parties first went before the Supreme Court in 1902.¹² There, the Court announced the doctrine of equitable apportionment which would thereafter

¹¹ See *Maryland v. Louisiana*, 451 U.S. 725, 734 (1981) ("[A]s is usual, we appointed a Special Master to facilitate handling of the suit."). A judicial adjunct. Special Masters raise their own constitutional witches' brews. Even supporters like Professor Linda Silberman suggest that the Special Masters raise Due Process concerns, as many of their decisions are effectively insulated from judicial review. Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2150 (1989). With regard to the functions and dysfunctions of Special Masters in the Supreme Court, see Anne-Marie C. Carstens, *Lurking in the Shadows of the Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 663-77 (2001) for an outline of the Constitutional difficulties in the use of Special Masters in the Court's Original Jurisdiction.

¹² *Kansas v. Colorado*, 185 U.S. 125 (1902).

govern interstate water allocation suits. The doctrine failed to resolve even the case in which it was announced. Although the parties eventually came to terms without the help of the Court,¹³ as of 2009, Colorado and Kansas were still before the Court disputing the Arkansas River.¹⁴ The Court's most recent decision established that 28 U.S.C. § 1821(b)'s expert witness fee-shifting provision applied to the case.¹⁵ Had it not, Kansas could have collected actual (rather than statutory) expenditures on expert witnesses (excluding attorney's fees).¹⁶ The amount? Almost \$10,000,000.¹⁷

In a poignant metaphor, several of the Special Masters the Court appointed to find facts in sister-state suits have died in office.¹⁸ The resolution of *Arizona v. California*¹⁹ was delayed for a year while a new Special Master acquainted himself with an evidentiary file built by one such predecessor.²⁰ No mean task, this: the case eventually built up 25,000 pages of transcripts.²¹ Anne-Marie Carstens recently suggested that the Court should appoint retired Article III judges as Special Masters.²² At least one scholar objected to this measure on the grounds that the candidates are too old and would too often die before they decided their cases.²³ Some would call it inauspicious.

¹³ *Colorado v. Kansas*, 320 U.S. 383 (1943) (continuing the dispute between Kansas and Colorado over the Arkansas River). See *Arkansas River Compact*, Pub. L. No. 81-82, 63 Stat. 145 (1949) (allocating the Arkansas River between Colorado and Kansas).

¹⁴ *Kansas v. Colorado*, 129 S. Ct. 1294 (2009).

¹⁵ *Id.* at 1298.

¹⁶ *Id.* at 1297.

¹⁷ *Id.*

¹⁸ *Texas v. New Mexico*, 488 U.S. 917 (1988); see also *Texas v. New Mexico*, 468 U.S. 1202 (1984) (retirement of Special Master); *Arizona v. California*, 350 U.S. 812 (1956) (death).

¹⁹ The dispute had earlier led Arizona to muster its national guard and occupy a federal work site in California. JACK L. AUGUST, JR., *DIVIDING WESTERN WATERS: MARK WILMER AND ARIZONA V. CALIFORNIA* 46 (2007).

²⁰ *Arizona v. California*, 350 U.S. 812 (1956).

²¹ *Arizona v. California*, 373 U.S. 546, 551 (1963).

²² Carstens, *supra* note 11, at 700.

²³ JOSEPH F. ZIMMERMAN, *INTERSTATE DISPUTES: THE SUPREME COURT'S ORIGINAL JURISDICTION* 156 (2006).

This state of affairs is destined to grow less tolerable. Increasing populations and climate change mean the value of water rises.²⁴ Heretofore, interstate water disputes have been a Western phenomenon. However, litigation has already been contemplated over water allocation in the water rich South-East.²⁵ And climate change, making most parts of the United States hotter and more arid, is expected to decrease the water available.²⁶ As the value of water rises, so does the value of a Supreme Court judgment allocating it. So, therefore, will the number of suits seeking an apportionment.

This Article critiques the Court's doctrine in its Original Jurisdiction clause. It argues that the Court has mistaken its function to determine appropriate remedies ("the remedies phase") after deciding the merits, for its function of resolving the case on the merits ("the merits phase"). The merits phase does not require the Court to determine ownership or sovereignty over the resource (land or water; which state owes what duty). Rather, the merits phase of the original action jurisdiction tracks the purpose of the jurisdictional grant – to determine whether a state has unconstitutionally abused its power.²⁷ The remedy need go

²⁴ GEORGE WILLIAM SHERK, *DIVIDING THE WATERS: THE RESOLUTION OF INTERSTATE WATER CONFLICTS IN THE UNITED STATES* 59 (2000).

²⁵ Georgia, Florida, and Alabama failed to agree on a Compact that would have apportioned the Apalachicola-Chattahoochee-Flint basin. See Benjamin L. Snowden, Note, *Bargaining in the Shadow of Uncertainty: Understanding the Failure of the ACF and ACT Compacts*, 13 N.Y.U. ENVTL. L. J. 134 (2005). For a discussion of the dispute and negotiations, and the potential expansion of water allocation conflicts to the South-East, see Andrew Thornley, *A Tale of Two River Basins: The Southeast Finds Itself in a Rare Interstate Water Struggle*, 9 U. DENV. WATER L. REV. 97, 103, 111 (2006). As of writing (May 2010), no litigation is pending in the Supreme Court.

²⁶ See, e.g., Jean. R. Sternlight, *Introduction: Collaboration Good or Bad: How is it Working on the Colorado River?*, 8 NEV. L. J. 803, 803–04 (2008) (Lake Mead, the primary reservoir for the Colorado River which supplies seven states including California, is rapidly diminishing).

²⁷ See THE FEDERALIST NO. 80, at 405 (Alexander Hamilton) (MacMillan Co., 1948) ("[T]he judiciary authority of the union ought to extend ... to all those [cases] which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves."). Cf. Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643,

no further than striking those acts. It is often better to go further, because allocating a resource is a pretty good way of ensuring that there will have been no aggression in allocating it. But the choice to impose this sort of prophylactic remedy is a pragmatic judgment, not a constitutional command, and can be defeated by a variety of considerations.

Most commentators suspect that the Court is not particularly effective at resolving these disputes.²⁸ The Court concurs.²⁹ Even as it issues decrees, it frequently opines that the outcome would have been better for the parties had they bargained with each other instead of invoking the Court's jurisdiction.³⁰ It is an odd state of affairs for a supreme tribunal typically empowered to order compliance to have futilely to beg for it.³¹ This is largely a function of the incentive the Court creates.

644 (2005) (arguing that the federal courts often confuse merits with jurisdictional issues).

²⁸ See *infra* Parts III., IV.

²⁹ See, e.g., *Colorado v. Kansas*, 320 U.S. 383, 392 (1943) ("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."); see also *New York v. New Jersey*, 256 U.S. 296, 313 (1921) ("We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted"); *Minnesota v. Wisconsin*, 252 U.S. 273, 283 (1920) ("It seems appropriate to repeat the suggestion, made in [*Washington v. Oregon*], that the parties endeavor with consent of Congress to adjust their boundaries."); *Washington v. Oregon*, 214 U.S. 205, 218 (1909) ("Similar [Compacts] have passed Congress in reference to the boundaries between Mississippi and Louisiana and Tennessee and Arkansas. 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"). For a contemporary example, see *Kansas v. Colorado*, 543 U.S. 86, 106 (2004) ("The Special Master also recommended that experts for the two parties confer and he expressed the hope that expert discussion, negotiation, and, if necessary, binding arbitration would lead to resolution of any remaining disputes. We express that hope as well.") (internal citations omitted).

³⁰ See *supra* note 29.

³¹ Cf. *id.*

The Court, by resolving disputes under a standard which ignores which state is in possession, induces the states not in possession of the resource to sue. In negotiations the state in possession will wrest advantage from possession. Thus, the well-advised governor of an out-of-possession state will, when the stakes are large enough, sue before negotiating. As suits become increasingly more valuable, it may become unvarying practice for states to try their luck with the Supreme Court before they attempt to negotiate.³²

At least since Mnookin and Kornhauser, scholars have focused on the impact that law has on private ordering. A party's bargaining position is shaped by the result that would follow if the parties were to sue and in this sense, parties negotiate in the shadow of the law. The standard the Court applies in interstate water suits, with its emphasis on equity and its erratic results, has convinced states to arrange their affairs so as to avoid giving each other an opportunity to sue. The result is a kind of perverse logical madness. Arizona *spends* money to use water so that this water does not become available to California.³³ Basin states on the Colorado River enter a Compact whose purpose and effect is to ensure that none will be able to trade each other water.³⁴ Michigan, alleging that its fishing industry will collapse because of an imminent invasion of Asian carp, thrice sues in the Supreme Court for emergency relief instead of negotiating.³⁵ As the

³² Some commentators believe that the Supreme Court has *sub silentio* raised the evidentiary thresholds necessary to prove an Original case. See George William Sherk, *Equitable Apportionment after Vermejo: The Decline of a Doctrine*, 29 NAT. RESOURCES J. 565, 578 (1989) (arguing that *Colorado v. New Mexico* dramatically raised the burdens on downstream states by raising the evidentiary thresholds).

³³ David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573, 615 (1997).

³⁴ James S. Lochhead, *An Upper Basin Perspective on California's Claims to Water From the Colorado River Part II: The Development, Implementation and Collapse of California's Plan to Live Within its Basic Apportionment*, 6 U. DENV. WATER L. REV. 318, 334-37 (2003).

³⁵ *Michigan v. Illinois*, 130 S. Ct. 2397 (Apr. 26, 2010) (denying request for leave to reopen case); *Michigan v. Illinois*, 130 S. Ct. 1934 (Mar. 22, 2010) (denying renewed

Court ponders the case, we see unfold in Michigan's filing papers the threatened invasion.³⁶ When Michigan finally obtains relief—through the Executive, not the judicial, branch—some commentators fear it is too late to be effective.³⁷

This Article aims to show that: (1) what is currently labeled the merits stage of an Original Jurisdiction action is better thought of as the outgrowth of an attempt prophylactically to prevent constitutional violations; (2) the Court is very bad at resolving interstate water disputes; (3) the Court's availability as a remedy induces states to litigate hoping thereby to obtain a better outcome than they could achieve through negotiations. Moreover, (4) the Court induces the states to be protectionist in order to avoid the possibility of suit. The Article concludes that at least in interstate water allocation cases, the Court should re-trench its prophylactic remedy.

I. WHAT THE COURT DOES

A. *The Original Jurisdiction of the Supreme Court*

The jurisdiction of the Supreme Court, as relevant to this article, is provided by Article III of the Constitution, which provides that:

request for preliminary injunction); *Michigan v. Illinois*, 130 S. Ct. 1166 (Jan. 19, 2010) (denying request for preliminary injunction).

³⁶ The first request for a preliminary injunction, filed December 21, 2009, and denied January 19, 2010, stated that evidence of Asian carp environmental DNA was found beyond the Army of Corps of Engineers' barrier. Motion for Preliminary Injunction at 3, *Michigan v. Illinois*, 130 S. Ct. 1166 (2010), 2009 WL 6310836. The second request noted that Asian carp had been found in Lake Michigan itself. Renewed Motion for Preliminary Injunction at 2, *Michigan v. Illinois*, 130 S. Ct. 1166 (2010), 2010 WL 1250413. In its reply brief, Michigan and the Corps of Engineers sparred over whether the Corps had committed any action subject to judicial review. See Reply Brief at 13–14, *Michigan v. Illinois*, 130 S. Ct. 1166 (2010), 2010 WL 1362241.

³⁷ See Thom Cmar, *New National Policy Gives Hope for the Future of the Great Lakes*, SWITCHBOARD: NAT. RESOURCES DEF. COUNCIL STAFF BLOG, http://switchboard.nrdc.org/blogs/tcmar/new_national_policy_gives_hope.html (July 19, 2010) ("If we'd had a national policy - like the one announced today - in place from Day One to ensure that the federal government was focused on the risk that the Asian carp pose to the Great Lakes and the urgent need to act aggressively to stop it, the current Asian carp crisis might have been avoided.").

The judicial power [of the United States, which “shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish,”] shall extend to . . . controversies between two or more states.³⁸

The Supreme Court today bills itself as an appellate federal law-making tribunal, a characterization that is largely accurate. Although guessing at the Framers’ intent is hazardous,³⁹ most sources indicate that they also contemplated for it a peacemaking function.⁴⁰ Thus, Federalist 80 sets out the types of problems that properly belong to the judiciary, and then justifies judicial review of cases assigned to the judiciary under Article III as solving one or more of these problems.⁴¹ In so doing, Hamilton highlights amongst just a few other functions the courts’ peacemaking function, entrusted to the United States’ final court of appeal (that is, the Supreme Court).⁴² Because the Court is the highest tribunal of the Nation, because in it was primarily vested the Judicial Power of the

³⁸ U.S. CONST. art. III, § 2, cl. 2.

³⁹ See JOHN HART ELY, *WAR AND RESPONSIBILITY* 3 (1993) (“One of the recurrent discoveries of academic writing about constitutional law—an all but certain ticket to tenure—is that from the standpoint of twentieth-century observers, the ‘original understanding’ of the document’s framers and ratifiers can be obscure to the point of inscrutability.”). On the Compact Clause, compare George William Sherk, *The Management of Interstate Water Conflicts in the Twenty-First Century: Is It Time to Call Uncle?*, 12 N.Y.U. ENVTL. L.J. 764 (2005) (“There is no doubt that the Framers of the Constitution expected the States to resolve conflicts among themselves through the use of interstate Compacts”), with Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 YALE L. & POL’Y REV. 163, 170 (2005) (scrutinizing Framers’ debates, finding that purpose and contours of Compact clause is unclear).

⁴⁰ THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 27, at 405 (“[T]he judiciary authority of the union ought to extend [to cases, including, inter alia] those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves.”). See also Dodge, *supra* note 2, at 1025; Pfander, *supra* note 8, at 572; Lee, *supra* note 5, at 1765.

⁴¹ See THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 27, at 405.

⁴² *Id.* at 405–08.

United States,⁴³ and because the Court could not pass on questions properly before it, it was ideally suited to resolve sensitive quasi-diplomatic questions.

This function of the Supreme Court's is today mostly antiquarian,⁴⁴ perhaps because it courts ridicule to seriously imagine the states going to war with each other.⁴⁵ It is thus perhaps necessary to point out that, at least under Hamilton's theory, it was largely coextensive with the Court's Original Jurisdiction.⁴⁶

These days the Court disfavors its Original Jurisdiction, and has permitted Congress to assign concurrent jurisdiction to other courts

⁴³ U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

⁴⁴ See Lee, *supra* note 5, at 1765 (commenting on Original Jurisdiction's "relative obscurity"). For instance, Chief Justice William Rehnquist's book on the Supreme Court fails even to mention the Original jurisdiction by which Hamilton believed it would keep interstate peace. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* (Random House 2001).

⁴⁵ Although in 2009, the Georgia Senate passed a resolution affirming Georgia's right to nullify federal laws, and includes the following language:

[T]hat faithful to that compact, according to the plain intent and meaning in which it was understood and acceded to by the several parties, it is sincerely anxious for its preservation: that it does also believe, that to take from the States all the powers of self-government and transfer them to a general and consolidated government, without regard to the special delegations and reservations solemnly agreed to in that compact, is not for the peace, happiness or prosperity of these States; and that therefore this State is determined, as it doubts not its co-States are, to submit to undelegated, and consequently unlimited powers in no man, or body of men on earth: . . . where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy natural right in cases not within the compact, (*casus non foederis*), to nullify of their own authority all assumptions of power by others within their limits: that without this right, they would be under the dominion, absolute and unlimited, of whosoever might exercise this right of judgment for them

S. Res. 632 (Ga. 2009).

See THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 27, at 405 (arguing that a Supreme Court is required precisely to determine questions between the several states where their differences might lead to war).

⁴⁶ See THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 27, at 405.

for some of its jurisdiction.⁴⁷ Because of the doctrine that parties seeking Original Jurisdiction must have no other available forum,⁴⁸ the Court then typically refuses to grant jurisdiction in these cases.⁴⁹

The Court applies strict procedural rules to limit the number of Original cases it hears.⁵⁰ It requires that states be on opposite sides of a controversy, or that a state be sued by the United States: a state cannot sue the United States and avail itself of the Court's jurisdiction.⁵¹ The states must show that they have no other available forum.⁵² Finally, the Court applies heightened jurisdictional standards and other rules that make it more difficult for states to reach the merits and remedies phase of their suit.

The Court has gradually extended its jurisdiction over sovereignty cases.⁵³ Thus, in addition to common-law proprietary actions, the Court usually accepts cases dealing with water rights, interstate nuisances, boundary disputes, and interstate tax escheats.⁵⁴

Today, the Court adjudicates mostly sovereign rights in its Original Jurisdiction.⁵⁵ These are, in any case, the cases with which this Article concerns itself. Thus, for purposes of this Article, a suit between New York State and Connecticut is not a suit over who has actual possession over water; it is, rather, a suit over which state has the sovereign right to assign water

⁴⁷ See, e.g., 28 U.S.C. § 1332 (assigning jurisdiction of diversity cases to federal district courts).

⁴⁸ See *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 499 (1971).

⁴⁹ See McKusick, *supra* note 3, at 197.

⁵⁰ See *infra* Part I.B; see also McKusick, *supra* note 3, at 194-97.

⁵¹ See, e.g., *Idaho v. Vance*, 434 U.S. 1031 (1978) (summary denial). See McKusick, *supra* note 3, at 198.

⁵² See *Wyandotte Chems. Corp.*, 401 U.S. 493, 499 (1971).

⁵³ E.g., *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838) (boundary cases); *Missouri v. Illinois*, 180 U.S. 208 (1901) (interstate water nuisance suits); *Kansas v. Colorado*, 185 U.S. 125 (1902) (apportionment of water from river).

⁵⁴ *Kansas v. Colorado*, 185 U.S. 125 (1902).

⁵⁵ Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 390 (1995).

according to its water rights regime. An assignment of 100,000 acre/feet/year⁵⁶ to Connecticut, and 100,000 to New York, means that Connecticut can assign 100,000 acre/feet/year according to its domestic laws, and New York can do the same according to its domestic laws. Likewise, a sale between New York and Connecticut of water rights would be a sale of the right to assign them under their respective domestic laws, rather than a sale of water rights themselves.

In Original Jurisdiction cases, the Court sits as a trial court.⁵⁷ This is an odd arrangement. It would be odder still if the Court actually sat as a trial court as in a federal district court; presiding over a jury trial, ruling on objections according to the Federal Rules of Evidence, deciding disputed motions according to the Federal Rules of Civil Procedure, etc. Fortunately, the Court delegates the responsibility of actually gathering evidence and presiding over a trial to a Special Master.⁵⁸

There have not been many Original cases. Carstens reports that, as of the mid 1990's, there had only been roughly 170.⁵⁹ That said, a few of these cases were of some note. For instance, in *Arizona v. California*,⁶⁰ the Court permanently granted to Arizona over one million acre/feet/year over California's objections.⁶¹ This is

⁵⁶ One acre/foot is enough water to submerge an acre of land with a foot of water. It is the standard measure of water in interstate water suits. For purposes of comparison, in the arid West, one acre/foot is enough to supply the needs of four people for a year (in the East, which faces fewer incentives to conserve water, each person uses about one acre/foot/year).

⁵⁷ See REHNQUIST, *supra* note 44, at 31-32.

⁵⁸ See *Maryland v. Louisiana*, 451 U.S. 725, 734 (1981) ("[A]s is usual, we appointed a Special Master to facilitate handling of the suit.").

⁵⁹ See Carstens, *supra* note 11, at 638.

⁶⁰ *Arizona v. California*, 373 U.S. 546 (1963).

⁶¹ Frank J. Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, 1963 SUP. CT. REV. 158, 165-66 (1963). At the time of decision, California had existing water contracts of some 5.362 million acre/feet/year. It was restricted by the Court's decision to 4.4 million acre/feet/year plus one half of any surplus in the Colorado's flow in any given year. It was further required to retrench its use by ½ of the Colorado's flow if flows were less than the statutorily assigned 7.5 million acre/feet/year. Arizona was granted 2.8 million acre/feet/year, up from the 1.2 million acre/feet/year the State claimed it was using.

roughly the water needed by a population of four million.⁶² It is largely because of this case that, to this day, California struggles to find available sources of water.⁶³ It has been called the “case of the Century”.⁶⁴

B. The Court’s Standard in Interstate Water Law Cases

The Court permits states to exploit water resources that flow through them so long as they do not cause substantial harm to other states.⁶⁵ In water pollution cases, this means that states may use interstate watercourses to dispose of waste so long as they do not cause substantial harm to other states.⁶⁶ In water apportionment cases, this means that states cannot so deplete the waters of an interstate watercourse that another state loses a substantial part of its equitable allocation.⁶⁷

In addition, the Court is sometimes tasked with Compact interpretation.⁶⁸ Where states reach agreement on interstate issues and obtain the consent of Congress, the result is an interstate

⁶² CITY OF SANTA FE PLANNING & LAND USE DEP’T PLANNING DIV., WATER USE IN SANTA FE (2001), available at <http://www.santafenm.gov/DocumentView.aspx?DID=1427>; see also PETER H. GLEICK, CALIFORNIA’S “ECONOMIC PRODUCTIVITY” OF WATER USE (2004), available at http://www.pacinst.org/reports/economic_productivity_cal_water.pdf (last visited May 26, 2010) (“Overall, 1,000 acre-feet of water produces 22,000 jobs in California’s industrial sector, 6,600 jobs in the commercial sector, and 12 jobs in the agricultural sector.”).

⁶³ See *infra* Part IV.

⁶⁴ See, e.g., AUGUST, *supra* note 19, at xvi–xvii. Indeed, when it was decided (in 1963—an eventful year that also saw the Court decide *Gideon v. Wainwright*, providing a right to counsel at trial), *Arizona v. California* spawned a vast literature that graced even the pages of the Supreme Court Review. See, e.g., Trelease, *supra* note 61; Mark Wilmer, *Arizona v. California: A Statutory Construction Case*, 6 ARIZ. L. REV. 40 (1964); David Haber, *Arizona v. California: A Brief Review*, 4 NAT. RESOURCES J. 17 (1965).

⁶⁵ *Kansas v. Colorado*, 206 U.S. 46, 100–01 (1907). See also STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 395–96 (2d ed. 2006) (international standard, taken from United States Supreme Court, prevents substantial harm).

⁶⁶ See, e.g., *Missouri v. Illinois*, 180 U.S. 208, 243 (1901).

⁶⁷ See, e.g., *Colorado v. New Mexico*, 459 U.S. 176, 183–84 (1982).

⁶⁸ See, e.g., *Norfolk & W. Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 129–130 (1991).

Compact.⁶⁹ Because of Congressional approval it is federal law, albeit a contract,⁷⁰ and the Court therefore cannot order relief inconsistent with it.⁷¹ There are currently about 196 Compacts in force in the United States.⁷² But disputes sometimes arise between states about what exactly a Compact provides, and Compacts rarely include provisions establishing dispute resolution procedures. Because these disputes are between sister-states, they fall within the Court's Original Jurisdiction.⁷³ There, the Court interprets Compacts as statutes, filling in ambiguities according to statutory rather than contract law.⁷⁴

Statutory interpretation principles hold that Congress is presumed to be aware of judicial interpretation when it legislates.⁷⁵ This usually means that in ambiguous cases the Court will consider the default substantive rule.⁷⁶

In water apportionment cases, this means the Court applies the doctrine of equitable apportionment.⁷⁷ This doctrine apportions the river according to equity, generally.⁷⁸ Since the Court hears the

⁶⁹ 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."). Despite this language, the Court has held that the Compact Clause creates an affirmative right to create a Compact provided federal interests are not harmed. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471-72 (1978).

⁷⁰ *Texas v. New Mexico*, 482 U.S. 124, 428 (1987).

⁷¹ *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

⁷² KENT W. BISHOP, INTERSTATE COMPACTS: THE NEXT FRONTIER FOR ADMINISTRATIVE PROCEDURE RULEMAKING 4, available at <http://www.csg.org/knowledgecenter/docs/ncic/Bishop2-InterstateCompactLaw-A-NewFrontierforAdministrativeProcedureRulemaking.pdf> (last visited May 24, 2010).

⁷³ *E.g.* *Texas v. New Mexico*, 482 U.S. 124 (1987).

⁷⁴ *Alabama v. North Carolina*, 130 S. Ct. 2295, 2313 (2010); *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991).

⁷⁵ *See, e.g., Norfolk & W. Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 129-130 (1991). For a discussion of Compact interpretation, see generally Tripolitsiotis, *supra* note 39.

⁷⁶ *See Texas v. New Mexico*, 462 U.S. 554, 569 (1983).

⁷⁷ *Kansas v. Colorado*, 206 U.S. 46, 100-01 (1907).

⁷⁸ *Colorado v. Kansas*, 320 U.S. 383, 393-94 (1943) ("[I]n determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed.").

cases in equity, no list of factors to consider can be exclusive;⁷⁹ nevertheless, the Court has established a number of canonical factors which it will consider. The main factor is the protection of existing uses.⁸⁰ The Court will only reluctantly interfere with existing uses of water.⁸¹

In practice, equitable allocation tends to present questions that do not draw on judicial competence. Take this statement from an early case:

[W]e may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which by the taking of water from the Arkansas River and in no other way can be made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas Valley, a benefit from water as great as that

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Scholars debate whether, before the case of *Colorado v. New Mexico* (“Vermejo”), the Court ever would disturb existing uses. 459 U.S. 176, 184–85 (1982). Compare Richard A. Simms, *A Sketch of the Aimless Jurisprudence of Western Water Law*, in *WATER LAW: TRENDS, POLICIES, AND PRACTICE* 326–27 (Kathleen Marion Carr & James D. Crammond, eds., 1995) (arguing that the majority opinion in *Colorado v. New Mexico* recast interstate water law by permitting infringement of existing uses), with MCCAFFREY, *supra* note 65, at 389–96 (arguing that *Colorado v. New Mexico* accurately applied the principle of equitable apportionment, that states not persons are entitled to a share of the interstate watercourses, and that harm is therefore a loss of that share). See also Sherk, *supra* note 32, at 578 (arguing that *Colorado v. New Mexico* dramatically raised the burdens on downstream states by raising the evidentiary thresholds). To sum up: of three noted experts on water law, one believes that *Vermejo* imposed new obligations on upstream states, one that it imposed new burdens on downstream states, and one that it effected no change at all.

For other examples of the confusion wrought by *Vermejo*, see Ann Macon McCrossen, *Is There a Future for Proposed Water Uses in Equitable Apportionment Suits*,

which would inure by keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit which the flow of the Arkansas through Kansas has territorially changed.⁸²

These determinations are, to put it mildly, not the sort that call for the legal acumen of the Court.⁸³ The Court recognizes this. If the states press their claims despite the Court's attempt to make it difficult for them to do so, the Court often re-proves them for this choice.⁸⁴

The proceedings in these cases act out the general aimlessness of the standard. The Court delegates hearings to a Special Master⁸⁵ and the Court then reviews the Special Master's findings. In theory, this review is *de novo*,⁸⁶ in practice according to

25 NAT. RESOURCES J. 791, 809 (1985); Ann Berkley Rodgers, *The Limits of State Activity in the Interstate Water Market*, 21 LAND & WATER L. REV. 357, 358 (1986).

⁸² *Kansas v. Colorado*, 206 U.S. 46, 100-01 (1907).

⁸³ In its appellate jurisdiction, which makes up the bulk of its responsibilities, the Court is not a court of correction of errors. See SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). A fortiori, it is not a court for finding facts. It is a Court whose purpose is to set the law in federal or constitutional cases, and to harmonize circuit splits. See, e.g., *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 497-98 (1971). See also Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2561 (1998). Yet in its Original Jurisdiction, the Court has no formal factfinder to which it can defer. Although the Court calls on a Special Master, in theory though not in fact, it reviews the facts *de novo*. See *Maryland v. Louisiana*, 451 U.S. 725, 762-63 (1981) (Rehnquist, J., dissenting) (finding that though the "Court is in theory the primary factfinder," it simply does not have the time to review *de novo* the Special Master's findings). Finally, there is no possibility of appeal from a judgment of the Court in its Original Jurisdiction. According to at least one commentator who was himself a Special Master, this increases the risk of error. McKusick, *supra* note 3 at 193-94.

⁸⁴ See *supra* note 23 (collecting statements from the Court advising parties that they should have resolved their disputes through good-faith bargaining).

⁸⁵ On the mysterious appointment process for Special Masters, see Carstens, *supra* note 11, at 644-53.

⁸⁶ *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984).

some unstated standard of appellate review.⁸⁷ It is not really possible for the Court to do anything else. The proceedings in front of the Special Master almost invariably take several years⁸⁸ and produce transcripts many thousands of pages long.⁸⁹

The Special Master's mysterious⁹⁰ task, as the standard she is to apply makes clear, is a difficult one.⁹¹ She is to recommend, on the basis of these tens of thousands of pages, certain specific actions; she is not to be bound by rights,⁹² but is rather to pronounce on equity.⁹³ This is not to say that Special Masters,⁹⁴ or

⁸⁷ See *Maryland v. Louisiana*, 451 U.S. 725, 762–63 (1981) (Rehnquist, J., dissenting) (arguing that though the “[C]ourt is in theory the primary factfinder . . .” it simply does not have the time to review *de novo* the Special Master's findings).

⁸⁸ There is no record of a proceeding taking less than a year, except where the Court denies leave to file outright. For a general overview of the length of proceedings, see Carstens, *supra* note 11, at 638–644.

⁸⁹ There is a tendency in Supreme Court original opinions, perhaps out of understandable frustration, to highlight the length of the record. See, e.g., *Arizona v. California*, 373 U.S. 546, 550 (stating that record was 25,000 pages); *Colorado v. Kansas*, 320 U.S. 383, 389 (1920) (stating that record was 7,000 pages and exhibits of several thousand pages); *Kansas v. Colorado*, 206 U.S. 46, 107 (1906) (stating that record was 8,556 pages; reassuring parties that although not all was addressed in the opinion, “it has all been reviewed”).

⁹⁰ Little literature exists on how exactly the Special Master is to perform her task – what rules of evidence and procedure she is to apply, what hearings to hold, etc. See generally Carstens, *supra* note 11, at 653–58.

⁹¹ The Federal Rules of Civil Procedure permit District Courts to appoint Special Masters in complex cases. See FED. R. CIV. P. 53. Special Masters occasionally recount their experiences. See, e.g., Robert H. Freilich, *Editor's Comment: The Use of a Special Master in Complex Environmental Litigation*, 29 URB. LAW. 1 (1997); D. Bruce La Pierre, *Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale*, 1987 WIS. L. REV. 971 (1987).

⁹² See generally James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 815–46 (1991). See also *Kansas v. Colorado*, 206 U.S. 46, 100–01 (1907) (all factors creating equities must be considered).

⁹³ This is, in other words, exactly what Special Masters should not do, according to general defenders of Special Masters. For instance, Wayne Brazil, an enthusiast for Special Masters in federal district courts, argues that Special Masters work only when they introduce a fresh perspective into litigation (rather than deciding on the perspectives presented by the parties). See Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI L. REV. 394, 412 (1986). Rather, when Special Masters render an opinion, there is always the risk that “generalist judges may be tempted to rely too heavily on the master's expertise.” *Id.* at 419.

other judges facing a similar task,⁹⁵ cannot perform them. But the demands do require, in the words of a few scholars, that they be “heroic”.⁹⁶

Moreover, even “heroic” Special Masters cannot render decisions according to law.⁹⁷ Because they must decide cases according to equity, their decisions are unpredictable and to some extent arbitrary.⁹⁸ Lord Selden observed of equity courts:

⁹⁴ See, e.g., Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL’Y REV. 1, 10–14 (2006) (analyzing the problem of vagueness in the 9/11 Special Master’s authorizing statute).

⁹⁵ Judge Jack Weinstein of the Eastern District of New York is one such judge. A number of thoughtful scholars, using him as a springboard, discussed the role of unconventional judges in complex, fact-sensitive cases. See, e.g., David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064 (1997). Professor Luban makes a number of points. Judge Weinstein’s appointed role as “judge for the situation”—judge over all the equities of a case—falls far beyond what is contemplated by Article III. See *id.* at 2067. Rather, it requires them to be “technocrats par excellence.” *Id.* at 2068. It further tempts them into hubris. See *id.*

Professor Martha Minnow gives some indication of what this hubris might be. See Martha Minnow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997). In the Agent Orange class-action litigation, Judge Weinstein rejected a proposed settlement between defendants and plaintiffs at \$200M. Rather, he argued that this price looked unfair to defendants, and pushed them to press for \$180M. See *id.* at 2028. Minnow concludes that Weinstein’s eclectic approach to law is justified, but only because of his nickname—“Reversible Jack”. *Id.* at 2031.

Judge Jack Weinstein has himself discussed his role in mass torts litigation. See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1993).

⁹⁶ See Luban, *supra* note 95, at 2064.

⁹⁷ Because Special Masters’ role are in theory judicial, but they cannot render decisions according to law, they face legitimacy issues. But see, e.g., Margaret G. Farrell, *The Function and Legitimacy of Special Masters*, 2 WIDENER L. SYMP. J. 235, 248 (1997) (Special Masters are legitimate, and, in any case, necessary in complex factual disputes); Mark A. Fellows and Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269 (2005) (self-explanatory).

⁹⁸ Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 18 (1985) (distinguishing between adjudication and legislation on grounds of, inter alia, consistency).

For law we have a measure, and know what to trust to. Equity is according to the conscience of him that is chancellor and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure the chancellor's foot. What an uncertain measure this would be! One chancellor has a very long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience.⁹⁹

The successful litigant must first clear the procedural hurdles discussed above, including an additional requirement that the suit is of sufficient magnitude for the plaintiff to avail itself

⁹⁹ JOHN SELDEN, TABLE TALK 44 (1689) quoted in Wesley Newcomb Hohfeld, *Relations between Equity and the Law*, 11 MICH. L. REV. 537, 566 (1913). Cf. Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 750-54 (2006) (outlining models of adjudication). See also *id.* at 755-56, 758 ("[T]he court must also provide a candid public statement of the reasons behind its decisions."). Interstate water law decisions, for instance, are based on the sum of equities, and the equities are largely incommensurable. See Douglas L. Grant, *Collaborative Solutions to Colorado River Water Shortages: The Basin States' Proposal and Beyond*, 8 NEV. L.J. 964, 991 (2008). In these cases, it becomes difficult for the Court to provide a reasoned public statement of its decision. This leads both parties and scholars to question the Court's decision. See, for instance, the Court's decision in *Vermejo*, where the Court seemed to change its decision rule without quite saying so, and its fallout. See *supra* note 81. Indeed, a noted water law scholar has observed that "equitable apportionment" is "a label, not an analysis." R. CLARK, *WATERS AND WATER RIGHTS* § 132.1 (1967), quoted in Richard A. Simms, *Equitable Apportionment – Priorities and New Uses*, 9 NAT. RESOURCES J. 549, 553 (1989). A fascinating question is how much of the old, decently buried equity still lives in the Court's Original Jurisdiction. This question goes beyond this Article. However, I should note a few resemblances between the Supreme Court's Original Jurisdiction and the paradigmatic equity case—*Jarndyce v. Jarndyce*, from Dickens' "Bleak House." Legal commentators have approached the novel with an understandable desire to see in it insight into the legal profession. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 983 (1987) ("It was the search for human perfection, trying to cover everybody and everything, combined with lawyer abuse, that caused the delay, expense, and endless fog in *Jarndyce . . .*"). How accurately this describes the Original Jurisdiction standard I leave for the reader to decide.

of the Court's jurisdiction.¹⁰⁰ But even if they ultimately get their day in Court, litigants may have their cases dismissed on jurisdictional grounds before even reaching the merits.¹⁰¹ Litigants must show a more serious injury than in ordinary civil cases, and their burden of proof in making this showing is also higher than in ordinary civil cases.¹⁰²

¹⁰⁰ See generally *California v. West Virginia*, 454 U.S. 1027 (1981) (denying jurisdiction on a case lacking "seriousness and dignity," i.e., importance). Cf. *McKusick*, *supra* note 3, at 197. See also *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

¹⁰¹ For a discussion of the manipulability of another justiciability doctrine, personal jurisdiction, see Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1249 (2001).

¹⁰² The plaintiff state must show that she was injured or that she is about to be *seriously* injured by clear and convincing evidence, a standard somewhat higher than the balance of the probabilities. E.g., *New York v. New Jersey*, 256 U.S. 296, 309 (1918). In civil cases, plaintiff's injury burden is typically met by the balance of the probabilities. Moreover, any injury, no matter how trivial, will do, provided it is legally cognizable. See *Sherk*, *supra* note 32, at 578. Professor Sherk suggests that the Court has raised the evidentiary burden required to meet the clear and convincing standard.

Since the words "clear and convincing" do not of themselves suggest an interpretation—other than that the burden is somewhat more than a preponderance of the evidence, and somewhat less than beyond a reasonable doubt—the standard draws its meaning from the case law. Since no other court's cases are binding on the Court, the standard is made up of the cases the Court decides. Thus, if the Court is inclined to raise the standard, it need merely reject certain claims as not presenting clear and convincing evidence of substantial a real and substantial harm that it would previously have accepted. This is an unorthodox situation for the Court, or, indeed, for any appellate court. They do not typically explicate a factual standard—that is usually left to the finders of facts, with the appellate courts merely judging whether the factfinding was clearly erroneous.

The literature suggests that courts often retrench justiciability for fear of the remedies they would have to provide to successful litigants. See, e.g., Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies – and their Connections to Substantive Rights*, 92 VA. L. REV. 633, 650 (2006); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873 (1999); Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 695 (2008) (observing this result in international courts).

II. WHAT DOES THE COURT DO, REALLY?

A. Introduction

Suits proceed in three stages. First, the court determines whether it has jurisdiction. Then it determines whether a right has been violated. Then it awards appropriate remedies.¹⁰³

The Remedies Theory, briefly put, holds that the work in Original Jurisdiction cases is done by an expansive remedy rather than by deciding a case on the merits. The Constitution grants Original Jurisdiction to guarantee states' rights to be free of aggressive behavior from other states. This, and no more, is what the Court adjudicates at the merits stage. Having determined the merits, the Court, *as a remedial measure*, awards the land or water ("actually resolves the case"). It does so under a general judicial power to impose remedies that prohibit constitutional conduct in order to prevent otherwise hard to reach

¹⁰³ This is a simplified statement of the jurisdiction/merits/remedy interaction. This footnote sets out some of the complexities of analysis of jurisdiction, merits, remedies, and their interaction. In *Marbury v. Madison*, 5 U.S. 137, 163 (1803), the Court famously claims that a right implies a remedy. 5 U.S. 137, 163 (1803). However, taking its foundational text as Hart's dialogue, a strand of the literature has concluded (with some resignation) that this is not so. Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371-73 (1953). Rather, courts must provide only those remedies that are necessary to keep government tolerably within the bounds of law. See, e.g., Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2563 (1998); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 123 (2007); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 367 (1993); Richard H. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 311, 313 (1993).

In an influential article, Darryl Levinson argued that "[t]here is no such thing as a constitutional right, at least not in the sense that courts and constitutional theorists often assume." See Levinson, *supra* note 102, at 857. Professor Levinson, rather, argued that courts do not first determine whether a right has been violated and then determine what remedy is appropriate; rather, they adjust rights to fit possible remedies, in what Professor Levinson calls "remedial equilibration." See *id.* at 873. See also Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 76-80 (2007) (identifying and critiquing a trend in federal courts to detach remedies from rights; rights are inherently attached to the remedies which give them meaning).

unconstitutional conduct: in other words, it issues a prophylactic injunction. This is a remedies stage consideration.

This contrasts with the Merits Theory. On the Merits Theory, the work in original cases is done at the merits stage. The Constitution grants jurisdiction over sister-state disputes involving (for instance) boundaries and river allocation. When the Court determines that a state has the better claim to land or water, it then grants the state the land or apportions it the water. The remedy is not expansive; it is only what a state has established it has a right to at the merits stage.

This arid discussion might benefit from a concrete illustration. Suppose the Court grants Connecticut leave to file a complaint against New York on the theory that New York is unlawfully occupying New York City which historical documents show was properly granted to Connecticut. Connecticut alleges a substantial injury, namely the tax revenues it loses through New York's continued occupation of New York City. The Court then awards Connecticut sovereignty over New York City. What has it just done? Under the Remedies Theory, it has intervened in the states' aggressive behavior—New York's occupation of New York City did not bode well for the ability of Connecticut and New York to resolve their differences in good faith, and so it has cut off the disagreement by awarding the City to Connecticut. On the Merits Theory, it has simply resolved a question—sovereignty over New York City—properly in its jurisdiction.

Thus, when a Supreme Court decree sets out an award, the problem is in determining how the Court arrived at that award—how much of that award was adjudicated on the merits, and how much was awarded as an expansive remedy to the question adjudicated on the merits. This distinction matters. Plaintiffs who establish that defendants owed them a particular duty have a much stronger claim than plaintiffs who merely

show that defendants violated a duty.¹⁰⁴ Thus, if a plaintiff state can establish that it has a right to apportionment of the waters from a river derived from the merits stage of an action, it becomes the defendant's burden to show that the plaintiffs should not receive the award.¹⁰⁵

If the plaintiff merely establishes breach of a duty and moves the Court to do more than order the defendant to comply with their duties, they proceed under a theory of prophylactic relief. They must show that an expansive remedy is required to prevent further breaches of the defendant's duty. The plaintiff must first show that the defendant's breach is repeated or ongoing.¹⁰⁶ In addition, the plaintiff must show that less intrusive forms of equitable relief would be futile.¹⁰⁷ Finally, even where the defendant's breach should theoretically lead to a remedy, some prophylactic remedies may be struck because they are too intrusive.¹⁰⁸ Prophylactic remedies enjoin much constitutionally permissible conduct. Further, they involve the courts in making many determinations that local actors might reasonably make better.¹⁰⁹ Prophylactic injunctions are disfavored forms of relief and plaintiffs must affirmatively show entitlement; plaintiffs are presumed entitled to have defendants perform a duty which they have shown defendants owe them, and defendants must affirmatively show that they should not

¹⁰⁴ See, e.g., *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 213–14 (2005) (declining to award plaintiff tribe sovereign immunity from taxation on grounds that remedy was inappropriate).

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (“[T]he nature of the violation determines the scope of the remedy.”).

¹⁰⁷ See, e.g., Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99, 113 (2007) (arguing that prophylactic remedy is only imposed on recalcitrant defendants).

¹⁰⁸ See *Lewis v. Casey*, 518 U.S. 343, 362 (1996). Indeed, there is evidence of this reluctance in the Court's Original cases. See, e.g., *New York v. New Jersey*, 256 U.S. 296, 309 (1921) (refusing to apply a remedy in part because of the “extraordinary [nature of the] power under the Constitution to control the conduct of one State at the suit of another”).

¹⁰⁹ E.g., *Lewis*, 518 U.S. at 362. See also Thomas, *supra* note 103, at 99–102.

be made to perform. There is thus much at stake in how the Court's awards are characterized.

The Remedies Theory draws its main support from the purpose of the jurisdictional clause as well as the reasoning the Court uses in Original Jurisdiction cases. It also draws support from the incoherence of the Merits Theory. Parts B., C., and D. set these out in turn. Part E. presents in simplified form how the Court could act on the Remedies Theory. Its primary aim, however, is not to prescribe judicial action, but to undermine claims that judicial action under the Remedies Theory is meaningless. A proposed detailed standard falls outside the scope of this essay.

My object below is to make a Dworkinian "fit and best light" argument.¹¹⁰ Such arguments take as given actual decisions, constitutional facts, legal principles, and any other relevant legal materials,¹¹¹ and aim to show that, seen in the best possible (normative and descriptive) light, these sources support a particular understanding of the law.¹¹² Thus, I argue that the best possible normative and explanatory way to read the legal materials is the Remedies Theory rather than the Merits Theory.

B. *The Purpose of the Jurisdictional Clause*

The Framers regarded sister-state suits as especially sensitive. By their very nature, these suits deal with disputes between (often-armed) sovereigns, and as a result, have raised the specter of civil war.¹¹³ Indeed, actual armed conflict has appeared as a possibility in two suits.

In *United States v. Texas*,¹¹⁴ the parties differed over a boundary question, the resolution of which would decide the allocation of

¹¹⁰ See Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 531 (1982).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *United States v. Texas*, 143 U.S. 621, 640 (1892); AUGUST, *supra* note 19, at 46. Cf., David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 146 (1999) (Original Jurisdiction is one of the "peace and harmony" clauses).

¹¹⁴ *United States v. Texas*, 143 U.S. 621 (1892).

vast tracts of land between the United States and Texas (then a state).¹¹⁵ The United States brought suit in the Supreme Court,¹¹⁶ prompting Texas to object that the Court had no jurisdiction over the case. Because the United States was not “a state,” Texas argued, the suit therefore did not fall within the Original Jurisdiction clause.¹¹⁷

Texas proposed, instead, that the United States negotiate,¹¹⁸ and if it and the United States could not reach agreement, that the United States sue in Texas state court.¹¹⁹ If the United States looked askance at the courts of the very entity which disputed its claims to vast tracts of land, it could always submit “to a trial of physical strength.”¹²⁰

Frustrated by federal government works that Arizona saw as diverting to California the Colorado River, which Arizona believed rightfully belonged to it, the Governor of Arizona mobilized its national guard against California.¹²¹ Acting on his promise “to repel any invasion or threatened invasion of the sovereignty of the State of Arizona,” he then sent 101 National Guardsmen and two gunboats to occupy a federal construction site in California.¹²²

The spirited states present a Constitutional problem. Motivated by parochial concerns and without a body able definitively to pass on their disputes, such states threaten the Union.¹²³ The Supreme Court, its standing elevated by its subordinate judicial hierarchy, untouched by purely regional concerns, and unable to pass on cases properly in its jurisdiction, offers one solution to

¹¹⁵ *Id.* at 637.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 641.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* For a discussion of *United States v. Texas* as it relates to sovereign immunity, see James Leonard, *Ubi Remedium Ibi Jus, Or, Where There's a Remedy, There's a Right: A Skeptic's Critique of Ex Parte Young*. 54 SYRACUSE L. REV. 215, 334–39 (2004).

¹²¹ AUGUST, *supra* note 19, at 46.

¹²² *Id.*

¹²³ See, e.g., Lee, *supra* note 5, at 1807, 1829, n. 291, and works cited therein.

this structural defect.¹²⁴ The Court, and scholars,¹²⁵ has recognized this peacekeeping role in its Original Jurisdiction cases.¹²⁶

The Framers were also well aware of this. Wary of aggression between states and fearful that sister-state disputes might bring the Union into civil war, the Framers charged the Supreme Court itself with the responsibility of resolving such disputes.¹²⁷ Because it was the Court from which no appeal could be had, and the only federal court explicitly established by the Constitution, the Court could speak with special authority. This made it the most appropriate judicial forum for the resolution of interstate disputes.

A branch of scholarship, developing from the work of Akhil Amar¹²⁸ and Robert Pushaw,¹²⁹ distinguishes between cases and controversies in Article III.¹³⁰ In “cases”, courts expound federal law through the resolution of specific disputes.¹³¹ In “controversies”, the courts’ law-expounding function is much more limited—their role is resolving disputes.¹³² Controversies are in the

¹²⁴ See, e.g., Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 538 (2008).

¹²⁵ See Dodge, *supra* note 2, at 1114. A similar structural concept—the concept of extraterritoriality, a concept which defies precise definition—underlies much of horizontal federalism. See, e.g., Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1888 (1987).

¹²⁶ E.g. *Rhode Island v. Massachusetts*, 37 U.S. 657, 726 (1838); *Kansas v. Colorado*, 185 U.S. 125, 142 (1902).

¹²⁷ THE FEDERALIST NO. 80, *supra* note 27, at 405. See also Dodge, *supra* note 2, at 1025.

¹²⁸ Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 270–71 (1985); Amar, *supra* note 9, at 476.

¹²⁹ See, e.g., Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 450–51 (1993). See also *id.* at 468–517 (canvassing historical sources to support the case/controversy distinction).

¹³⁰ Engdahl, *supra* note 113, at 149 n.278.

¹³¹ Pushaw, *supra* note 129, at 458–59 (cases give concrete meaning to abstract federal rights).

¹³² *But see* Pfander, *supra* note 8, at 600 (controversy jurisdiction includes all cases, but party-based jurisdiction must partake of the “case” menu).

federal courts' jurisdiction because of the status of parties.¹³³ Thus, the constitution grants jurisdiction in diversity cases even if the resolution of the case depends on state law.¹³⁴ Thus, controversies that arise under the Court's Original Jurisdiction¹³⁵ do so solely because of the status of parties as states.¹³⁶ Because the Framers dreaded aggression between the states, they granted the Court jurisdiction over controversies between states, even if its resolution depended on state law. These disputes are important not for the issues involved but for the status of the parties as disputes between them could threaten the Nation as a whole.¹³⁷

This fear of aggressive and protectionist behavior on the part of the states is not unique to the Original Jurisdiction Clause. The Articles of Confederation failed because they did not protect the nascent Union from interstate aggression and protectionism.¹³⁸ The lessons of the Articles of Confederation inform two other major doctrines as well: the Dormant Commerce Clause,¹³⁹ and the Privileges and Immunities Clause of Article IV.¹⁴⁰

¹³³ Another thesis holds that, within the meaning of Article III, "case" means civil and criminal matters, whereas "controversies" just means civil matters. Pushaw argues that this civil/criminal distinction between cases and controversies arose in the 1790's to forbid federal interference in state criminal law. Pushaw, *supra* note 129, at 464. If this distinction between case and controversy was not present at the founding then its importance for Article III's original meaning diminishes.

¹³⁴ U.S. CONST. art. III, § 2, cl. 2. Although, to be fair, the literature suggests two other possible meanings for the distinction between cases and controversies. See Luban, *supra* note 95, at 2077.

¹³⁵ U.S. CONST. art. III, § 2, cl. 2.

¹³⁶ Pushaw, *supra* note 129, at 511.

¹³⁷ See generally *id.* (arguing that in controversies, the federal courts' role is more peacekeeping than developing federal rights). A caveat is in order. Because of the development of federal common law, Professor Pushaw believes that the Original Jurisdiction might now more properly be labeled a bearer of "cases." See *id.* at 511.

¹³⁸ See, e.g., Richard B. Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 HARV. ENVTL. L. REV. 241, 244 (1982); Olen Paul Matthews & Michael Pease, *The Commerce Clause, Interstate Compacts, and Marketing Water across State Boundaries*, 46 NAT. RESOURCES J. 601, 613-14 (2006).

¹³⁹ *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935) ("What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against

Doctrinal, textual, original, prudential, structural, and intratextual methods reach the same result: the purpose of giving the Court jurisdiction over sister-state suits is to provide a check against aggression between states. Since states can submit their disputes to a body authorized to speak for the nation they will be able to resolve them without too much aggression.¹⁴¹ The aspirational¹⁴² norm of comity is why the Court has an original docket; it follows, more or less, that comity governs the exercise (the merits and remedies stages of litigation) of the jurisdiction.¹⁴³

An analogy to public law litigation might be helpful. In public law litigation, parties sue to enjoin continuing violations of aspirational constitutional norms.¹⁴⁴ Examples include suits alleging that entire prison systems violate the Eight Amendment's prohibition against cruel and unusual punishment, or efforts to desegregate

competition with the products of another state or the labor of its residents."'). *See also* Erbsen, *supra* note 124, at 556.

¹⁴⁰ U.S. CONST. art. IV, § 2, cl. 1. *See* Saenz v. Roe, 526 U.S. 489, 502 (1999) ("Without some provision . . . removing from citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists") (quoting *Paul v. Virginia*, 75 U.S. 168, 8 Wall. 168, 180 (1869)). For commentary, see Erbsen, *supra* note 124, at 548. Fear of aggression and protectionism on the part of the states is a cross-constitutional concern. *See, e.g.,* Douglas Laycock, *Equal Citizens of Equal States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 261-68 (1992) (fear of parochial preference for own citizens is structural principle of constitution, but particularly present in the Dormant Commerce Clause and the Privileges and Immunities Clause of Article IV).

¹⁴¹ Seen this way, the Court's peacemaking function looks much like its role in other public law cases. *See* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L. J. 1355, 1361 (1991) ("Public law cases concern ongoing violations of general aspirational norms grounded in statutes or the Constitution.").

¹⁴² *See* *Nevada v. Hall*, 440 U.S. 410, 425 (1979) ("In the past, this Court has presumed that the States intended to adopt policies of broad comity toward one another. But this presumption reflected an understanding of state policy, rather than a constitutional command.") *See also* Erbsen, *supra* note 124, at 568.

¹⁴³ Similarly, Professor Regan argues that reaching into intraterritorial interests is only justifiable when the federal government has an interest in play. *See* Regan, *supra* note 125, at 1883. Otherwise, the States must for structural constitutional reasons be left to their own devices.

¹⁴⁴ *See* Sturm, *supra* note 141, at 1361.

previously segregated school systems in compliance with the Equal Protection Clause.¹⁴⁵

Sister-state litigation seems to fit within this definition of public law litigation. There, states sue to enjoin continuing violation (unconstitutional aggression, through abusive use of possession) of the aspirational constitutional norm of comity. Indeed, Woolhandler and Collins argue that early twentieth century interstate suits are the prototype for later public law litigation.¹⁴⁶ This is revealing; public law scholarship squarely places the work done by courts in the remedies stage.

My theory in what follows is that the Court's interpretation of its role in remedying this aggression in Original Jurisdiction cases dramatically expands the role the Constitution contemplates for it. The basic metaphor for this claim is Hobbes's understanding of war in *Leviathan*. There, Hobbes holds that war consists not "of battle only . . . but in a tract of time wherein the will to contend by battle is sufficiently known."¹⁴⁷ The states have only once resorted to actual war against each other, but there is constant friction and competition between them, as well as competition and tendencies to aggression.¹⁴⁸ In all their doctrines but one,

¹⁴⁵ *Id.* Public law litigation has its defenders and its detractors. Its defenders claim that it is necessary to enforce constitutional norms—to transform mere parchment barriers into rights properly so-called. See, e.g., Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 661–670 (1993). Professor Sturm also argues that litigation may be "most effective in transforming institutions that deviate from a widely shared . . . norm." *Id.* at 681. Its detractors say that it is ineffective, and requires courts to interfere in states and the other branches of the federal government, in violation respectively of federalism norms and the separation of powers. See Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 420–21 (1993). But Professor Sager noted that even critics of the public law model agree that judicial interventions have "disappointed the dire prophecies of the critics of judicial intervention."

¹⁴⁶ Woolhandler & Collins, *supra* note 55, at 479–82.

¹⁴⁷ THOMAS HOBBS, *LEVIATHAN* 94 (Michael Oakeshott ed., Simon & Schuster 2008) (1651).

¹⁴⁸ See Stewart, *supra* note 138, at 241–55; A. Dan Tarlock, *National Power, State Resource Sovereignty and Federalism in the 1980's: Scaling America's Magic Mountain*, 32 U. KAN. L. REV. 111, 144 (1983) ("[S]tates will always have a taste for anti-competitive, redistributive legislation.").

the federal courts have resolved these disputes by outlawing aggressive tactics—battles, in Hobbesian terminology. For instance, the courts in Dormant Commerce Clause cases do not issue injunctions threatening to punish repeated offender states; rather, they review laws passed by states and strike down those that overtly discriminate against other states or that have unjustifiable discriminatory effects.¹⁴⁹ In other words, they prevent battles and hope that this will reduce war or at least make it more tolerable.¹⁵⁰

In Original Jurisdiction, the Court recognizes the possibility that sister state disputes will lead to civil war. Then, however, it does not proceed as it does in other doctrines to outlaw the specific tools of aggression—abusive bargaining, exploitation of a more powerful position, and the like. Rather, it attempts to resolve the dispute at issue and therefore remove the threat of war. By awarding land, apportioning rivers, or dismissing suits, then there is no longer anything left for the states to battle about.

Because the Court's jurisdiction over original cases is premised on the need for a peacemaking authority between the states, its function in these cases should, constitutionally speaking, track the constitutional harm¹⁵¹—the breach of inter-state peace. Thus the controversy properly within the Court's jurisdiction, for which it is empowered to issue a remedy, must relate to particular acts of aggression (exploitation of powerful position, bad faith bargaining, and the like).¹⁵²

¹⁴⁹ Tarlock, *supra* note 148, at 135 (courts in Dormant Commerce Clause strike anti-competitive acts not anti-competition) *citing* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

¹⁵⁰ *Cf.* Sturm, *supra* note 141, at 1364 (in public law cases, the rights established at trial provide little guidance as to appropriate remedies).

¹⁵¹ See Siegel, *supra* note 103, at 85 (constitutional readings must be read to have a purpose).

¹⁵² There is some suggestion that at least in the international sphere, states already enforce upon each other the norms of good faith bargaining through a sort of *tu quoque* principle; whatever actions a state takes to abuse its position are then fair game against that state. See Laurence R. Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 *YALE L. J.* 273, 285-86 (1997). See also Brian Poulsen, *The North Giveth and the North Taketh Away: Negotiating Delivery Reductions to Mexico through the Colorado River Seven State Agreement for Drought Management—a*

This is not to say that the Court's actual resolution of disputes under its Original Jurisdiction is constitutionally unjustified. Instead, such a resolution must be justified as an expansive remedy to a constitutional harm capable of repetition.¹⁵³ If the Court has good cause to believe that a mere injunction ordering the states to reach a negotiated solution and to bargain in good faith would be ineffective in ending the constitutional harm, it is justified in resolving the dispute itself.¹⁵⁴ This actual resolution is an example of a prophylactic remedy imposed on the bargaining to prevent unconstitutional abuse.¹⁵⁵ It enjoins some constitutionally permissible conduct (bargaining in good faith) in order to properly reach the constitutionally impermissible conduct (bargaining in bad faith). In terms of the analogy governing this section, if a known disposition to do battle exists and is likely to lead to actual battles (or other constitutional violations), the Court is amply justified in removing this disposition by resolving the issue and thereby removing the object of the will to

Potential Conflict?, 30 ENVIRONS ENVTL. L. & POL'Y J. 221, 226 (2006). Poulsen suggests that negotiations between Mexico and the United States over the Colorado were influenced by a sort of *tu quoque* principle from previous negotiations over the Rio Grande.

¹⁵³ See Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301 (2004). Professor Thomas argues that the prophylactic remedy, far from being a free-floating mandate to do right, is circumscribed by constitutional principles. A judge must first identify a constitutional wrong. *Id.* at 333-34. A judge must collect evidence and a record to limit her discretion. *Id.* at 363. Finally, prophylactic remedies are necessary to turn paper rights into concrete realities. *Id.* at 374-79.

¹⁵⁴ See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. 657, 726 (1838).

¹⁵⁵ Prophylactic injunctions are constitutionally troubling creatures. They enjoin constitutional conduct in order to prevent unconstitutional conduct. Their injunction of constitutional conduct has laid them open to a charge that they are judicial overreaching. See, e.g., John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 111-14 (1999). Professor Jeffries has observed a pattern in prophylactic remedies reminiscent of water law cases. At first, frustrated that actors violate constitutional rights, the courts impose *ad hoc* remedies that cut into constitutionally permitted behavior. Over time, these remedies, under federal common law, harden into substantive *per se* constitutional rights. *Id.* at 112. Then, higher courts strike at these *per se* rules, seeking to retrench them back into the "remedies stage." *Id.* These efforts, because of inconsistent application, are only partly successful. *Id.*

contend by battle, rather than enjoining specific constitutional violations.

Despite the possible acceptability of the issuance of injunctions, when the Court resolves disputes in such a way, it cuts off permissible constitutional behavior, states negotiating in good faith towards a resolution.¹⁵⁶ Such negotiations are by far the better method of resolving disputes.¹⁵⁷ Indeed, the Court has repeatedly recognized this, stating variously that the Court is ill-structured to find facts,¹⁵⁸ that the states negotiating with each other would produce outcomes more palatable to each,¹⁵⁹ and that technical experts would arrive at better solutions than the Court, composed of specialists in law.¹⁶⁰ For these reasons, amongst others,¹⁶¹ the Court believes that states better resolve their conflicts through negotiation rather than litigation.¹⁶²

Indeed, there is a case to be made that the behavior is not merely constitutionally permissible, but constitutionally favored.¹⁶³ States negotiating in good faith to resolve issues of

¹⁵⁶ Sturm, *supra* note 141, at 1368, documents that one way in which courts solve public law problems is through the “bargaining model.” Under the model, courts push the parties to bargain with each other, and restrict their role to oversight (with the threat of contempt sanctions if states fail to bargain in good faith). Although Professor Sturm rejects the bargaining model, many of her objections do not apply to sister-state bargaining. *See id.* at 1414–16. For instance, one problem with the bargaining model is forcing the bargainers to include all the parties in negotiations. *Id.* Where the parties are all included in the case, as in sister-state bargaining, this is no problem.

¹⁵⁷ *See, e.g.,* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1300 (1976) (negotiated decrees are more likely to be voluntarily obeyed); Tarlock, *supra* note 148, at 114 (cooperative solutions more responsive to local interests).

¹⁵⁸ *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971).

¹⁵⁹ *Washington v. Oregon*, 214 U.S. 205, 218 (1909).

¹⁶⁰ *See New York v. New Jersey*, 256 U.S. 296, 313 (1921).

¹⁶¹ *McKusick*, *supra* note 3, at 191–94.

¹⁶² *See supra* note 23 (collecting statements from the Court advising parties that they should have resolved their disputes through good-faith bargaining).

¹⁶³ Behavior X might be constitutionally favored if the Constitution permits a state actor to do X or Y, but explicitly prefers that the actor do Y. The preference for Y might be found in other provisions of the Constitution, or, more likely, in background constitutional norms. Take for instance the choice Presidents face when Congress puts before them a law that they believe is unconstitutional. The President

common concern, and putting the agreement before Congress for approval, is how the Constitution contemplates states will resolve their disagreements.¹⁶⁴ Departures from this model, such as a judicial resolution of the dispute, are thus frowned upon.¹⁶⁵

But the Constitution does not mandate that a dispute be resolved in the wisest way. Rather, for a value to be constitutionally preferred it must be grounded in the Constitution.¹⁶⁶ The Compact Clause, in providing an affirmative right to the states to deal with one another subject to the consent of the federal government if they abrogate its rights, provides one possible grounding.¹⁶⁷ Perhaps the

might veto the decision or note her disagreement and fail to enforce it. The problem with the latter approach is that it impairs the constitutionally prescribed role of another actor—Congress. See generally Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 12, 17, 32 (2000). Thus, the Constitution itself prefers that the President veto an action, although nothing in the Constitution prevents a President from reading the Take Care Clause to allow him not to enforce constitutionally troubling statutes. In the case of the Court's Original cases, this leaves two problems: a) determining the existence of a constitutional preference, and b) what duty that preference imposes.

¹⁶⁴ See Tarlock, *supra* note 148, at 126 (because state decisions are more representative, they are more in keeping with democratic constitutional norms). In determining the existence of a constitutional preference, the public law literature has much to contribute. One problem with the expert resolution model of the type undertaken in Original Jurisdiction cases is that it sacrifices participation. Since one of the main constitutional purposes of the Original Jurisdiction Clause is to encourage parties to negotiate, it is counterproductive that the method of dispute resolution actively discourages state participation and ownership of decisions. See *Rhode Island v. Massachusetts*, 37 U.S. 657, 726 (1838).

¹⁶⁵ In a 1990's article, Professors Ann Woolhandler and Michael G. Collins critiqued the expansion of the Court's original docket to adjudicate sovereignty (as opposed to proprietary) issues. See generally Woolhandler & Collins, *supra* note 55. Professors Woolhandler and Collins argue that the Framers never intended the Court to adjudicate sovereignty, *id.* at 415; that an allegation of injury to a sovereign interest did not create a justiciable controversy, *id.* at 422; that the Court only began to take sovereignty suits in earnest in the early 1900's, *id.* at 455; and that the State was an early public law plaintiff, *id.* at 479. They argue that the Court should scale back its jurisdiction, granting standing only to legally protectable proprietary interest. *Id.* at 515.

¹⁶⁶ See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973) (value enforced in constitutional decision must not only be desirable but also grounded in the Constitution).

¹⁶⁷ See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471–72 (1978).

Framers included the Compact Clause because they wanted the states to bargain amongst themselves to resolve their disputes.¹⁶⁸ More likely, though, they wanted to outlaw interstate alliances that might harm the Union.¹⁶⁹

The principle itself—that states should negotiate their differences rather than sue—is abstract enough that it would be difficult to ground it in concrete constitutional text at all. However, it might be possible to ground it in principles derived from the structure of the Constitution itself. The Constitution mandates a republican form of government,¹⁷⁰ and mentions “states” more than a hundred times.¹⁷¹ Thus, comity supports giving states a first crack at solving

¹⁶⁸ Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – a Study in Interstate Adjustments*, 34 YALE L.J. 685, 694 (1924). *But see* Tripolitsiotis, *supra* note 39, at 186–170 (canvassing historical sources, finding scarce support for any theory of the Compact Clause's purpose).

¹⁶⁹ *See* Erbsen, *supra* note 124, at 533 (2008).

¹⁷⁰ *See* U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”). There is no point in summarizing the vast literature on democracy. In addition to the obvious sources (The Federalist Papers, Alexander Bickel's *The Least Dangerous Branch*, John Hart Ely's *Democracy and Distrust*, Jon Elster's work, and Jeremy Waldron's), here is one noted article more exactly on point: Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 324–32 (1998) (arguing that the Constitution mandates low-level, experimental self-government). Professors Dorf and Sabel also fire a broadside at the Court's determination of ends and balancing. *Id.* at 409.

¹⁷¹ Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 41 (2007). Professor Resnik argues that the courts ought not to read pre-emption lightly, because the Constitution encourages states to experiment, engage in redundant debates, and work out social norms on their own. Professor Resnik's thesis offers some support for this Article's thesis. How ought upstream riparians to treat downstream riparians? How ought the states in-possession treat with the states out-of-possession? How ought the states to develop their natural resource endowments? These are all questions that concern citizens of each and every state. By resolving these disputes for them, on out-of-possession state's motion, the Court forecloses the people of the several states from having these debates. It decides them. *See also* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1059 (1977) (noting the importance of dialogue between the Court and lower courts); Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1743 (2004) (arguing that local actors should be granted autonomy to solve local problems); Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1329

their problems themselves.¹⁷² Additionally, the Constitution reserves to elected bodies most disputes that can be resolved without abrogation of textually committed or fundamental rights, and that do not implicate equality.¹⁷³ Because of the Constitution's general bias in favor of elected bodies it seems more plausible that it contemplates that states would negotiate resolutions to their disputes themselves and that the Court would guard the constitutional value of interstate peace?

But the Court also opines that states in possession will not negotiate absent the threat of a lawsuit,¹⁷⁴ which is a remedies stage consideration.¹⁷⁵ In this section, I make no claims to the advisability of a prophylactic remedy in particular cases; however, because a prophylactic remedy cuts off a large amount of constitutionally permissible, and at the very least advisable, behavior, it is *generally* to be avoided.

To sum up the Remedies Theory: (a) the Original Jurisdiction clause, granting jurisdiction over sister-state suits, grants jurisdiction over constitutional violations, i.e. unconstitutional aggression between states; (b) the Court's actual resolution of the dispute at issue is an expansive remedy to the constitutional grant of jurisdiction; (c) the Court's actual resolution cuts off much behavior that is not only constitutionally permissible but constitutionally desirable; (d) judicial resolution of interstate disputes thus bears the heavy

(2004) ("The value of having multiple levels of government lies in having many institutions capable of acting to solve social problems.").

¹⁷² *E.g.*, *Lewis v. Casey*, 518 U.S. 343, 362 (1996).

¹⁷³ *See id.* See also the discussion in note 163, *supra*.

¹⁷⁴ *Rhode Island v. Massachusetts*, 37 U.S. 657, 726 (1838); *see, e.g.*, Carrie Menkel-Meadow, *Getting to "Let's Talk": Comments on Collaborative Environmental Dispute Resolution Processes*, 8 *NEV. L.J.* 835, 836 (2008). Professor Menkel-Meadow focuses on the role of incoming crisis (including the threat of litigation) in forcing states to extend their bargaining range and reach cooperative solutions. But for so-called destabilization rights (the right of and forum for participants to challenge the status quo), existing powerful parties would not negotiate. *Id.* at 846.

¹⁷⁵ *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *HARV. L. REV.* 1015, 1020 (2004) (public law litigation succeeds by giving expansive remedies to shut-out parties so that they can push inside parties to negotiate with them).

burden of justifying a prophylactic remedy that cuts off the preferred way for states to resolve their disputes.¹⁷⁶

The balance of this Article argues that the Court has in many cases disregarded the burden of the remedial thesis. This is not to say that this burden can never be met.¹⁷⁷ Nevertheless, this Article argues that interstate water allocation cases fail to meet the test for two reasons. First, original cases are *hard*; they take years, produce transcripts tens of thousands of pages long, and involve complicated technical questions.¹⁷⁸ Moreover, while typical Supreme Court cases are hard in the sense that they present difficult legal questions, this is not true of Original cases; rather, the difficulty is entirely factual. They require the Court to balance almost innumerable *non-legal* factors to arrive at an equitable allocation of a river. These questions are ill-suited for the Supreme Court¹⁷⁹ – or, really, for any court.¹⁸⁰ As the Court itself recognizes, they would be better resolved by states, their citizens, and their experts negotiating with each other.¹⁸¹

¹⁷⁶ Dorf and Sabel argue that prophylactic remedies are necessary only when there is likelihood of official misbehavior or it would be difficult for a reviewing court to identify such misbehavior. Dorf & Sabel, *supra* note 170, at 456. If this is an accurate account of the grounds for prophylactic remedies, it is difficult to justify their use in Original Jurisdiction. Violations are easy to identify; bargaining states have every incentive to bring them to the attention of the Court. Knowing this, there is little reason for states to engage in violations.

¹⁷⁷ In fact, in a number of border dispute cases, *United States v. Texas*, 143 U.S. 621 (1892), being among them, it seems plausible that this burden *was* met; however, such cases are beyond the scope of this paper's focus.

¹⁷⁸ See *supra* notes 82–83, and accompanying text.

¹⁷⁹ See Carstens, *supra* note 11, at 641 (the Supreme Court is “a tribunal of limited jurisdiction, narrow processes, and small capacity for handling mass litigation,”) quoting ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 25 (1955).

¹⁸⁰ Cf. Oldfather, *supra* note 99, at 755–56, 758 (“the court must also provide a candid public statement of the reasons behind its decisions.”) Interstate water law decisions, for instance, are based on the sum of equities, and the equities are largely incommensurable. See Grant, *supra* note 99, at 991. In these cases, it becomes difficult for the Court to provide a reasoned public statement of its decision. This leads both parties and scholars to question the Court's decision. See, for instance, the Court's decision in *Vermejo*, where the Court seemed to change its decision rule without quite saying so, and its fallout. See *supra* note 81.

¹⁸¹ See *supra* note 29.

The questions presented in Original Jurisdiction cases are thus different in kind, not simply in degree, from the questions presented in the appellate courts.¹⁸² The law frames claims for adjudication;¹⁸³ it creates channels by which claimants press their arguments, and standards and elements that they must meet in order to show entitlement to relief.¹⁸⁴ In equitable apportionment cases, the Special Master must exercise virtually unfettered discretion, both to establish rights and to establish the remedies that these rights imply. Not surprisingly, both the Court and the Special Masters increasingly express irritation at the equitable apportionment standard.¹⁸⁵

Nor can a coherent standard be fashioned from constitutional norms. The Court has stated that it will decide the cases on the basis of states' equality. The equality of states is a fine principle¹⁸⁶ and the Court's standard works to exclude extreme cases (e.g. a complete appropriation of a resource by a state), but how does it lead to a specific resolution in tough cases?¹⁸⁷ In application, the standard is usually erratic and ungrounded in any constitutional text or other legal standards.¹⁸⁸

¹⁸² Cf. Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty To Decide*, 94 GEO. L.J. 121, 154–55 (2005) (arguing that, for instance, mass tort litigation is not properly described as adjudication). *But see* Carstens, *supra* note 11, at 698 (arguing that Original cases are not different from ordinary federal trial cases).

¹⁸³ See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 989 (1987) (insisting on application of law to facts as core of adjudication).

¹⁸⁴ See J. Clark Kelso, *One Lesson From the Six Monsanto Lectures on Tort Law Reform and Jurisprudence: Recognizing the Limits of Judicial Competence*, 26 VAL. U. L. REV. 765, 778 (1992).

¹⁸⁵ See *Maryland v. Louisiana*, 451 U.S. 725, 762–63 (1981) (Rehnquist, J., dissenting) (“[J]ustice is far better served by trials in the lower courts, with appropriate review, than by trials before a Special Master whose rulings this Court simply cannot consider with the care and attention it should.”). Note also the many statements of the Court that the dispute would be better resolved by the parties themselves. Cf. McKusick, *supra* note 3, at 197–98.

¹⁸⁶ Erbsen, *supra* note 124, at 507–08. See also *infra* note 220 and works cited therein.

¹⁸⁷ See Erbsen, *supra* note 124, at 556; *infra* note 218.

¹⁸⁸ The *Vermejo* litigation provides a perfect example of this. See note 82, *supra* (noting three experts' completely opposite conclusions about the holding of the case).

Second, the very openness of the Court encourages parties to bring suit rather than to attempt to resolve their differences through negotiation. Where a downstream state (or its political agents) may sue in court to obtain an equitable apportionment of a river, it is ill advised to negotiate an allocation of the river without first trying its luck in the Court.¹⁸⁹ Not surprisingly, most states (where the stakes are high) do so.¹⁹⁰

C. *The Court's Justifications for Extending Its Jurisdiction*

Few of the cases the Court currently adjudicates in its Original Jurisdiction would have been thought fit for such adjudication at the time of the Founding.¹⁹¹ Rather, the Court has, case by case, expanded the kinds of cases it would take.¹⁹² When it expands its jurisdiction over new types of cases, defendant states typically object that the Court has no jurisdiction over the case¹⁹³ and the Court's response to these arguments is similar in each case.

The Court first extended Original Jurisdiction to boundary cases. In these cases, states dispute which of them has the better claim to be sovereign over a piece of land. The Court first accepted these cases in *Rhode Island v. Massachusetts*.¹⁹⁴ There, the Court overruled Massachusetts's objection that the Court had no authority to adjudicate disputes over sovereign (as opposed to proprietary) ownership of land:

Bound [a] hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree, or fight with its adversary, without the consent of con-

¹⁸⁹ See Part IV, *infra*.

¹⁹⁰ This argument is developed more fully in Part IV, *infra*.

¹⁹¹ Woolhandler & Collins, *supra* note 55, at 400 ("It seems, however, that insofar as state-as-party jurisdiction was concerned, Article II originally contemplated conventional common-law actions and excluded most suits seeking to enforce criminal and other public law norms.")

¹⁹² See, e.g. *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

gress: a resort to the judicial power [b] is the only means left for legally adjusting, or persuading a state which has possession of disputed territory, to enter into an agreement or Compact, relating to a controverted boundary. Few, [c] if any, will be made, when it is left to the pleasure of the state in possession; but [d] when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by Compact.¹⁹⁵

This is, more or less, the Remedies Theory. [a] States out of possession have no means of enforcing good faith bargaining against states in possession.¹⁹⁶ The Constitution worries about the friction created by [b] leaving states with no remedy in these cases. [c] The Court awards sovereignty to grant these states a remedy. More than the remedy, however, [d], the Court hopes that the availability of the remedy will ensure that the state in possession will negotiate fairly with the state out of possession, lest it lose by a judgment what it could have kept by negotiations.

This final point ([d]) merits some discussion. Scholars have expanded on how the threat of litigation may prompt negotiation, but their discussion has veered in different directions. In the leading formulation, a threat of litigation succeeds because it provides “destabilizing rights”.¹⁹⁷ Under this theory, litigation threats succeed when jurisdiction permits outside parties to destabilize existing expectations of inside parties;¹⁹⁸ because the courts lack the sophistication and depth of control to enforce appropriate remedies,¹⁹⁹ destabilization rights are required to give outside parties,

¹⁹⁵ *Id.* at 726.

¹⁹⁶ See also Erbsen, *supra* note 124, at 531-33.

¹⁹⁷ See generally Sabel & Simon, *supra* note 175.

¹⁹⁸ See *id.* at 1020.

¹⁹⁹ See *id.* at 1053.

through the court, the right to request a response to their claims.²⁰⁰

Other writings, however, emphasize the power of expert adjudicators to force parties to negotiate.²⁰¹ For instance, Professor Deason argues that a “managerial expert”—a skilled technocrat—may, by understanding the facts of the case, see through false claims. This managerial expert’s threats are therefore more convincing.²⁰²

The *Rhode Island v. Massachusetts* theory—indeed, its very language—will recur often when the Court first extends jurisdiction over a new type of case. Thus, in *United States v. Texas*,²⁰³ where the Court extended its Original Jurisdiction to suits brought by the national government against individual states, the Court put forward something very much like this theory. There, Texas had seized vast tracts of land, sovereignty over which was disputed between Texas and the United States.²⁰⁴ Texas argued, in decreasing order of plausibility, that the suit was of a political nature,²⁰⁵ that the United States’ remedy was suit in Texas’s courts,²⁰⁶ or that “there must be a trial of physical strength between the government of the Union and Texas.”²⁰⁷

Predictably, the Court rejected Texas’s claims. The Constitution [b] could not contemplate that a dispute between states, or between states and the United States, should be settled by war.²⁰⁸ Moreover, [d] war is not a reliable way of establishing

²⁰⁰ See *id.* at 1056. Sabel and Simon also include their three elements of an experimental remedy in public law cases: (1) Stakeholder negotiations; (2) Rolling-rule regime; (3) transparency. See *id.* at 1067-72.

²⁰¹ See Kirk Emerson, Comment, *On Perfect Storms and Sacred Cows of Collaboration*, 8 NEV. L.J. 830, 833 (2008).

²⁰² Ellen E. Deason, *Managing the Managerial Expert*, 1998 U. ILL. L. REV. 341, 371-72 (1998).

²⁰³ *United States v. Texas*, 143 U.S. 621 (1892).

²⁰⁴ *Id.* at 637.

²⁰⁵ *Id.* at 638.

²⁰⁶ *Id.* at 641.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

rights or encouraging negotiations because in war, the rights belong to the strongest.²⁰⁹ The strongest need to be induced to negotiate but [c] the stronger have little incentive to deal with the weaker if the weaker only appeal is to war.²¹⁰ Since the United States and Texas [a] each must have a forum to resolve their disputes, and since Texas state courts are not an adequate forum, the Court must extend its jurisdiction by necessity.²¹¹

The Court extended jurisdiction over interstate nuisance cases in *Missouri v. Illinois*.²¹² There, Missouri sought to enjoin Illinois from operating a canal that would have discharged Chicago's waste into the Mississippi, eventually reaching Missouri.²¹³ Illinois moved to dismiss the bill.²¹⁴ In rejecting Illinois's claim, the Court reasoned that "[a] [d]iplomatic powers and the right to make war having been surrendered to the general government, [b] it was to be expected that upon the latter would be devolved the duty of providing a remedy . . ." ²¹⁵ It quoted this language in *Kansas v. Colorado*,²¹⁶ to support its holding that it had jurisdiction over river apportionment cases.²¹⁷ Indeed, *Kansas v. Colorado* quotes the full-throated statement of the Remedies Theory found in *Rhode Island v. Massachusetts* above.²¹⁸

²⁰⁹ See *id.* at 638.

²¹⁰ See *id.*

²¹¹ See *id.* at 641.

²¹² *Missouri v. Illinois*, 180 U.S. 208 (1901).

²¹³ *Id.* at 243.

²¹⁴ *Id.*

²¹⁵ *Id.* at 241. Professor Robert V. Percival echoes this interpretation of *Missouri v. Illinois*. See Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 760-65 (2004).

²¹⁶ *Kansas v. Colorado*, 185 U.S. 125 (1902).

²¹⁷ *Id.* at 141-42.

²¹⁸ *Id.* at 144 ("Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree, nor fight with its adversary, without the consent of Congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a State which has possession of disputed territory, to enter into an agreement or Compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the State in possession; but when it is known that some tribunal can decide on the right, it is most probable that controver-

Thus, despite imposing the remedy that the Remedies Theory frowns upon, in the majority of cases the Court has endorsed the theory when justifying its extension of jurisdiction.²¹⁹ It then justifies its resolution on the merits as a prophylactic remedy to constitutional harm.²²⁰

D. *The Merits Theory*

There has, surprisingly, been no scholarly theory on how best to conceptualize the process the Court employs in original cases. Nevertheless, drawing from the Constitutional text, the Court's opinions, and academic commentary, it is possible to draw out an account to oppose the Remedies Thesis. Because this account argues that the work in original cases is done on the merits, I will call it the Merits Theory.

The theory can be simply stated in three steps. First, the Court must resolve "controversies" between states, since the jurisdictional clause properly places such suits before it. Second, those disputes properly before it include suits calling for actual allocation of land or water.²²¹ Third, it therefore follows that the Court must actually allocate water or land when a state properly sues another in the Court's Original docket.

sies will be settled by Compact." (quoting *Rhode Island v. Massachusetts*, 37 U.S. 657, 728 (1838))).

²¹⁹ McKusick, *supra* note 3, at 198-99 (listing types of suits accepted in Original Jurisdiction).

²²⁰ See Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859 (1991) (describing "enriched" remedies that go beyond the constitutional harm).

²²¹ This is, I believe, a false premise in the Merits Theory. Why might suits calling for actual allocation of land or water properly be before the Court? The traditional answer is that the states have remained sovereign over their lands and water. Federalism means dual sovereignty. This thesis has not survived the twentieth century. See, e.g., Roderick M. Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 847-55 (1998). Of course, it could just be a brute fact that suits over land and water are in the Court's jurisdiction. But this is unlikely. As Siegel brilliantly argues a rather obvious point, constitutional doctrines have to have a purpose. Siegel, *supra* note 103, at 85.

The Merits Theory challenges the Remedies Theory by claiming that the dispute in water and land allocation cases is the actual allocation of the water and land.²²² This is an almost painfully commonsensical proposition; nonetheless it is wrong. Its main defects are that it fails to state a constitutional harm that would guide the Court in its exercise of jurisdiction, and that it provides no explanation for judicially crafted exceptions to Original Jurisdiction.

1. THE MERITS THEORY AND DECISION RULES

Jurisdiction simply means the ability of a court to hear the merits of a case and decide upon them, and nothing more.²²³ Finding jurisdiction, a court is not provided with a decision rule to apply to the particular case; rather, the court must measure the merits of the case against a particular legal standard, or, finding none, construct one using the available legal materials.²²⁴ This is not to say that the Merits Theory leaves the Court with no rules of decision available and that the Court could justifiably resolve a case by the toss of a coin.²²⁵ Rather, it

²²² Cf. Oldfather, *supra* note 182, at 128–29 (arguing that judges have a duty to decide cases in their jurisdiction; criticizing many courts for failing to do so).

²²³ Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1207 (2001). See also Wasserman, *supra* note 27, 644–45 (arguing that the federal courts often confuse merits with jurisdictional issues).

²²⁴ See, e.g., *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). See also *R.I. v. Massachusetts*, 37 U.S. 657, 732 (1838) (first deciding on jurisdiction, then deciding on a rule of decision). See also ELY, *supra* note 39, at 56 (arguing, in the context of political questions, that the “Court has come generally to recognize . . . that if the issue is otherwise properly before it . . . its first duty is to try to *fashion* manageable standards”).

²²⁵ See Oldfather, *supra* note 182, at 130, 165. Professor Oldfather argues that courts must respond to the claims and arguments of the parties. Professor Oldfather advocates what he calls “weak responsiveness” for appellate courts. Under weak responsiveness, the courts must respond to arguments and claims, but need not be strictly confined to them. Professor Oldfather argues that mass torts cases, because they are channeled towards settlement, are not really adjudicated. See *id.* at 154. Professor Oldfather's theory provides a problem for original actions. There is often no limit on what arguments states might put forward to advance their claims to land or water in equity. The arguments they make are, moreover, incommensurable. See Grant, *supra*

must construct a decision rule using whatever legal materials are available.

In original cases, the substantive legal standards today are provided by federal common law.²²⁶ For instance, the Court has held that it will interpret Compacts like contracts.²²⁷ Further, to fill in contractual gaps, it will apply the federal law of statutory interpretation.²²⁸ In boundary cases, it will resolve cases as if the states were landowners disputing property boundaries.²²⁹ Thus, the theory goes, the Court has fashioned together a federal common law governing its Original docket. Under the Merits Theory, it is just this sort of random borrowing that provides the Court with its decision rules. Indeed, it must be so; under the Merits Theory, the Court is resolving questions of who owes what duty to whom (questions no different from ordinary common law questions) rather than protecting interstate comity. Thus, the Court must borrow its decision rules from the substantive law of who owns what. Because the theory of who owes what duty to whom is scattered across the common law of torts (interstate nuisance), property (interstate ownership of land and water), and contract and administrative law (Compact interpretation), the principles underlying the Court's doctrine should be about as cohesive might be expected if it randomly pulled together doctrines from these four fields. Indeed it should be difficult to even speak of "the principles underlying the doctrines" at all. However, the doctrines exhibit an underlying order informed by substantive principles of federalism, something we might expect if the Court is doing remedies work. We rejoin our two disputing states, Rhode Island and

note 99, at 991 ("Equitable apportionment requires the weighing of multiple factors that are incommensurable, and there is a dearth of precedent on how to weigh competing factors."). What is the Special Master to do?

²²⁶ *Connecticut v. Massachusetts*, 282 U.S. 660, 669–71 (1931).

²²⁷ *Vermont v. New Hampshire*, 289 U.S. 593, 619 (1933).

²²⁸ *Alabama v. North Carolina*, 130 S. Ct. 2295, 2313 (2010); *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n. 5 (1991).

²²⁹ *See Rhode Island v. Massachusetts*, 37 U.S. 657, 734 (1838).

Massachusetts, this time after determination of standing.²³⁰ In this case, Rhode Island claimed the right to land that Massachusetts had claimed dominion over for two centuries (and which they had thusly ruled over).²³¹ As a result, the Court dismissed Rhode Island's claim on the grounds of Massachusetts's possession.²³²

This is the strongest case for the Merits Theory: the Court seems to apply adverse possession straightforwardly to the interstate context.²³³ This is thus strong evidence that the Courts, when they originally extend jurisdiction to new types of action, apply the laws of the respective subjects.

Another interpretation is possible, though, and is better supported by the facts and subsequent jurisprudence. The inhabitants of the disputed land had lived as citizens of Massachusetts, under Massachusetts's laws, for their entire lives. If the Court were to transfer the land to Rhode Island, these citizens would find themselves citizens of Rhode Island and subject to Rhode Island's laws. Rather than a discussion of adverse possession, which one would expect if the Court were rendering a decision on this ground, the Court does mention the plight of the citizens of Massachusetts and Rhode Island before resolution of the boundary.²³⁴ Under this theory, the Court applied a remedies stage consideration, choosing the best resolution of an interstate dispute as the method least likely to engender continued strife.

More probative are later decisions on boundary lines. In *Virginia v. Tennessee*,²³⁵ the Court established that prescription (long possession and recognition by other states) established sovereignty. In doing so, the Court quoted with approval an

²³⁰ *Rhode Island v. Massachusetts*, 45 U.S. 591 (1846).

²³¹ *Id.* at 638.

²³² *Id.*

²³³ *Id.* See also *Woolhandler & Collins*, *supra* note 55, at 415 (noting that *Rhode Island v. Massachusetts* resembled a traditional property claim).

²³⁴ *Rhode Island v. Massachusetts*, 45 U.S. at 630.

²³⁵ *Virginia v. Tennessee*, 148 U.S. 503, 524 (1893).

international relations scholar noting that the resolution of border disputes in favor of the possessor was necessary to promote interstate peace.²³⁶ The Court further observed that:

There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home and to family, on which is based all that is dearest and most valuable in life.²³⁷

Boundary problem cases are the best cases for the Merits Theory as they are the cases in which the Courts have adhered most closely to the common law applicable to persons (“ordinary common law”).²³⁸ It is thus telling that even there, the Court shapes its doctrine even in this area without particular reference to ordinary common law; that, rather, it informs its decision rules by horizontal federalism concerns.

In other areas, the Court departs much further from ordinary common law. The standard in apportioning water and halting interstate, discussed above,²³⁹ bear no relation to the ordinary common law standards; rather, they are based on the State’s responsibility as sovereign to stand as a parent of its people.²⁴⁰ Indeed, in the nuisance context, the Court explicitly authorizes states to sue for nuisance because of the inadequacy of remedies available at law to individuals.²⁴¹ In these cases, the

²³⁶ *Id.* at 523–24.

²³⁷ *Id.* at 524.

²³⁸ See Woolhandler & Collins, *supra* note 55 at 415, 422.

²³⁹ See *supra* Part II.B.

²⁴⁰ See *Kansas v. Colorado*, 206 U.S. 46, 100–01 (1907); *Missouri v. Illinois*, 180 U.S. 208, 240 (1901).

²⁴¹ *Missouri v. Illinois*, 180 U.S. at 241–42.

Court fashions its awards from the states' status as states,²⁴² and the need to avoid friction between states.²⁴³

All of this suggests that there is more order to the Court's decisions in various interstate merits branches than the Merits Theory would suggest; and that this order exists because the Court applies federalism norms to reach its rules of decision. In deciding on the merits in original cases, the Court follows the Remedies Theory.²⁴⁴

2. THE MERITS THEORY AND JUDICIAL RETRENCHMENT

The Court makes its jurisdiction difficult to access.²⁴⁵ Before obtaining relief, a complaining state must prove by clear and convincing evidence an important and immediate injury,²⁴⁶ a hurdle that excludes many meritorious suits.²⁴⁷ Why not exclude original suits altogether?

At first, the Court justified these unusually strong justiciability rules by way of the great imposition involved in enjoining a sovereign state from doing what it is, in theory, permitted to do. For example, in *New York v. New Jersey*,²⁴⁸ the Court held that these justiciability safeguards were justified because of the "extraordinary [nature of the] power under the Constitution to control the conduct of one State at the suit of another."²⁴⁹ Thus, the Court limited its jurisdiction by explicit reference to the burden

²⁴² See, e.g., *Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (refusing to apply the common law rule that a material fact not denied in a demurrer (reply) brief is admitted because applying this rule would impair state's ability to be parent to its people).

²⁴³ See, e.g., *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945) (holding priority of right inapplicable between states, and deciding to rule on the basis of interstate equity instead to produce a just result).

²⁴⁴ As an extreme statement of this position, Harvard's Dean Langdell apparently thought there could be no rights in equity. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 370 (1978) (citing C.C. Langdell, *Classifications of Rights and Wrongs (pt. II)*, 13 HARV. L. REV. 659, 670-71 (1900)).

²⁴⁵ See *supra* Part I.B.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *New York v. New Jersey*, 256 U.S. 296 (1920).

²⁴⁹ *Id.* at 309.

imposed by the remedies. Under the Merits Theory, this is no defense: if New York's rights are violated by New Jersey's, then it is facile to claim that the Court overreaches when it enjoins New Jersey from violating New York's rights.²⁵⁰

This serious injury requirement, however, does make sense if the Court only adjudicates interstate aggression at the merits stage. "Interstate aggression" does not admit of ready definition; "actions causing serious injury to another state" is one possible gloss on it.²⁵¹ If a state is unable to show that another state's actions caused it serious injury, then it is unlikely to be so displeased with the other state as to breach interstate peace. The proper disposition is for the Court to dismiss the case on the Original Jurisdiction equivalent of a dismissal for failure to state a cause of action. Thus, the Remedies Theory provides some understanding to what is otherwise a perplexing doctrinal requirement.

In fairness the Court is now more likely to cite docket pressure to justify its reluctance to extend its jurisdiction.²⁵² Indeed in an era when states routinely defend their criminal practices against constitutional requirements—where, indeed, entire prison, child welfare, or school systems are sometimes taken under the directorship of federal district judges²⁵³—the charge of interference in state processes rings hollow. Despite this change of rationale, however, the Court has held on, as a matter of federal common law, to its earlier limitations on state standing.²⁵⁴

²⁵⁰ Cf. Oldfather, *supra* note 182, at 130 (courts are under a duty to decide cases properly brought before them). See also David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 576 (1985) ("A grant of exclusive jurisdiction to resolve certain controversies should be read as depriving the court of discretion to determine that it is an inappropriate forum, at least when the 'appropriate' forum lacks jurisdiction under the terms of the granting statute.").

²⁵¹ I will argue in another article that "bargaining in bad faith over the resolution of a dispute" provides a better gloss. As such, the definition is not properly a subject of this Article.

²⁵² McKusick, *supra* note 3, at 190-91.

²⁵³ See, e.g., Sturm, *supra* note 141, at 1362. See also McKusick, *supra* note 3, at 188-89 nn.21-22 and cases cited therein.

²⁵⁴ It has added a few. See McKusick, *supra* note 3, at 197.

This suggests that the requirements bear some relation to the standard.

E. Regulating States' Bargaining

This section tentatively outlines a possible method for the Court to directly intervene in states' bargaining to vindicate constitutional values. Its main purpose is to answer the argument that to leave the states with only the Court's intervention in bargaining is to leave them with no remedy at all. It does not attempt to develop a full-fledged prescriptive model for the Court's intervention.

The argument has two main premises. First, "bad faith negotiation", "abuse of bargaining position", and "unconstitutional aggression" are all terms too vague to grant any meaningful protection at all. Second, the remedy for states showing a violation of such terms is meaningless—the Court can only, in effect, tell misbehaving states not to misbehave again.²⁵⁵ It follows that to give states the benefit of a too-vague-to-enforce merits determination, followed by a pointless remedy, is to leave them at each other's mercy.²⁵⁶

The first argument is, at best, superficially plausible. Laws require parties to behave or negotiate in good faith in innumerable settings. Let me count the ways: (1) parties must perform contracts in good faith;²⁵⁷ (2) enforceable agreements sometimes call for good faith negotiations over remaining terms, in which case parties are obligated to negotiate them in good faith;²⁵⁸ (3) unions and management must negotiate over work conditions

²⁵⁵ See, e.g., Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99, 104 (2007).

²⁵⁶ This is a largely theoretical objection. As no one has proposed to locate the Original Jurisdiction Clause jurisprudence in either the merits or remedies phase of suit, this argument appears nowhere in the literature.

²⁵⁷ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). See generally Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619 (1981).

²⁵⁸ *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (1965). See generally Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673 (1969).

in good faith;²⁵⁹ (4) majority shareholders of closely-held corporations are prevented from oppressing minority shareholders, which has generated not one but three separate tests;²⁶⁰ (5) international States are obligated to negotiate treaties in good faith;²⁶¹ (6) parties seeking to compel production of documents must first make good faith attempts to resolve disputes.²⁶²

This is a small sample of the many laws obliging parties to behave in good faith. They are all litigated; courts pronounce on their meaning. The claim that “bad faith” is too vague is a mere debater’s point.

The second premise disregards the Court’s power of contempt. The courts have inherent power to charge parties with contempt to see that their orders are complied with.²⁶³ Thus, if the Court orders the parties to negotiate in good faith, and finds that one is not, it may charge it with contempt of court. Or it may cloak itself with Rule 11 and order sanctions against parties raising frivolous arguments that they are negotiating in good faith. Finally, the determination that a state is negotiating in bad faith is not one guaranteed to bring it into high repute. Since states will need to negotiate again, and since states often apply *tu quoque* to these negotiations,²⁶⁴ a determination from

²⁵⁹ 29 U.S.C. § 158(a)(5) (2006). See generally Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

²⁶⁰ Compare, e.g., Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657 (Mass. 1976) (legitimate business purpose, least restrictive means analysis), with *In re Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1179 (N.Y. 1984) (defeats reasonable expectations), and *Nixon v. Blackwell*, 626 A.2d 1366, 1380 (Del. 1993) (en banc) (little judicial review).

²⁶¹ Vienna Convention on the Law of Treaties, Art 26, 31, May 23, 1969, 1155 U.N.S.T. 331.

²⁶² FED. R. CIV. P. 36.

²⁶³ See Robert J. Pushaw, *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 766–75 (2001).

²⁶⁴ There is some suggestion that at least in the international sphere, states already enforce upon each other the norms of good faith bargaining through a sort of *tu quoque* principle; whatever actions a state takes to abuse its position are then fair game against that state. See Helfer & Slaughter, *supra* note 152 at 285–86. See also Poulsen, *supra* note 152, at 226 (2006).

the Court that a state is a bad faith negotiator is itself a striking penalty.²⁶⁵

Finally, as noted labor law scholar Archibald Cox has observed in the context of the surprising effectiveness of a statutory duty imposed on unions and management to negotiate in good faith:

The law can influence men's attitudes, up to a point, by declaring a higher standard of conduct than the legal machinery can enforce. A good many companies would have done no more if listening politely had satisfied their legal obligations. Many empty discussions were gradually and unconsciously transformed into a bona fide exchange of ideas leading to mutual persuasion; for this is a field in which there is much wisdom in the saying of Elie Halévy that many a man has become a good man as a result of a life of hypocrisy.²⁶⁶

III. TYPES OF ORIGINAL CONTROVERSIES

This section sets out the three types of water cases in the Court's Original jurisdiction: suits to allocate a river,²⁶⁷ suits to abate pollution,²⁶⁸ and suits to force an interpretation of an interstate Compact.²⁶⁹

²⁶⁵ See also Oldfather, *supra* note 99, at 782–85 (describing how informational requirements may discipline parties and operate as political safeguards).

²⁶⁶ Cox, *supra* note 259, at 1439 (internal quotations omitted). The theme represented by the quotation—of hypocrisy gradually becoming earnest good faith—is widespread. (Consider, for instance, Pascal's wager.) (Of course although the argument is valid, it is also unsound).

²⁶⁷ See, e.g., *Kansas v. Colorado*, 206 U.S. 46, 46 (1907).

²⁶⁸ *Missouri v. Illinois*, 180 U.S. 208 (1901). The Supreme Court has held, no doubt with some relief, that the Clean Water Act supersedes its own interstate water pollution common law. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 325–26, 329 (1981). For a discussion of the case, see Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 760–65 (2004).

²⁶⁹ *Oklahoma v. New Mexico*, 501 U.S. 221 (1991).

In the vast majority of these suits, downstream states sue upstream states,²⁷⁰ with the exceptions confirming the general principle of upstream superiority. Indeed, a noted expert on interstate water law has stated that, in water suits, the Court is effectively just a downstream state's forum for vindicating its rights.²⁷¹ In *Colorado v. Kansas*,²⁷² Colorado, the upstream state, sued Kansas to quiet suits by Kansas water rights holders against Colorado citizens.²⁷³ The Court applied the equitable apportionment standard in reverse.²⁷⁴ Because it concluded that Kansas could not meet the requirements of an equitable apportionment suit against Colorado, it quieted Kansas's water suits against Colorado.²⁷⁵

A. *Characteristics of water disputes*

The Court makes it a practice to chide parties to an original suit for resorting to litigation rather than negotiation.²⁷⁶ Although it is impossible to tell what the situation would be like without these reproaches, it is a fair guess that they have little effect, since the states still sue. This section outlines the states' negotiating positions for those disputes that are likely to make their way to the Court.²⁷⁷

²⁷⁰ Sherk, *supra* note 32, at 576. There is an obvious exception for matters of compact interpretation; there, either state may sue to force an interpretation that favors it.

²⁷¹ *Id.*.

²⁷² *Colorado v. Kansas*, 320 U.S. 383 (1943).

²⁷³ *Id.* at 388. The Court strictly construes "state" in its Original Jurisdiction docket. See McKusick, *supra* note 3, at 195. Thus, although the entities qualify as state entities for most purposes, they do not so qualify under the Original Jurisdiction Clause.

²⁷⁴ *Colorado v. Kansas*, 320 U.S. 383, 400 (1943).

²⁷⁵ *Id.*

²⁷⁶ See *supra* note 29 (collecting examples of Supreme Court decisions advising states to resolve their problems themselves).

²⁷⁷ Many disputes are extremely unlikely to end up in the Court's docket. Most clearly, where the stakes are too low, states would not think of using the Court's cumbersome and expensive resolution process. Less clearly, where disputes are between parties equally able to hurt each other, litigation in the Court is unlikely. This will become clearer after I present the Court's standard, and I state the argument more fully there.

Negotiations take their character from three facts. First, negotiations are necessary because the states' rights and needs relating to the waters that flow through them are vague: States are "substantively obligated to avoid causing substantial harm."²⁷⁸ What this means in practice depends, generally, on equity. Second, because citizens of these states must plan economic activity that depends on particular rights to the waters, states must (sooner or later) negotiate with each other to secure protection for this activity. If the states do not clarify their rights in the waters, individuals may lose their economic investments. Third, the negotiations are between unequally powerful states—"upstream" and "downstream" states. Downstream states must seek upstream states' consent before acting; upstream states may simply act.²⁷⁹

1. STATES' RIGHTS TO ACCESS THE COURT

As a matter of doctrine, the Court has held that all states have the right to access judicial review in the resolution of their rights in the waters that flow through them.²⁸⁰ States are permitted to take or pollute waters so long as they do not cause substantial harm to other states. This provides both a justiciable restraint on state action (they may not cause substantial harm) and a justiciable guarantee to states (they will be protected from substantial harm).

Stated this way, the position is question begging. States have rights in water. Why? Because the Court says they do. What gives the Court authority to declare that they do? A recognition of the fact that states have rights in water. The inartful

²⁷⁸ See, e.g., *Kansas v. Colorado*, 206 U.S. 46, 102-03 (1907).

²⁷⁹ For instance, since the Court is loath to disturb existing uses, downstream states are sometimes able to appropriate most of a river's flow before a less-developed upstream state can. Upstream states' future planned appropriations would then conflict with downstream states' existing appropriations. Knowing that a suit mostly confirms existing appropriations gives a downstream state with existing appropriations a heavy advantage against upstream states with future planned appropriations.

²⁸⁰ See *Kansas v. Colorado*, 206 U.S. 46, 102-03 (1907).

phrasing, however, hides a concern that was, at least in the Court's earlier opinions, fully articulated.

Rhode Island v. Massachusetts,²⁸¹ though a boundary dispute case, presents in admirably concise form the full argument. Because states must definitively establish their rights, states claiming land or water must have their claims heard,²⁸² otherwise they will not settle their claims and may be tempted to take aggressive action to resolve them.²⁸³ Thus, the federal government must provide some forum in which states may present their claims.²⁸⁴

Something must ground an exercise of jurisdiction; a court cannot *sua sponte* set itself to right the world's wrongs. Rather, a party must come forward claiming that a right has been violated, or that it is entitled to some relief on the basis of some other provision. If the courts have no jurisdiction over a dispute, then the states cannot insist on judicial review of their differences. I have argued above that the claim of right is best understood as a right not to be abused, as constrained by the Constitution. This right, though thinner than a right to have the dispute actually resolved, is still enough to ground judicial action (and a possible expansive remedy that actually resolves the dispute).

Scholars advance another argument from the nature of rights granted to the federal government and that of rights withheld, but this argument suffers from subtle flaws. According to the argument, states retain all rights of sovereignty that they have not given up at the Founding.²⁸⁵ Because they have not abandoned territorial sovereignty, including the sovereignty over rivers and water, it follows that they have the same rights over the rivers that flow

²⁸¹ See *Rhode Island v. Massachusetts*, 37 U.S. 657, 726 (1838).

²⁸² *Id.*

²⁸³ *Id.* Cf. *United States v. Texas*, 143 U.S. 621, 641 (1892).

²⁸⁴ *Rhode Island v. Massachusetts*, 37 U.S. 657, 726 (1838). Cf. *Missouri v. Illinois*, 180 U.S. 208, 243–44 (1901).

²⁸⁵ See, e.g., James S. Lochhead, *An Upper Basin Perspective on California's Claims to Water from the Colorado River Part I: The Law of the River*, 4 U. DENV. WATER L. REV. 290, 295 (2001).

through them that sovereign states would have.²⁸⁶ These rights, as developed in twentieth century international customary law, include the substantive right to use water so long as such uses cause no significant harm, as well as the substantive right to be protected from significant harm.²⁸⁷ Hence, because of constitutional law, the states have rights, derived from customary international law, that parallel the Court's jurisprudence.

This is a stretch, even granting the premise that states would have tied themselves, in 1789, to evolving norms of international law.²⁸⁸ This argument depends on the merits theory—it depends, that is, on the idea that the Court really adjudicates sovereignty in its Original jurisdiction. Moreover, the doctrine of dual sovereignty that underlies the doctrine has not fared well in the twentieth century.²⁸⁹

2. SECURE PROPERTY RIGHTS

Clear rules to protect property rights better allow private ordering of parties' rights than vague standards. The point was made in the classic article by Robert Mnookin and Lewis Kornhauser.²⁹⁰ Mnookin and Kornhauser took the case of divorce. There, they argued, judicial decisions were replete with vague, discretionary standards. Courts most commonly used the "best interests of the child" test to award custody.²⁹¹ Mnookin and Kornhauser deplored this. Uncertain rules lead to litigation provided either party prefers risk,²⁹² especially if litigants typically

²⁸⁶ See *id.* But see Hills, *supra* note 221, at 847–55.

²⁸⁷ See *Kansas v. Colorado*, 206 U.S. 46, 102–05 (1907). Cf. MCCAFFREY, *supra* note 65, at 386–96.

²⁸⁸ For an originalist argument as this one is, does it not make more sense to say they bound themselves in 1789 to the law that existed in 1789?

²⁸⁹ Hills, *supra* note 221, at 818, 837–45.

²⁹⁰ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1978).

²⁹¹ *Id.* at 979.

²⁹² *Id.* at 970.

overestimate their chances of winning, as most scholars believe they do.²⁹³

Uncertain rules disadvantage relatively risk-averse parties. Because litigation the risks of an unsuccessful conclusion of litigation is harder to bear for the more risk averse party, the less risk-averse party may more plausibly threaten the more risk averse party.²⁹⁴ Since the more risk-averse party is commonly the party with *less*, a vague standard has negative distributional impacts. Moreover, vague legal standards increase transaction costs as the vague standards must be interpreted, and parties may then spend much of their time attempting to convince the other party that their interpretation is wrong.²⁹⁵

From this, Mnookin and Kornhauser conclude that vague legal standards have undesirable distributional consequences, and that in any case, they are economically inefficient as they tend to increase transaction costs and make litigation more likely.²⁹⁶ Elsewhere in its Original docket, the Court has recognized this insight and used it to guide its selection of a decision rule. For instance, in *Texas v. New Jersey*,²⁹⁷ a tax escheat case, the Court rejected a rule suggested by Texas that the taxes go to the state with the most significant contacts. The Court conceded that the rule was the best summary of the then-evolving choice of law cases.²⁹⁸ However, it rejected the rule because:

Under such a doctrine any State likely would easily convince itself, and hope to convince this Court, that its claim should be given priority—as is shown by Texas’ argument that it has a superior claim to every single

²⁹³ *Id.* at 975 n.84 and works cited therein. See also Oren Bar-Gill, *The Evolution and Persistence of Optimism in Litigation*, 23 J.L. ECON. & ORG. 490, 490–91 (2005) (summarizing the literature finding that litigant optimism exists).

²⁹⁴ Mnookin & Kornhauser, *supra* note 290, at 977.

²⁹⁵ *Id.* at 979.

²⁹⁶ *Id.*

²⁹⁷ 379 U.S. 674, 678–79 (1965).

²⁹⁸ *Id.* at 678.

category of assets involved in this case. . . . The uncertainty of any test which would require us in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts, might in the end create so much uncertainty and threaten so much expensive litigation that the States might find that they would lose more in litigation expenses than they might gain in escheats.²⁹⁹

Interstate water doctrines set themselves to solve problems that do not lend themselves to the establishment of clear rules. In *Kansas v. Colorado*, the Court set the problem thus: “in case a portion of that flow is appropriated by Colorado, [what] are the effects of such appropriation upon Kansas territory.”³⁰⁰ Clear rules do not spring self-evidently from this, nor has the Court, in over a century of experimentation, had much success in crafting them.³⁰¹

3. WHO USES THE COURT AND WHY?

Upstream states rarely need the Court.³⁰² They may simply take the water or pollute;³⁰³ the burden is then downstream states to seek a legal remedy. The Court is one such legal remedy. It is thus a downstream state’s remedy and ensures that the

²⁹⁹ *Id.* at 679.

³⁰⁰ *Kansas v. Colorado*, 206 U.S. 46, 100 (1907).

³⁰¹ Snowden, *supra* note 25, at 186. See Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 566 (2009). See also Percival, *supra* note 215, at 772 (interstate pollution cases involve very fact-specific equitable balancing).

³⁰² While upstream states may occasionally use the Court *see, e.g., Colorado v. Kansas*, 320 U.S. 383, 385 (1943), these cases are rare. See Sherk, *supra* note 32, at 576.

³⁰³ This is captured by a wonderful adage common in arid states, “highority is better than priority.” See Kenneth W. Knox, *The La Plata River Compact: Administration of an Ephemeral River in the Arid Southwest*, 5 U. DENV. WATER L. REV. 104, 114 (2001).

more powerful state negotiates with it without abuse³⁰⁴ and within the bounds of the Constitution.³⁰⁵ Because the Court is the less powerful state's only forum, it is also a downstream state's major threat in bargaining to obtain favorable treatment.³⁰⁶

The effect of the Court's availability is well illustrated by a comparison with international water dispute resolution. In the international context, the geographical position of a State (whether it is upstream or downstream) is a major factor in apportionment.³⁰⁷

A recent study of international treaties allocating water conducted by Professor Shlomi Dinar confirmed the cardinal importance of geography.³⁰⁸ To examine the claim, Professor Dinar compared "through-border" rivers (rivers that pass through borders) and "border creating" rivers (rivers that create borders).³⁰⁹ Through-border rivers have an upstream and a downstream state, whereas no state has geographic priority in the case of border-creating rivers.³¹⁰ Dinar examined treaties between states in both categories for the presence of side-payments (money paid by one state to another for use) and construction subsidies (e.g. for dams).³¹¹

Dinar found side-payments from downstream states to upstream states in 87% of agreements between through-border rivers.³¹² This was true even when the upstream state was markedly inferior in terms of economic development, military power, or

³⁰⁴ *Rhode Island v. Massachusetts*, 37 U.S. 657, 726 (1838). *Accord* *Kansas v. Colorado*, 185 U.S. 125, 141-42 (1902).

³⁰⁵ See *supra* Part II. For an understanding of "equitable utilization" as a procedural norm in international law, see MCCAFFREY, *supra* note 65, at 401-05.

³⁰⁶ *Kansas v. Colorado*, 185 U.S. 125, 144 (1902).

³⁰⁷ Aaron T. Wolf, *International Water Conflict Resolution: Lessons from Comparative Analysis*, 13 INT'L J. WATER RESOURCES DEV. 333, 352 (1997).

³⁰⁸ See SHLOMI DINAR, INTERNATIONAL WATER TREATIES: NEGOTIATION AND COOPERATION ALONG TRANSBOUNDARY RIVERS 25 (2008).

³⁰⁹ *Id.* at 3.

³¹⁰ *Id.*

³¹¹ *Id.* at 64-84.

³¹² *Id.* at 112.

any other measure of state power.³¹³ For instance, India financed the *whole* cost of the construction of dams on a river in upstream Bhutan.³¹⁴ Indeed, the United States itself when negotiating river treaties with foreign states pays them off (or receives payments from them), even as the several states resolutely refuse to pay them in *their* disputes.³¹⁵ No such inequality existed in border-creating river treaties.³¹⁶ Finally, though perhaps on shakier grounds, Professor Dinar rebuts claims that these payments are viewed as extraordinary. Rather, they “are commonly regarded [by the states themselves] as an appropriate instrumentality for fostering cooperation in this context.”³¹⁷

IV. THE COURT AND COMPACT NEGOTIATIONS

This section analyzes the effects of the standard on interstate Compact negotiations. A. raises one issue: the puzzling absence of side-payments in interstate water Compacts. B. summarizes the scholarship on interstate negotiations. C. summarizes interactions between water suits and water dispute resolution in terms of paradigmatic cases. D. seeks to explain these odd results in light of bargaining theory. E. briefly concludes.

A. *The Absence of Side Payments*

Although Professor Dinar found side payments from downstream states to upstream states in 87% of international water treaties,³¹⁸ in sister state disputes, side payments are almost unheard of.³¹⁹ Indeed,

³¹³ *Id.* at 113.

³¹⁴ *Id.* at 75. Note however that some of the funding came in the form of low interest loans. *Id.*

³¹⁵ *See id.* at 51 (collecting sources discussing United States payments to upstream Canada relating to the Columbia River).

³¹⁶ *Id.*

³¹⁷ *Id.* at 113.

³¹⁸ *Id.* at 112.

³¹⁹ This qualification is necessary because although at the time of this writing, no states make side payments in their Compacts, there is every incentive to hide them. Downstream states will not want other states to know they are willing to pay for

two recent authoritative and encyclopedic sources from respected scholars detailing issues in the negotiation of Compacts (“how to” guides for states on negotiating Compacts) fail even to mention side-payments.³²⁰

Though there are some probabilistic explanations for why payments might be rarer in the United States,³²¹ they fail to explain why there are *none*. Why is the very idea of paying for water regarded as such a novelty? Why do water-rich states like Nebraska seek, by statute, to prevent the export of their water to other states?³²² In the recent case of the possible invasion of Michigan by Asian Carp, the state of Michigan thrice requested emergency relief (the closure of locks, or other equitable relief) from the Supreme Court against the State of Illinois and the Army Corps of Engineers, claiming that its fishing industries would be devastated by this invasion. It did not—or if it did, such is not public knowledge—offer payments to the State of Illinois for the losses it would inevitably incur if it accommodated

their water; upstream states, who are possibly downstream on other rivers, will not want other states to be able to use this knowledge against them in negotiations.

³²⁰ SHERK, *supra* note 24, at 29–47 (guide to negotiating a Compact; no mention of side-payments). *See also id.* at 538–971 (list of Compacts, none of which provide for side-payments). *See also* Jerome C. Muys et al., *Utton Transboundary Resources Center Model Interstate Water Compact*, 47 NAT. RESOURCES J. 17 (2007) (no mention of side payments).

³²¹ Some characteristics of the international sphere, absent in the interstate context, make the use of side-payments more propitious. For instance, as Professor Dinar notes, payments often flow from substantially less developed upstream states to substantially more developed ones. *See* DINAR, *supra* note 308, at 62. Less developed upstream states may be comfortable with higher levels of pollution than more developed downstream states. The downstream states may thus pay upstream states to reduce pollution not for the upstream state's benefit but for its own sake. However, within the United States there are no such dramatic income inequalities. Even if there were, the Clean Water Act limits interstate water pollution.

Professor Dinar suggests that this accounts for side-payments in the pollution context. *Id.* at 78. However, he further finds that economic asymmetry accounts for side-payments in water apportionment cases. *Id.* at 69. Here, no dissimilarity between the international and interstate contexts seems to explain the absence of side-payments in the interstate context.

³²² *See* Richard S. Harnsberger et al., *Interstate Transfers of Water: State Options After Sporhase*, 70 NEB. L. REV. 754, 776 (1991) (compiling statistics about Nebraska's ample water supplies).

Michigan's request. Such payments might have made Illinois more likely to consider taking actions that would likely have devastating financial consequences for it.³²³

The most salient difference between the rest of the world, where there almost invariably are side-payments, and the United States, where there never are, is that the states are subject to the power of the federal government. Since Congress rarely takes an active role in interstate water law except to pass laws regulating water pollution,³²⁴ "the federal government" means the Supreme Court and the Executive Branch. Although the Executive Branch—here, the Army Corps of Engineers—is active in this area, it has generally been thought to facilitate agreement.³²⁵

No scholar has attempted to explain the absence of the tools of international water dispute resolution in interstate dispute resolution.³²⁶ Side-payments are, at least from an economic

³²³ There are currently no undisputed estimates of the losses Illinois would have incurred. However, they would likely be steep, as they would sharply curtail the City of Chicago's maritime traffic.

³²⁴ See Sherk, *supra* note 39, at 814–18.

³²⁵ Because the Bureau of Reclamation and the Army Corps of Engineers, who typically funds hydroelectric dams, requires that the beneficiary states agree to an allocation of water before beginning construction, delay costs states heavily.

³²⁶ A few scholars call for interstate water trading. See, e.g., Kristen Maule, *When Silence Speaks 1,000 Words: Negative Commerce Clause Restrictions on Water Regulations and the Case of Tarrant Regional Water District v. Herrmann*, 38 TEX. ENVTL. L. J. 239, 268 (2007); Terry L. Anderson & Clay J. Landry, *Exporting Water to the World*, 118 WATER RESOURCES UPDATE 60, 65 (2001).

Professor Dellapenna objects to water markets, claiming that the characteristics of water make establishing a market practically impossible. See, e.g., Joseph W. Dellapenna, *Climate Disruption, the Washington Consensus, and Water Law Reform*, 81 TEMP. L. REV. 383, 411–22 (2008). Professor Dellapenna, however, is speaking of water markets in the sense of locations, metaphorical or actual, where buyers can purchase water from sellers at a rate set by the market. See Joseph W. Dellapenna, *The Importance of Getting Names Right: The Myth of Markets for Water*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 317, 324 (2000). Where a state sells water in bulk to another after prolonged negotiations, it is not participating in a water "market." It is making a water "sale." Thus, his criticism does not go to why there should be no interstate water sales.

One source does seem to come close. David M. Freeman, Colo. Water Inst., *Negotiating New Environmental Governance in the Platte River Basin: Implementing the Endangered Species Act* (Oct. 14, 2009), available at http://cwi.colostate.edu/seminars/GRAD592/2009/10-12-2009_Freeman.pdf. Pro-

standpoint, the preferred method for allocating a good to the most efficient user.³²⁷ Money is how you buy an entitlement. It is apparently not a question of vagueness³²⁸ – the international standard of allocation of water is as vague, if not vaguer, than the American one.³²⁹ Indeed, the international standard of reasonable and equitable use is taken from the American standard of equitable apportionment.³³⁰

Nor does it seem to be a concern arising out of water itself. Sellers sell water *intrastate*; though, granted, these sales are still not nearly as comprehensive as scholars would expect.³³¹ A recent study found increased transfer of water from lower value farming uses to higher value urban uses.³³² Indeed, a scholar tells that he began his career when a professor told him that “[t]hey’ve been trying to create a water market for years here in California but haven’t succeeded. No one knows why.”³³³ In 2000, Utah suggested that Upper Basin Colorado River States sell some of their rights to Lower Basin California.³³⁴ Nothing came of it.

Intrastate markets—or at least sales—abound.³³⁵ In Arizona, where there is a twenty-fold disparity between the price paid by

fessor Freeman discusses the need for side-payments to stakeholders in individual states of an interstate Compact, without discussing the need for side-payments to states.

³²⁷ See generally Ronald Coase, *The Problem of Social Costs*, 3 J.L. & ECON. 1 (1960).

³²⁸ Vague entitlements are, presumably, harder to sell. See generally *id.*

³²⁹ MCCAFFREY, *supra* note 65, at 399–400.

³³⁰ *Id.* at 397–99.

³³¹ For instance, farmers use about 80% of the West's water, even though more profitable urban uses exist; and, indeed, expensive efforts to cut down on urban uses of water. See generally Jedidiah Brewer et al., *Water Markets in the West: Prices, Trading, and Contractual Form* (Ariz. Legal Studies Discussion Paper No. 07-07, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=964819&download=yes.

³³² *Id.*

³³³ BRENT M. HADDAD, *RIVERS OF GOLD: DESIGNING MARKETS TO ALLOCATE WATER IN CALIFORNIA* xiii (2000). A lively little literature debates the use of “markets” to sell water. Markets differ from individual sales in that in a market anonymous buyers and sellers may meet to exchange water at a uniform price determined by the market as a whole. See also *supra* note 342.

³³⁴ Getches, *supra* note 33, at 619.

farmers and that paid by cities, cities pay farmers to have their land lay fallow.³³⁶ The cities then use the farmers' unused water.³³⁷ After an adverse Supreme Court decision³³⁸ on an over-appropriated river, New Mexico purchased water that it was no longer entitled to grant from current users. It paid \$60M.³³⁹ Colorado routinely sells water intrastate.³⁴⁰

Anecdotal evidence indicates that water transfers fail not for a lack of buyers but for a lack of sellers. In the late 1990's, California had a standing offer to purchase water in bulk from any of the other six states in the Colorado River basin.³⁴¹ There were no takers.³⁴² Far from selling water, states craft water Compacts to prevent future private and *public* sales. Indeed, *Arizona spends money to consume water* so that California does not become entitled to use it.³⁴³ A scholar recently argued that the Colorado River Compact (for instance) explicitly prevents interstate transfers.³⁴⁴ The goal of such provisions is to prevent California from resolving its water problems by purchasing water from states willing to sell it water.³⁴⁵ Thus, the states mutually bound themselves not to engage in sales where there were willing buyers and willing sellers. States eager to sell their excess water have no incentive to conserve it, while across the state border thirst strangles the economy of a willing buyer. The author's thesis would be implausible if it were not a recognizable

³³⁵ See *supra* note 326 and accompanying text.

³³⁶ HADDAD, *supra* note 333, at 10.

³³⁷ *Id.*

³³⁸ *Texas v. New Mexico*, 488 U.S. 917 (1988).

³³⁹ HADDAD, *supra* note 333, at 11.

³⁴⁰ *Id.* at 13-14.

³⁴¹ Getches, *supra* note 33, at 611-12.

³⁴² In the intrastate context, farmers are the usual sellers and cities the usual purchasers. There are large numbers of sales, even if there may not be any markets. HADDAD, *supra* note 333, at 113.

³⁴³ Getches, *supra* note 33, at 611-12.

³⁴⁴ Lochhead, *supra* note 285, at 324-29. The author also argues that the framers of the Compact were induced by the Court's standard. See *id.* at 303-04.

³⁴⁵ *Id.* at 330. See also Lochhead, *supra* note 34, at 334-37.

pattern. Water rich states like Nebraska³⁴⁶ and Oklahoma³⁴⁷ pass bills aiming to prevent the export of water to states with smaller water endowments. They are but two of the many states imposing restrictions on interstate water transfer.³⁴⁸ This despite the probable unconstitutionality,³⁴⁹ under the Dormant Commerce Clause, of most statutes preventing the sale of water.³⁵⁰

How did the states arrive at this economic madness? I hazard two guesses. The Supreme Court has jurisdiction over interstate water cases. The Court, when a case reaches it, substantively allocates or otherwise substantively resolves the disputes. Although the finding of a violation of a Compact comes after a long process, the complaining state receives a prospective allocation.³⁵¹ Thus, a state may find it better suits its interest to engage in a protracted suit, hoping for an entitlement or abatement, than to pay off the upstream state.³⁵²

³⁴⁶ See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982). See also Harnsberger et al., *supra* note 322, at 776 (compiling statistics about Nebraska's enormous water supplies).

³⁴⁷ See Maule, *supra* note 326, at 241.

³⁴⁸ See, e.g., Matthews & Pease, *supra* note 138, at 649 (collecting state statutes prohibiting transfer).

³⁴⁹ Maule, *supra* note 326, at 251 (Oklahoma statute probably unconstitutional). See also Mark A. Willingham, Note, *The Oklahoma Water Sale Moratorium: How Fear and Misunderstanding Led to an Unconstitutional Law*, 12 U. DENV. WATER L. REV. 357 (2008) (agreeing that the Oklahoma statute is probably unconstitutional).

³⁵⁰ An interesting article by Richard Stewart discusses the possible motives states have in regulating out-of-state transfer of natural resources. Professor Stewart concludes that state protections of natural resources tends to be based on economic protectionism but are sometimes animated by legitimate conservationism. Stewart, *supra* note 138, at 241-55.

³⁵¹ Agency costs are also involved. See *infra* Part IV.D.

³⁵² The Colorado River offers a recent example on this. The main division in the Colorado River allocation of water is between Lower Basin (California, Arizona, Nevada) and Upper Basin (Colorado, New Mexico, Utah, and Wyoming) states. Because of growth in California and Nevada, water is worth more to these states than to Upper Basin States. In 2000, Utah expressed a willingness to lease part of the Upper Basin allocation to Lower Basin States. The measure was supported by water experts. See, e.g., Jerome C. Muys, *Innovations in Water Management*, 25 WATER INT'L 526, 533 (2000). However, despite the economic good sense of the proposition, Utah was unable to secure agreement, and no leases were made.

This does not explain why a state would deliberately hamstring its ability to sell or buy water in excess of or to satisfy its needs, as in the case of the Colorado River. Strategic litigation positioning better explains this.³⁵³ The Court's equitable apportionment standard in large part allocates water to those states best able to use it—that is, to those states whose valuation of the water is highest.³⁵⁴ If a state is willing to accept side-payments, it cannot value water (at the margins) more than the state purchasing from it. Otherwise, the purchasing state could make no offer the selling state could accept.³⁵⁵ A state may wish to sell excess water, but such a sale is damning evidence that it does not value water as much as the state it is selling to. The purchasing state can then sue the selling state in the Court's Original Jurisdiction, seeking an equitable apportionment. Imagine New York trying to explain to a Special Master that it needs the water of Able River more than Connecticut, having just offered to sell to Connecticut excess water from the Able River. Thus, the Court's equitable apportionment standard may induce states to refrain from engaging in efficient behavior (selling rights to water for money) for fear that this behavior would lead to a lower eventual allocation from the Court. In any case, they may be loath to disclose something close to their

³⁵³ Professor Lochhead's fascinating article supports one theory that would explain the particular case of the Colorado River Compact. See Lochhead, *supra* note 285. According to Professor Lockhead, the framers of the Compact dreaded the possibility of an interstate water suit. *Id.* at 304. Under the theory that the Compact framers were aware of the Court's substantive standard and wanted to avoid litigation, Professor Lockhead's argument makes a peculiar sort of sense. If no state may sell its water, then the framers exclude a substantial type of evidence that might be submitted in an interstate water suit: evidence that one party values water less, as shown by their willingness to sell it. If parties may not submit what would be their strongest evidence in a suit, then they may be deterred from suing at all.

³⁵⁴ *Colorado v. New Mexico*, 459 U.S. 176, 184 (1982).

³⁵⁵ Commonsensically, if I place a higher value on an orange than does a fruit seller, I cannot sell him an orange. Any offer I can make him within my price range is above his price range. That is why ordinary consumers do not sell oranges to fruit sellers.

true valuation for fear that the opposing party may use the valuations against them in Court proceedings.

This concern has precedents. Intrastate leases of water rights are careful about contract terms that imply “sale”. They are further careful not to make too long a lease, lest the lessee’s rights ripen into full possession. For instance, a deal between an irrigation district and a City to sell water floundered for years until the parties hit on the clever solution of leasing water rights without using the words “sale” or “transfer” in the contract.³⁵⁶

B. The Interaction of the Standard and Compact Negotiation

Interstate Compact negotiations have attracted intermittent scholarly interest. Compacts and the Compact Clause of the Constitution first came to scholarly attention when (then Professor) Felix Frankfurter and James Landis published their article acclaiming them as instances of “cooperative federalism”.³⁵⁷ As might be expected from these authors, the article praises Compacts for their rejection of the form of federalism in favor of its substance, as well as for the Compacts’ practicality.³⁵⁸ Later scholars echoed the article’s normative thesis that interstate Compacting calls for practical and self-abnegating states willing to take the steps needed to solve problems despite the form of federalism. In particular, because no Compact can predict all contingencies, interstate Compacts must create interstate agencies capable of resolving contingencies as they appear.³⁵⁹

³⁵⁶ HADDAD, *supra* note 333, at 114–15.

³⁵⁷ Frankfurter & Landis, *supra* note 168.

³⁵⁸ *Id.* at 729. As might be expected from Frankfurter, the article also advises the Court to stay out of, and for Congress to be involved in, the process of negotiating a Compact. *Id.* at 728–29.

³⁵⁹ See generally SHERK, *supra* note 25; Muys et al., *supra* note 320. See also Joseph W. Dellapenna, *Interstate Struggles Over Rivers: The Southeastern States and the Struggle Over the 'Hooch*, 12 N.Y.U. ENVTL. L.J. 828, 890 (2005) (critiquing equitable apportionment because it does not provide for revision); Alejandro E. Camacho, *Beyond Conjecture: Learning About Ecosystem Management From the Glen Canyon Dam Experiment*, 8 NEV. L.J. 942, 953–57 (2008) (arguing that water administration must be iterative and provide for measurement of outcomes).

Otherwise any contingency risks a journey to the Compacting table (or to the Supreme Court). Scholars have not, on the whole, found the states to be willing to give up this power in negotiating Compacts.³⁶⁰ What they have found instead are states that guard their sovereign powers, share resources only after long negotiations, and markedly fail to agree.³⁶¹ Writing in 1959, Leach and Sugg,³⁶² noted that states jealously guarded their prerogatives in assigning powers to the Compacts' administrative agencies.³⁶³ The authors praised this result, though faintly; they accepted it as an inevitable by-product of the states' parochialism.³⁶⁴

Later authors echoed the claim that the states fearfully protect their prerogatives from Compact commissions, and regard with resentment any powers thus granted.³⁶⁵ Barton, writing in 1965, agreed with this conclusion, though he was of mixed feelings about whether the results were on the whole desirable.³⁶⁶ He further suggested that Compacts, while useful devices for the allocation of waters where a national project is contemplated,³⁶⁷ are less useful when there is no such project.³⁶⁸ Without a federal impetus, states tended to form Compacts at the

³⁶⁰ See SHERK, *supra* note 24.

³⁶¹ In addition to the sources described in text, see Tripolitsiotis, *supra* note 39, at 173, 179.

³⁶² RICHARD H. LEACH & REDDING S. SUGG., *THE ADMINISTRATION OF INTERSTATE COMPACTS* (1959). After a thorough study of all types of interstate Compacts which made them experts on the subject. See WELDON V. BARTON, *INTERSTATE COMPACTS IN THE POLITICAL PROCESS* 163 (1965).

³⁶³ LEACH & SUGG, *supra* note 362, at 215-216.

³⁶⁴ *Id.*

³⁶⁵ See, e.g., SHERK, *supra* note 24, at 38-39; Jerome C. Muys, *Allocation and Management of Interstate Water Resources: The Emergence of the Federal-Interstate Compact*, 6 *DENV. J. INT'L L. & POL'Y* 307, 319 (1976); BARTON, *supra* note 362 at 177.

³⁶⁶ BARTON, *supra* note 362, at 165-67.

³⁶⁷ Briefly, the Bureau of Reclamation and Corps of Engineers, who typically fund hydroelectric dams, require that the beneficiary states agree to an allocation of water before beginning construction. Thus, delay costs states heavily for those water resources on which they contemplate dams funded by these agencies. Basing himself on the experience of *Kansas v. Colorado*, Barton argues that allocation by Compact is quicker and therefore preferable to apportionment by the Supreme Court. *Id.* at 171.

behest of and operate them for the benefit of those special interests who stand to gain from their formation and operation.³⁶⁹ The Compacts do not serve the public interest.

Muys, writing in 1976 (and summarizing his work on a prior detailed article and book), found it “difficult to disagree with one characterization of most traditional water Compacts as creatures of ‘states jealous of their prerogatives and niggardly in their grants of authority.’”³⁷⁰ He argued that the commissions thus weakly empowered were unable to resolve water conflicts.³⁷¹

Sherk, writing in 2000, echoed these concerns. Indeed, Sherk quotes a passage from Muys in 1976 as the definitive statement of states and interstate Compacts . . . which is itself a quote from Barton in 1965.³⁷² Not much has changed.

Thus, the scholarship suggests that states are reluctant to cooperate or to grant authority, and jealous of their power. Scholars mostly differ as to whether this state of affairs is tolerable. Leach and Sugg suggest that it should be praised as the best possible outcome, given the circumstances. Others suggest that this parochialism is incompatible with solutions to interstate water disputes that endure beyond the immediate controversy.

³⁶⁸ *Id.* at 171–72.

³⁶⁹ *Id.* at 173–77.

³⁷⁰ Muys, *supra* note 365, at 315 (1976) (quoting HOWARD H. ODUM & HARRY E. MOORE, *AMERICAN REGIONALISM* 206 (1938)). The author, writing in 1976, found that a characterization of the Compact device *from 1938* was still accurate.

³⁷¹ *Id.* at 315. In fairness, he also argued that the interstate Compact process took too long to resolve mostly because of the complexity of the issues. *Id.* at 317. If this is, in fact, the root of the problem, this paper's solution would be of no help. In another work, though, Muys raises the separate difficulty engendered by requiring agreement from sets of legislatures. Jerome C. Muys, *Interstate Compacts and Regional Water Planning and Management*, 6 NAT. RES. L.J. 153, 168 (1973).

³⁷² SHERK, *supra* note 24, at 39.

C. *The Varieties of Negotiating Experience*³⁷³

This section sets out three paradigmatic cases of Compacts apportioning what Dinar calls “through-border” rivers (rivers that pass through one state before entering another). The paradigmatic cases capture two common fact situations. In the first, the Court refuses to grant standing. In the second, it does grant standing, and equitably apportions the river. In the third, the states negotiate a Compact without the Court’s intervention. The fact situations are modeled on a (more or less) game theoretic methodological analysis of state behavior.³⁷⁴

1. WHERE THE COURT DENIES STANDING

The Able River flows from New York to Connecticut. Although the Able River has not yet been the subject of dispute, New York City’s rising population means that it will need more of the Able River in coming years. Connecticut had planned to use the Able River to pursue its own growth. Although New York avers that Connecticut will suffer no material harm, Connecticut’s own experts suggest that the drainage will impair its projected growth. Connecticut offers to share the river. New York contemptuously refuses an offer based on such speculative harm.

³⁷³ Courts use Special Masters in other difficult remedial situations. See FED. R. CIV. P. 53 (permitting district courts to appoint Special Masters). The accounts of these Special Masters, though not directly on point, are always enlightening. D. Bruce La Pierre, who was appointed Special Master in a desegregation case involving two school districts, later recounted his experiences. La Pierre, *supra* note 91. Master La Pierre engaged in extended “shuttle diplomacy” to persuade the parties to agree to particular remedies. *Id.* at 995. In order to bring them into compliance, he constantly raised with them the threat of litigation. *Id.* at 1000. Unfortunately, Master La Pierre believes that the remedies he agreed upon were not successful. *Id.* at 1025.

³⁷⁴ For a similar analysis, see Hills, *supra* note 221, at 885. Methodologically, this paper owes much to Professor Hills’s approach. It follows a similar economic analysis of states as rational actors.

Connecticut sues in the Supreme Court.³⁷⁵ The Court hears the case because of the dispute's importance. However, it denies Connecticut standing because it is unable to show a ripe injury. The suit is dismissed without prejudice.

Decades go by. New York City's population continues to grow, and New York State drains more and more of the Able River. Connecticut, convinced it might now show a ripe injury by pointing to actual limitations on growth, again sues in the Supreme Court. New York, looking at the same data, is unconvinced. The Court accepts the case, and assigns a Special Master. The Special Master spends five years on the case and creates a record of tens of thousands of pages long plus exhibits. At the end of the five years, the Special Master recommends that the suit be dismissed, again without prejudice. The Court agrees.

Having twice tried to see to its future growth, and twice failed, Connecticut settles for protecting current uses, and those projected in the near future. Over a few years, it negotiates a Compact with New York. It bargains for a much smaller allotment of the river than New York and is unhappy with the results.

Decades pass. Each state now allocates close to its full Compact share. Any new use of the Able River requires painful cutbacks on existing uses. Cities, more efficient users of water than farmers, must purchase their water from them: land lies fallow for lack of water to irrigate it.

The states no longer stake future speculative gain; water has both value and price, and both are high. Connecticut again sues in the Supreme Court. Clever lawyering and imprecise Compact drafting convince the Court that the Compact is ambiguous on a crucial point. The Court exercises its jurisdiction, and equitably apportions the Able River.³⁷⁶

³⁷⁵ See, e.g., Michael Keene, Note, *The Failings of the Tri-State Water Negotiations: Lessons to be Learned From International Law*, 32 GA. J. INT'L & COMP. L. 473, 476 & nn.19-28 (2004) (describing just such a pattern of "sue first negotiate later").

³⁷⁶ See, e.g., *Texas v. New Mexico*, 462 U.S. 554, 569 (1983).

In this case, Connecticut bet on a Supreme Court judgment twice, and lost twice. It was encouraged to do so by the Court's vague procedural and substantive standards, which make decisions more or less impossible to predict. Since informed legal judgment still makes the results of a suit anyone's guess,³⁷⁷ Connecticut, like most litigants, guesses that it will win.³⁷⁸ So does New York. The parties settle when Connecticut can no longer afford to guess.

This case, although driven by game theory, describes a common lawsuit pattern. A few illustrative cases will do (footnote 405 *infra* sets out every case and its current status, albeit in less detail than the following case studies).

Most prominently, the Court recently refused Michigan's three separate requests to force Illinois to close two shipping locks near Chicago.³⁷⁹ Michigan alleged that Chicago's continued operation of the locks would cause Lake Michigan to be invaded by Asian carp, possibly destroying Michigan's \$7B annual recreational and commercial fishing industries.³⁸⁰ Michigan's first motion, filed on December 19, 2009, was prompted by the discovery of Asian carp environmental DNA in the rivers directly connected to Lake Michigan around November 22, 2009.³⁸¹

³⁷⁷ See Grant, *supra* note 99, at 991 ("Equitable apportionment requires the weighing of multiple factors that are incommensurable, and there is a dearth of precedent on how to weigh competing factors.").

³⁷⁸ Bar-Gill, *supra* note 293, at 490-91.

³⁷⁹ Michigan v. Illinois, 130 S. Ct. 2397 (Apr. 26, 2010) (denying request for leave to reopen case); Michigan v. Illinois, 130 S. Ct. 1934 (Mar. 22, 2010) (denying renewed request for preliminary injunction); Michigan v. Illinois, 130 S. Ct. 1166 (Jan. 19, 2010) (denying request for preliminary injunction).

³⁸⁰ See Motion for Preliminary Injunction at 3, Michigan v. Illinois, 130 S. Ct. 1166 (2010), 2009 WL 6310836. See also Joel Hood & James Janega, *Fight to keep Asian Carp out of Great Lakes Reaches Supreme Court*, L.A. TIMES, Dec. 22, 2009 at A15, available at <http://articles.latimes.com/2009/dec/22/nation/la-na-asian-carp22-2009dec22>.

³⁸¹ See Motion for Preliminary Injunction at 3, Michigan v. Illinois, 130 S. Ct. 1166 (2010), 2009 WL 6310836. See also James Janega, *Voracious Asian Carp Poised to Upset Great Lakes*, CHI. TRIB., Nov. 22, 2009 at C27, available at http://articles.chicagotribune.com/2009-11-22/news/0911220098_1_chicago-sanitary-carp-lakes-coalition.

The Court denied the motion's request for a preliminary injunction in a terse order on January 19, 2010.³⁸² Michigan renewed its motion for a preliminary injunction on February 4, 2010, providing evidence that showed that Asian carp DNA had been found in Lake Michigan itself.³⁸³ On March 22, in another terse order, the Court again denied Michigan's request for a preliminary injunction.³⁸⁴ Finally, on April 26, the Court denied Michigan's request in full.³⁸⁵ As this goes to press, Michigan, Illinois, and the Corps of Engineers have not agreed to any measures. Yet Michigan lost more than half a year pursuing emergency relief in the Supreme Court. During this year, Asian carp moved from the tributaries of Lake Michigan into the Lake itself, and had some time to establish viable populations therein.³⁸⁶ This, according to Michigan itself, puts at risk its \$7B annual fishing industries. Having failed in the Court, the Great Lakes states stepped up pressure on the Federal Government to deal with the threatened invasion.³⁸⁷ President Obama agreed to develop a framework to address Great Lakes states' problems.³⁸⁸ According to Thomas Cmar of the Natural Resources Defense Council, "If we'd had a national policy—like the one announced [by President Obama]—in place from Day One to ensure that the federal government was focused on the risk that the Asian carp

³⁸² Michigan v. Illinois, 130 S. Ct. 1166 (2010).

³⁸³ See Renewed Motion for Preliminary Injunction at 2, Michigan v. Illinois, 130 S. Ct. 1166 (2010), 2010 WL 1250413.

³⁸⁴ Michigan v. Illinois, 130 S. Ct. 1934 (2010).

³⁸⁵ Michigan v. Illinois, 130 S. Ct. 2397 (2010).

³⁸⁶ A recent Army Corps of Engineers study, which found no Asian carp in the area near the tributaries that environmental DNA tests originally showed were contaminated, suggests that despite inaction, Michigan has escaped invasion. See Joel Hood, *No Asian Carp Found in Fish Kill*, CHI. TRIB., May 26, 2010 at C8, available at http://articles.chicagotribune.com/2010-05-25/news/ct-met-0526-fish-kill-20100525_1_calumet-sag-channel-carp-dead-fish.

³⁸⁷ See Mark Guarino, *Great Lakes States Step up Pressure on Obama to Stop Asian Carp*, CHRISTIAN SCI. MONITOR, July 14, 2010.

³⁸⁸ See Exec. Order No.13,547, 75 Fed. Reg. 43,023 (July 22, 2010), adopting THE WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE (July 19, 2010).

pose to the Great Lakes and the urgent need to act aggressively to stop it, the current Asian carp crisis might have been avoided.”³⁸⁹

This timeframe, however inadequate it is as a response to the threatened invasion, is remarkably prompt by the standards of the Court’s Original docket. In 1902, Kansas, the downstream state, first sued Colorado, the upstream state, over Colorado’s appropriation of the Arkansas River.³⁹⁰ Kansas sought a judgment enjoining Colorado from diminishing the Arkansas from its full natural flow.³⁹¹ In its demurrer (reply brief), Colorado interposed legal objections, but did not dispute Kansas’s factual allegations. The Court ruled against Colorado on the law. However, the Court refused to find for Kansas on this ground, remanding the case to the Special Master for further proceedings.³⁹²

The parties were back before the Court in 1907. Then, facing a full record developed by the Special Master, the Court denied standing to Kansas, holding that Kansas had not made out the heightened injury it was required to show.³⁹³

Kansas was apparently dissatisfied with the result. The Finney County Water Users’ Association brought suit in 1916 and 1923, seeking an apportionment of Colorado users’ priorities to it.³⁹⁴ In response, Colorado sued in the Supreme Court to enjoin the two pending lawsuits.³⁹⁵ Kansas’s answer alleged that the

³⁸⁹ Cmar, *supra* note 37.

³⁹⁰ *Kansas v. Colorado*, 185 U.S. 125 (1902).

³⁹¹ *Id.* at 142.

³⁹² *Id.* at 147.

³⁹³ *Kansas v. Colorado*, 206 U.S. 46 (1907).

³⁹⁴ *Colorado v. Kansas*, 320 U.S. 383, 386–88 (1943). The dates are not as implausible as they sound. Colorado actually filed suit in January 1928, *id.* at 388, meaning that a mere five years had elapsed since the Finney County Water Association’s latest suit. This also means, however, that the dispute had been before the Supreme Court for some fifteen years.

³⁹⁵ *Id.* In addition, a federal dam, premised on parties’ agreement to share the water, helped push the parties to agreement. David W. Robbins & Dennis M. Montgomery, *The Arkansas River Compact*, 58 U. DENV. WATER L. REV. 58, 65 (2002).

Finney County Association held riparian rights in the Arkansas River.³⁹⁶

The Special Master recommended that the Court grant Colorado's injunction but equitably apportion the Arkansas River.³⁹⁷ The Court accepted the Special Master's injunction, but based on the higher justiciability standards, again rejected the finding that the River should be equitable apportioned.³⁹⁸

In 1945, just two years after the decision, Congress authorized the states to negotiate a Compact. The parties, over the course of three years, came to an agreement. The result was the Arkansas River Compact of 1949,³⁹⁹ which divided the flows of the Arkansas River.⁴⁰⁰ The Compact allocates roughly 50% more water to Colorado than to Kansas.⁴⁰¹ In response to some complaints in the literature about the Compact's ambiguity on key issues, certain to give rise to future litigation, at least two reputed scholars maintain that the ambiguity is there because "Colorado won a significant victory . . . and was unwilling to bargain away [its] fruits."⁴⁰²

Arizona's conflict with California provides another such example. It would be tedious to summarize the proceeding but it is enough to say that the Court has made forty-four orders in the case and Arizona was denied its apportionment three times in the 1930's.⁴⁰³

Some of the Court's standing denials have had better results. For instance, in the early 1980's it twice denied Colorado's claims to an allocation for the Vermejo River⁴⁰⁴ and Colorado has not

³⁹⁶ *Colorado v. Kansas*, 320 U.S. at 388-89.

³⁹⁷ *Id.* at 390.

³⁹⁸ *Id.* at 392-93.

³⁹⁹ *Arkansas River Compact*, Pub. L. No. 81-82, 63 Stat. 145 (1949).

⁴⁰⁰ *Id.* at Article I.B.

⁴⁰¹ *Id.* at Article V.

⁴⁰² *Robbins & Montgomery*, *supra* note 395, at 92.

⁴⁰³ *Arizona v. California*, 298 U.S. 558 (1936); *Arizona v. California*, 292 U.S. 341 (1934); *Arizona v. California*, 283 U.S. 423 (1931).

⁴⁰⁴ *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Colorado v. New Mexico*, 467 U.S. 310 (1984).

pursued further action to reclaim the waters. The trivial amount of water at stake (some 4,000 acre/feet) may be the cause, however, rather than anything substantively definitive in the Court's opinion.⁴⁰⁵

2. WHERE THE COURT GRANTS STANDING

In the second paradigmatic case, the Court grants Connecticut standing. It equitably apportions the Able River in gross as between Connecticut and New York. This, however, is of little use to either party. Apportionment in gross is their litigating position, not their actual need. Connecticut sees its future growth along the Baker tributary of the Able River; New York would like to draw from the main stream.

Satisfied with the "how much" of the Supreme Court judgment but dissatisfied with the "how", Connecticut negotiates with New York over the particular terms of the decree. They take the decree as a distributive baseline, but are not overly

⁴⁰⁵ Below is a list of cases where the Court has denied standing. It is organized by the river in question.

Colorado River, Arizona plaintiff and California defendant: *Arizona v. California*, 283 U.S. 423 (1931) (holding that the Boulder Canyon Act was constitutional, and thus that Arizona could not enjoin proceedings insofar as they affected Arizona water rights); 292 U.S. 341 (1934) (holding that Arizona could not avail itself of prior Compact); 298 U.S. 558 (1936) (holding that Arizona not entitled to apportionment because United States, an indispensable party, was not subject to suit without its consent); 376 U.S. 340 (1964) (awarding Arizona portion of the Colorado River). No further action (other than decree modification immediately following the decree) on dispute until 1978.

Arkansas River, Kansas plaintiff and Colorado defendant. *Kansas v. Colorado*, 185 U.S. 125 (1902) (holding that further factual determinations required before reaching merits); 206 U.S. 46 (1907) (holding that Kansas had not met heightened standing requirements); 320 U.S. 383 (1943) (enjoining Kansas' claims on Arkansas on grounds that it had not met heightened standing requirements; this suit was brought by Colorado to quiet Kansas' claims on the river). Compact entered into in 1948. No further action for 40 years. Case ongoing on Compact violation claim by Kansas.

Vermejo River, Colorado plaintiff and New Mexico defendant. *Colorado v. New Mexico*, 459 U.S. 176 (1982) (reversing Special Master's determination); 467 U.S. 310 (1984) (holding that Colorado could not meet its standing requirement and dismissing the case). This controversy is dead; note however, that the case was for an allocation of a mere 4,000 acre/feet.

concerned with the physical allocation. After a few years' bargaining, they submit a modified decree to the Court, which leaves the parties about as relatively advantaged as the original decree; nonetheless, its terms are vastly different.

This picture matches what happens when the Court equitably apportions water. Though there are a limited number of cases of the Court actually entering a decree, as there are few cases of states actually invoking the Court's jurisdiction to settle a matter, a pattern nevertheless emerges. First, the Court enters a decree. Then, usually within a year or two, but sometimes as late as eight years later (as in the case of *Nebraska v. Wyoming*⁴⁰⁶) the parties modify the decree. The decree often modifies the initial allocation quite a bit: in *Nebraska v. Wyoming*, of the five allocative provisions in the original decree, all were modified.⁴⁰⁷ In addition, the parties inserted two additional clauses.⁴⁰⁸ Hardly any part of the decree was left unmodified.

The decree then stands for a couple of decades (twenty to forty years, usually)⁴⁰⁹ and then one party brings suit to alter it. Over this period, many changes can occur that can make the original decree inappropriate. For instance, states can develop unequally. Underground aquifers may be depleted. Time may reveal that the measuring period was unusual.⁴¹⁰ For whatever reason, the parties then re-litigate or renegotiate the issue.

Sometimes the parties are able to negotiate a Compact after a Supreme Court decision, as in *Kansas v. Colorado*.⁴¹¹ There,

⁴⁰⁶ Compare *Nebraska v. Wyoming*, 325 U.S. 589 (1945), with *Nebraska v. Wyoming*, 345 U.S. 981 (1953) (8 years).

⁴⁰⁷ 345 U.S. 981.

⁴⁰⁸ *Id.*

⁴⁰⁹ See *supra* note 405; *infra* note 412.

⁴¹⁰ This is what happened over the Colorado River. See Suzanne Knowle, *Conference Report: Answering a Call on the Colorado River Compact: Colorado Bar Association: Water Law Section & University of Denver Water Law Review*, 8 U. DENV. WATER L. REV. 732, 732 (2005). The actual flow of the river, compared with its flow during the measuring period, is given by Lochhead, *supra* note 285, at 318.

⁴¹¹ Arkansas River Compact, Pub. L. No. 81-82, 63 Stat. 145 (1949).

again, the Compact stands for at least some time before further litigation is necessary. Regardless, the Compacts, like modifications of decrees, reallocate water in more and different detail from the original Supreme Court judgment.⁴¹²

3. AGREEMENT WITHOUT LITIGATION

There is no need to provide a hypothetical case of agreement without litigation as Montana and Wyoming have already provided such a paradigmatic case.

The Yellowstone River, which originates in Wyoming,⁴¹³ runs northward from Wyoming into Montana and then for a few miles into North Dakota.⁴¹⁴ Since the negotiation of the

⁴¹² The following is a summary of decrees and modifications. It follows the same format as note 405, *supra*.

Laramie River, Wyoming plaintiff and Colorado defendant. Wyoming v. Colorado, 259 U.S. 419 (1922) (initial decree); 260 U.S. 1 (1922) (first modification); 353 U.S. 953 (1957) (second and current modification).

Delaware River, New Jersey plaintiff and New York defendant. New Jersey v. New York, 283 U.S. 336 (1931) (initial decree); 283 U.S. 805 (1931) (first modification); 347 U.S. 995 (1954) (second and current modification).

North Platte, Nebraska plaintiff and Wyoming defendant. Nebraska v. Wyoming, 325 U.S. 589 (1945) (initial decree); 345 U.S. 981 (1953) (first modification); 479 U.S. 1051 (1987) (proceeding to modify decree begins); 534 U.S. 40 (2001) (decree modified by stipulation).

Pecos River, Texas plaintiff and New Mexico defendant. Texas v. New Mexico 462 U.S. 554 (1983) (partial decree entered; case remanded for further proceedings); 468 U.S. 1202 (1984) (retirement of Special Master); 482 U.S. 124 (1987) (decree entered); 485 U.S. 388 (1988) (amended decree entered). The Court appointed a River Master to manage the river.

Canadian River, Oklahoma and Texas plaintiffs and New Mexico defendant. Oklahoma v. New Mexico, 501 U.S. 221 (1991) (opinion entered); 510 U.S. 126 (1993) (decree entered).

Republican River, Kansas plaintiff and Nebraska and Colorado defendant. The parties reached an agreement while litigation was pending. Report of the Special Master on Final Settlement Stipulation in Kansas v. Nebraska no. 126 original, available at <http://www.supremecourt.gov/specmastrpt/specmastrpt.aspx> (No. 126 original Final Settlement Stipulation v. 1–5), accepted at 538 U.S. 720 (2003).

⁴¹³ First Interim Report of the Special Master Barton H. Thompson, Jr. at 3, Montana v. Wyoming, 120 S. Ct. 480 (2008) (No. 137, Original) (Feb. 10, 2010) [hereinafter “Master Thompson Report”].

⁴¹⁴ According to the 1990 census, only 1,000 persons lived in the North Dakota region of the Yellowstone River Basin. U.S. GEOLOGICAL SURVEY, WATER RESOURCES

Wyoming-Montana Compact, the Yellowstone has irrigated more of Montana than Wyoming.⁴¹⁵

Thus, although Wyoming controls all of the Yellowstone's tributaries (and hence its flow), the River is of greater importance to Montana. In the international sphere, this would typically be acknowledged by a side-deal, or some specific piece of aid from Montana to Wyoming. Since the Compact was negotiated between two States, however, the inequality was made manifest chiefly through a convoluted negotiation process.

Congress originally granted the states the authority to negotiate a Compact in 1932 as a pre-requisite for federal funding of water storage facilities in the basin.⁴¹⁶ The negotiators produced and signed a draft in 1935, but this draft was never signed by the legislatures.⁴¹⁷ Congress then re-authorized the states to negotiate a Compact in 1937.⁴¹⁸ The commission charged with negotiating a Compact was unable to meet its deadline, and following a Congressional extension, the commission signed a draft in 1942.⁴¹⁹ This draft differed conceptually from the 1935 draft; where the 1935 draft merely recognized vested rights and a process whereby persons in each State could register later rights, the 1942 draft sought to apportion the River's waters between the States.⁴²⁰ The Wyoming legislature ratified a *modified* draft, which neither the Montana nor North Dakota legislatures would accept.⁴²¹ This led Congress, in 1944, to once again authorize the states to negotiate a Compact, which though signed and ratified, was ultimately vetoed by the Wyoming governor.⁴²² Finally, after a fourth Congressional authorization in

INVESTIGATION REPORT 98-4269, ENVIRONMENTAL SETTING OF THE YELLOWSTONE BASIN, MONTANA, NORTH DAKOTA, AND WYOMING 57 [hereinafter "Yellowstone"], available at <http://pubs.usgs.gov/wri/wri984269/wri984269.pdf>.

⁴¹⁵ *Id.* at 6.

⁴¹⁶ *Id.* See Act of Jun. 14, 1932, Pub. L. No. 178, 47 Stat. 306.

⁴¹⁷ Master Thompson Report, *supra* note 413, at 6-7.

⁴¹⁸ *Id.* See Act of Aug. 2, 1937, Pub. L. No. 237, 50 Stat. 551.

⁴¹⁹ Master Thompson Report, *supra* note 413, at 7.

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.* at 8. See Act of Mar. 16, 1944, Pub. L. No. 257, 58 Stat. 117.

1949, the states were able to negotiate, sign, and ratify a Compact, which was not vetoed by either of the Governors.⁴²³ The final draft forewent protecting vested rights as such, relying instead on block grants to the States.⁴²⁴ Thus, it took the states four-and-a-half Congressional authorizations, four drafts, and two decades to arrive at a Compact.⁴²⁵

This contrasts with the relative haste of negotiations in cases where a State, whether successfully or not, actually does use its rights to petition the Court for relief. Those negotiations take years, not decades. Of course, it is possible that the leisurely pace of negotiations owes more to the fact that the issue was not as pressing at the time (given the relative abundance of water in the area), than it does to the importance of a negotiation. However, this is unlikely. The commissions operated near-continuously for two decades, during which time the States went without federal aid to build much-needed water storage facilities. The drafts were enough of an issue to draw both a legislative amendment and a veto from Wyoming. Finally, the time spent on negotiations compares rather favorably with the time the Court takes to resolve equitable apportionment cases. This suggests that the latter are no more emergencies than the allocation of the Yellowstone River.

Whether the additional time made for a wiser allocation is open to doubt. In 2008, the Supreme Court granted Montana leave to file a complaint over whether Wyoming's more efficient

⁴²³ Master Thompson Report, *supra* note 413, at 8.

⁴²⁴ *Id.* at 20.

⁴²⁵ Other examples of protracted negotiations bear this out. Zimmerman cites two additional examples, the attempted Potomac River Basin Compact, abandoned in 1976, and the attempted Delaware River Basin Compact, abandoned in the 1950's. ZIMMERMAN, *supra* note 23, at 44. The Potomac River Compact, abandoned in 1976, would have regulated the Potomac River as between Maryland, Virginia, and the District of Columbia. The Potomac River is distinctly through-border, passing through Maryland, to Virginia, and to the District of Columbia. Similarly, the Delaware River passes through Pennsylvania/New York, on to Pennsylvania/New Jersey, and to New Jersey/Delaware (that is, it is a border-creating river in all these pairs).

use of irrigation water, leaving less to return to the River, was a violation of the Compact.⁴²⁶ Special Master Barton H. Thompson, Jr., concluded that it was not a violation of the Compact,⁴²⁷ and the Court has allowed for oral arguments on Montana's exception to this conclusion.⁴²⁸

Some natural arrangements allow the states to avoid the inequality trap and the attending specter of Supreme Court suit. Here again, though, the story is not one of unqualified success. Scholars have noted that negotiations are time-consuming,⁴²⁹ with some citing as the cause of this delay the states' very different negotiating positions for instance the difference between upstream and downstream states⁴³⁰ or state parochialism.⁴³¹ Even Compact enthusiasts have had to defend Compacts from the charge that negotiations take unusually long.⁴³² Finally, in at least one case, Georgia appears to have undertaken measures solely to extract concessions from other negotiating parties.⁴³³

But most disputes are resolved without resort to litigation. Why? Many negotiations are facilitated by rough equality of positions. One traditional circumstance that ensures rough equality is that the parties negotiate over a border-creating river. Other natural linkages include rivers that make their way sinuously

⁴²⁶ *Montana v. Wyoming*, 552 U.S. 1175, 1175 (2008).

⁴²⁷ Master Thompson Report, *supra* note 413, at 86.

⁴²⁸ *Montana v. Wyoming*, 562 U.S. ___, (Oct. 12, 2010) (No. 137, Original).

⁴²⁹ Muys, *Interstate Compacts*, *supra* note 371 at 168.

⁴³⁰ SHERK, *supra* note 24, at 37-46.

⁴³¹ *Id.* at 38-9.

⁴³² Jerome C. Muys, a great defender of Compacts on this issue, nevertheless has had to defend this position which runs counter to the scholarly consensus in his writings. See, e.g., Muys, *supra* note 365, at 319; Muys, *Interstate Compacts*, *supra* note 371, at 168.

⁴³³ Dellapenna, *supra* note 359, at 875 (arguing that Georgia aimed by constructing a dam on a river that was the object of a Compact negotiation to increase its allocation in the eventual Compact); Michael Keene, Note, *The Failings of the Tri-State Water Negotiations: Lessons to be Learned From International Law*, 32 GA. J. INT'L & COMP. L. 473 (2004) (same); Sherk, *supra* note 39, at 812-13 (same).

across borders,⁴³⁴ or lakes which parties are more or less equally well disposed to pollute or to draw water from.⁴³⁵ Neither party has an incentive to bet on a Supreme Court allocation, because it is neither party's sole, or even primary, recourse. Negotiations are simpler. Neither party needs to determine the "cash value"⁴³⁶ of a Supreme Court suit (not that they could agree on it). Some states, however, create linkages by linking basins. Although the river is upstream for one state and downstream for another, tributaries to the river need not follow this pattern. By linking negotiations of the allocation of tributaries to negotiations of the allocation of the river proper, states are able to achieve the rough equality that promotes successful negotiation. Finally, some negotiations are just not that important. For instance, the Costilla Creek Compact allocates flows from a reservoir whose total capacity is a mere 15,700 acre/feet.⁴³⁷

Some cases do not fit within this neat classification. These tend to be middle-sized Compact negotiations, where a threat to sue is credible, but only barely so. For instance the La Plata River, disputed between Colorado and New Mexico, flows at

⁴³⁴ One example is the Bear River. See *History of the Bear River Compact*, UTAH DIVISION OF WATER RIGHTS, available at <http://waterrights.utah.gov/techinfo/bearrivc/history.html>.

⁴³⁵ The Great Lakes are a prime example of this. See Great Lakes Basin Compact, Public Law No. 90-419, 82 Stat. 414 (1968). For an analysis of enforcement of the Compact, see Charles F. Glass, Note, *Enforcing Great Lakes Water Export Restrictions Under the Water Resources Development Act of 1986*, 103 COLUM. L. REV. 1503, 1514 (2003). For an argument that the states should grant more authority to interstate (and in this case international) agencies, see generally Jessica A. Bielecki, Note, *Managing Resources with Interstate Compacts: A Perspective from the Great Lakes*, 14 BUFF. ENVTL. L.J. 173 (2006).

⁴³⁶ See Levinson, *supra* note 102, at 874 ("cash value" of a constitutional right is remedy available for violation of that right).

⁴³⁷ Pub. Law No. 88-198, 77 Stat. 350 (1963). There has been no litigation over or leading to the Costilla Creek Compact. See Kenneth W. Knox, *The Costilla Creek Compact*, 6 U. DENV. WATER L. REV. 453 (2003). The Costilla Creek irrigates some 10,000 acres. *Id.* at 462. The negotiations were completed without threat of a lawsuit in the Court. *Id.* at 465-67.

some 26,000 acre/feet year.⁴³⁸ After a drought and its fallout, New Mexico's attorney general threatened suit.⁴³⁹ The Compact was negotiated in a mere three years⁴⁴⁰ (and ratified three years later).⁴⁴¹

D. Analysis

To summarize: 1) states denied standing still seek the Court's jurisdiction and only reluctantly enter agreement without first having the Court equitably apportion a river on the merits; 2) states that receive an equitable apportionment quickly modify the decree granting apportionment, or negotiate a Compact overriding the decree; modified decrees or Compacts last for some decades before needing further modification; and 3) Compacts are negotiated more quickly when there is no power imbalance; where there is a power imbalance, negotiations take a very long time (except when the negotiations are over a trivial amount). This section analyzes the results in light of negotiation theory.

The literature suggests that litigants are excessively optimistic about their chances of winning at trial.⁴⁴² Litigants each believe that their chances of winning the case are higher than they actually are.⁴⁴³ Plaintiffs overestimate the cash value of their suit; defendants underestimate the cash value of plaintiffs' suit. Believing this, they make mutually unacceptable offers.

Interstate water law, because it consists of a set of radically uncertain doctrines, induces litigant optimism to wreak havoc on negotiations. It is, first, uncertain whether a party will be able to

⁴³⁸ Kenneth W. Knox, *The La Plata River Compact: Administration of an Ephemeral River in the Arid Southwest*, 5 U. DENV. WATER L. REV. 104, 106 (2001).

⁴³⁹ *Id.* at 108.

⁴⁴⁰ *Id.* at 110.

⁴⁴¹ *Id.* at 115.

⁴⁴² See generally Bar-Gill, *supra* note 293, at 490-91 (2005) (summarizing the literature).

⁴⁴³ *Id.*

meet the Court's jurisdictional requirement,⁴⁴⁴ as this procedural standard is erratic in application.⁴⁴⁵ Second, it is anyone's guess how the Court will actually divide the waters if it decides that a case is properly before it.⁴⁴⁶ Thus, the downstream state may overvalue the litigation option, while the upstream state undervalues it.

Moreover, the stakes in Original Jurisdiction cases can be very high. In *Arizona v. California*, the Court permanently awarded over one million acre-feet of water to Arizona against California's claims. That is about the annual consumption of four million suburban water users and has forced California to seek water from any available source since. Thus, it has an open offer to any of the other six Colorado River basin states, should they ever wish to sell.

⁴⁴⁴ See, e.g., Sherk, *supra* note 32, at 578 ("What appears to have changed in Vermejo is the quantum of evidence that constitutes clear injury or harm.").

⁴⁴⁵ Consider, for instance, the litigation over the Vermejo River. Professor Simms argues that the decision stands for the proposition that the Court will permit infringement of prior use. He claims that this reduces the injury that must be pled, and is a terrible development that greatly favors claimant states. See Simms, *supra* note 81, at 326-27. In contrast, Professor George William Sherk argues that the case dramatically and unfortunately raised the evidentiary burden needed to prove injury. Sherk, *supra* note 32, at 578. Professor McCaffrey, unlike Simms and Sherk, believes that the decision effected no change in water allocation law. MCCAFFREY, *supra* note 65, at 387-96. See also *supra* note 81.

⁴⁴⁶ See, e.g., Snowden, *supra* note 25, at 186-89 (2005) (attempting to discover how the Supreme Court would rule if asked to apportion the ACF basin; concluding that no such estimate is possible). But see A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381, 385-94 (1984) (arguing that while interstate Compacts and Congressional allocation are more efficient and predictable than equitable apportionment, scholars overestimate the uncertainty of the equitable apportionment standard).

There is only one *Arizona v. California*.⁴⁴⁷ Still, where water rights become fully appropriated, and the value of water therefore rises, the stakes become high. Much depends on a successful litigation, of which it is nearly impossible to predict the outcome. These are crucial problems: a number of studies cite uncertainty and magnitude of risk as major factors driving inability to settle.⁴⁴⁸

Principal-agent problems factor into decisions in a complicated way; it is difficult to know how much store to put by them in any individual case. In water apportionment cases, the agents are the politicians who decide to bring suit or litigate. However, we know that generally speaking they ought to increase the value of the litigation option for the agent. Supreme Court litigation takes years—longer than the period between elections. Politicians from upstream states may feel their states have more to gain from a Compact than from litigation because litigation is so erratic. But a Compact must be paid for now, while litigation ends only in the indefinite future. In the meantime, politicians can cite the lawsuit as proof that they are doing something, leaving the fallout from litigation to another day (and perhaps another office-holder).⁴⁴⁹

⁴⁴⁷ There are actually about fifty orders from the Supreme Court on disputes between Arizona and California over the Colorado River. Of these, four are separate “cases”; and one of these is a case with three independent determinations by the Court, separated from each other by some decades. So, really, there are seven “*Arizona v. California*” cases. Nevertheless, there is only one case which allocated to Arizona 1 million acre/feet/year of water and dramatically changed Western water politics. That case is *Arizona v. California*, 373 U.S. 446 (1963). See *supra* note 60. It also generated, in its own time, a vast secondary literature. See *supra* note 61. Today, the case and the literature are largely forgotten.

⁴⁴⁸ Gary Fournier and Thomas W. Zuehlke, *The Timing of Out-of-court Settlements*, 27 RAND J. OF ECON. 310 (1996); Daniel Kessler, *Institutional Causes of Delay in the Settlement of Legal Disputes*, 12 J. L. ECON. & ORG. 432 (1996); Paul Fenn and Neil Rickman, *Delay and Settlement in Litigation*, 109 ECON. J. 476 (1999).

⁴⁴⁹ Litigation in the Supreme Court also employs a large number of lawyers and experts. The states may award contracts to these firms and experts. This, theoretically, raises the specter of corruption; a state Attorney General might be only too happy to incur litigation fees, knowing that it passes them on to well-connected firms. There is, however, little suggestion of such corruption in the literature. Since

Finally, the endowment effect suggests that states would be reluctant to pay money now to see to their growth in the future. A Supreme Court suit has a calming abstractness. Parties dispute the allocation of water, when their consumption of the water is nowhere near the maximum; or they dispute whether one side must undertake pollution abatement at some time in the distant future. A Compact's consequences, particularly one that involves cash payments, are immediately felt.⁴⁵⁰

The length of the trials recommends litigation to politicians, as the magnitude of the stakes and the uncertainty of resolution appeal to their optimism. Thus, upstream states may come to exercise the litigation option in their more important cases as a matter of course. The theoretical explanation matches the particular results: repeated efforts by the downstream states to obtain an apportionment from the Supreme Court, abandoned only when hope is definitively lost; modification of decrees because Supreme Court judgments act as a redistribution of rights rather than an establishment thereof; and protracted negotiations, except when states are equals in power or the stakes are too small to make a threat to sue in the Supreme Court credible.

E. Economic Conclusions

What, finally, can be said about the Supreme Court's Original Jurisdiction? Some states are more powerful than others with respect to the allocation of a specific river or of pollution in the river. By insisting on its duty to allocate rivers as though the states were equals, the Court creates an imbalance between the proceeds of bargaining and the proceeds of litigating. By imposing a process that is uncertain and lengthy, the Court encourages state politicians

the state brings complaint, counsel of record must, of course, be the Attorney General. It is unclear to what extent, as a general matter, Attorneys General are helped by outside counsel.

⁴⁵⁰ *But see* Kathryn Zeiler and Charles L. Plott, *Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory?*, 97 AM. ECON. REV. 1449 (2007) (calling into question the existence of an endowment effect).

to wager on success (or at least wager that they will pay for failure in the future). Arbitrating state politicians are well-advised to exploit this opportunity by bringing suit rather than negotiating.

The Court's standard goes further than this, of course. Parties bargain in the shadow of the law and the Court's standard influences this bargaining. For instance, Lochhead reports that the parties to the negotiations apportioning Colorado River dreaded the possibility of a Supreme Court suit, and so arranged the Compact as to make such a suit practically impossible.⁴⁵¹ In consequence, the states must be forbidden from selling water to each other, even if there are willing buyers and sellers among them. The drafters thought it worthwhile; considering the havoc wrought by Supreme Court decisions, it is difficult to disagree with them.

The Court, perhaps in recognition of this arbitrage opportunity, limits its jurisdiction so as to limit the scope of cases which states may bring. This, however, trades off one valuable consideration (encouraging the states to bargain with each other) against another (ensuring that the Court is available as a remedy to the states). This necessity is a structural defect in the rule.

If, on the other hand, the Court set its task to resolve constitutional violations (bargaining in bad faith), any rule it crafted would not have this defect. States could not bet on a Supreme Court allocation in their favor because the Court would not allocate rivers. Rather, states would bargain in good faith for an allocation, raising any abusive bargaining or other constitutional violations to the Court. This, and not the mess of Original Jurisdiction doctrine, is what the Constitution contemplates.

V. CONCLUSION

If the Remedies Theory is correct, then the Court should only impose a solution to a dispute if it can meet the heavy burden of

⁴⁵¹ Lochhead, *supra* note 285

showing that its solution is required by the risk of unconstitutional aggression. Otherwise, the Court should allow the states to resolve their own disputes, intervening only when one state can show a violation of the core of the jurisdictional grant: a state's attempt at abusive bargaining.

Interstate water disputes emphasize with stark clarity the risks of the aggressive remedial approach the Court has taken. The Court complains to litigating states of its institutional incapacity to decide their disputes, while simultaneously giving little thought to the encouragement its expansive remedial rule provides to states to litigate before negotiating. The result is the economic madness summarized above. Here, if nowhere else, the Court should reconsider its approach.

More broadly though, if the Remedies Thesis is correct, the Court should discipline itself in all Original Jurisdiction cases. This discipline can hardly be unwelcome to the Court, as it continues to express displeasure with Original cases. It should ask of every case whether it is the sort of case that justifies an expansive remedy and it should ask this with the same rigor it applies to prophylactic remedies elsewhere in its jurisprudence. Where the answer may be clear in water cases, it may be murkier in other types of cases—say boundary cases. Perhaps the Court has greater confidence in its ability to resolve boundary cases. The questions they pose are closer to properly legal ones so they therefore fall closer to the Court's own core competence. Nevertheless, before granting an expansive remedy in land cases, the Court must meet the Remedies Theory's affirmative burden. The Court does not sit as a federal quasi-legislature granted the right to assign this or that remedy to a constitutional wrong as it sees fit. Article III only vests it with the judicial power of the United States. Any prophylactic remedy, therefore, must be tied to a specific fear of violation of a specific constitutional right.

In few original cases is this ever true. Never does the Court attempt to show that it is.