THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

Volume 18 | Issue 1 Article 4

2017

Original Intent: Understanding the Supreme Court's Original Jurisdiction in Controversies Between States

Kristen A. Linsley

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ARTICLES

ORIGINAL INTENT: UNDERSTANDING THE SUPREME COURT'S ORIGINAL JURISDICTION IN CONTROVERSIES BETWEEN STATES

Kristin A. Linsley*

I. INTRODUCTION

At a time in which the closely watched cases reaching the Supreme Court tend to involve novel issues under the Bill of Rights or important federal statutory questions that have produced conflicts in the lower courts, one important category of cases on the Court's docket often goes unnoticed: those involving the Court's original jurisdiction over disputes between States. Original jurisdiction at the Supreme Court is somewhat of an oddity, in that the Court must act as both the trial court and the court of last resort in deciding these matters—an unusual posture for a Court that rarely resolves discovery disputes, takes live testimony, or makes original findings of fact. But the unique structure of our federalist form of government—with

*The author is a partner at Gibson, Dunn & Crutcher LLP. While at a different firm, she served as a Special Master in *South Carolina v. North Carolina*, Original No. 138, a dispute between the two States over the allocation of the waters of the Catawba River. The author thanks Lindsey Sugimoto for her helpful research and input in the preparation of this article.

subordinate sovereigns losing some aspects of their separate sovereignty upon joining the union but retaining others—called for a unique judicial structure in which disputes between these subordinate sovereigns could be resolved in a way that avoided the partisan state court systems and accorded the States the dignity to which their sovereign status entitled them.

Although Article III also created other bases for the Court's original jurisdiction, this article focuses on disputes between States, which from the inception have been the mainstay of the Court's original jurisdiction jurisprudence, and have represented the strain of Article III power consistently reserved for exclusive resolution by the Court. Several features of the Court's original jurisdiction distinguish it from the Court's "appellate" docket—a term that is used broadly to describe its review of cases originating in the lower federal courts or the state courts, and that includes both the Court's certiorari jurisdiction and, in earlier years, appeals as of right in certain categories of cases.

First, the history of, and rationale for, the Court's original jurisdiction are central to the manner in which the Court has defined the contours of the jurisdiction. Part II of this article explores the background of the grant of original jurisdiction in Article III, the manner in which that grant has been construed and defined in disputes between States, and the early history of the Court's exercise of original jurisdiction. As this history shows, the Court consistently has given great weight to the historical and structural rationale for its original jurisdiction in determining how that jurisdictional grant should be exercised and applied.

Second, in part because of this historical and structural context, the Court's original jurisdiction has produced very different issues and rules than has its ordinary appellate docket. Because the very nature of original jurisdiction requires the Court to act as a trial court and as a court of last resort, the rules for such cases are very different from either type of jurisdiction standing alone. The Federal Rules of Civil Procedure and the Federal Rules of Evidence, for example, are said to serve as "guides,"[1] but the Court is not bound to follow them, and a State

1. Sup. Ct. R. 17(2) (providing also that "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed" in original actions).

seeking to invoke the Court's jurisdiction must seek the Court's leave to do so.[2] Further, the intensely time-consuming responsibilities of the trial court role create the potential that original jurisdiction cases could occupy an inordinate portion of the Court's limited resources, and could involve the Court in managing petty disputes between the States or their constituents. For precisely these reasons, the Court has guarded its original jurisdiction carefully, reserving the "delicate and grave"[3] exercise of that jurisdiction for the narrow class of disputes that truly implicate the concerns that necessitated the constitutional grant. And to address the practical concerns, the Court frequently appoints Special Masters to assist with these cases.[4] Part III discusses some of these unique issues and practical concerns and the manner in which the Court has addressed them.

II. THE SOURCE AND NATURE OF THE COURT'S ORIGINAL JURISDICTION

Article III, Section 1, of the Constitution states that 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."[5] Article III, Section 2, itemizes the specific categories of cases to which the "judicial Power" shall extend, including "Controversies between two or more States," and goes on to state that "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme court shall have original jurisdiction."[6]

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2. Sup. Ct. R. 17(3) (providing that "[t]he initial pleading shall be preceded by a motion for leave to file").

3. La. v. Tex., 176 U.S. 1, 15 (1900) (refusing to exercise original jurisdiction because the case was not in substance a controversy between states: original jurisdiction should be exercised only when "the necessity [i]s absolute and the matter in itself properly justiciable"); *see also* S.C. v. N.C., 558 U.S. 256, 267 (2010) (indicating that the Court will exercise its original jurisdiction "sparingly" and will "retain substantial discretion to decide whether a particular claim requires an original forum" (internal quotation marks omitted)).

4. *See, e.g.*, *S.C. v. N.C.*, 558 U.S. at 259 (noting that case had first been referred to a special master).

5. U.S. CONST. art. III, § 1.

6. U.S. CONST. art. III, § 2.

A. Nature of Original Jurisdiction

The term "original" jurisdiction is distinguished from "appellate" jurisdiction. It means that the Court has "the power to hear and decide a lawsuit in the first instance"—in other words, to act as a trial court—whereas "appellate" denotes the power "to review the judgment of another court that has already heard the lawsuit in the first instance."[7] The distinction between "original" and "appellate" jurisdiction was a settled feature of English law at the time the Constitution was adopted.[8] William Blackstone used the term "original jurisdiction" to describe the role of the king to resolve disputes between American provinces over the "extent of their charters" or similar matters: "Whenever also a question arises between two provinces in America, or elsewhere, as concerning the extent of their charters and the like, the king in his council exercises *original jurisdiction* therein, upon the principles of [feudal] sovereignty."[9] Although of course this type of original jurisdiction would not be the same as that exercised by the Court under Article III—given that the king, as the source of the charters that created certain rights (including boundaries) for American provinces before the Revolution, naturally would have been called upon to interpret those charters so long as England controlled the colonies—the reference nonetheless would have provided a model for similar resolution by a Supreme Court, particularly given that some royal charters continued to be relevant to such matters as boundaries even after the Constitution was ratified.[10]

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7. WILLIAM. H. REHNQUIST, THE SUPREME COURT 31 (2001); *see also* THE FEDERALIST NO. 81, at 551 (Alexander Hamilton) (J.E. Cooke ed., 1961) (asserting that "the expressions 'appellate jurisdiction, both as to law and fact,' do not necessarily imply a re-examination in the supreme court of facts decided by juries in the inferior courts").

8. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *231 (1809) (indicating that the privy council acted as a "court of appeal" in some cases, and that appeal to the king himself was also possible).

9. *Id*. (emphasis in original); *see also* Wis. v. Pelican Ins. Co., 127 U.S. 265 (1888), *overruled in part by* Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935).

10. Even the current borders between some of the states continue to be guided by royal charters, except that now these charters are interpreted by the Supreme Court instead of the crown. *See, e.g.*, Ga. v. S.C., 497 U.S. 376, 380–81 (1990) (noting that the boundary between the two states, originally defined in 1732 by letters patent issued by the crown, was clarified in the 1787 Treaty of Beaufort, which continues to define the boundary).

The original jurisdiction bestowed on the Supreme Court was indeed of a different character than that exercised by the crown, and was crucial to the Constitutional design. At the time the Constitution was ratified, and under the Articles of Confederation, each state was sovereign in its own right, subject only to powers "expressly delegated" to Congress.[11] The Articles did not provide for any federal judiciary or for a Supreme Court,[12] and any disputes between states over "boundary, jurisdiction or any other causes whatever" were to be resolved by Congress, which was directed to convene a court to resolve such disputes under its auspices.[13]

Early drafts of Article III of the Constitution would have vested all original jurisdiction in state courts,[14] but the framers quickly came to the view that state court jurisdiction would not be satisfactory for certain important categories of cases—either because state courts might entertain biases in favor of their own citizens or local governments, or because certain disputes might implicate national interests at the highest level. After several rounds of drafts, the final version of Article III conferred original jurisdiction upon the Supreme Court over disputes between States and other important categories of cases.[15]

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11. ARTICLES OF CONFEDERATION, Art. II (1877) ("Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."); *see also* THE FEDERALIST NO. 21 (Alexander Hamilton) at 130 (J.E. Cooke ed., 1961).

12. THE FEDERALIST NO. 22 (Alexander Hamilton) at 143 (J.E. Cook ed., 1961) (complaining of "[a] circumstance, which crowns the defects of the confederation . . . the want of a judiciary power").

13. ARTICLES OF CONFEDERATION, Art. IX (1877) ("The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise, between two or more states concerning boundary, jurisdiction, or any other cause whatever."). The Articles also provided for procedures by which such disputes would be presented to and resolved by Congress. *Id.*; *see generally* Mo. v. Ill., 180 U.S. 208, 220–21 (1901) (quoting Articles of Confederation).

14. J.E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 620 (1994) (tracing the "progression of the drafts, from one that vested all original jurisdiction in state courts to one that conferred original jurisdiction directly upon the Court," and concluding that "the grant was predicated on distrust of state courts and a preference for original cognizance in the federal courts").

15. *Id.*; *see also Mo. v. Ill.*, 180 U.S. at 221–24 (following language through proposals and drafts).

B. Rationale Behind Original Jurisdiction for State Disputes

The context of the States' entry into the United States makes clear why the Court's original jurisdiction was so crucial. Before the formation of the federal union, the states were separate sovereigns, and, as such, had at least the theoretical ability to resolve disputes among themselves by war or negotiation.[16] When the states ratified the Constitution and thereby joined the Union, they expressly relinquished these customary international law means for settling disagreements among sovereigns. Article I, Section 10, of the Constitution states that "[n]o State shall enter into any Treaty, Alliance, or Confederation," and that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, . . . or engage in War."[17] By agreeing to these restrictions, the States gave up a significant part of their ability to resolve any differences that might arise between them, and it was essential that the Constitution provide them an alternative means of resolving disputes that would not require the use of the courts of one of the involved states—because, as Alexander Hamilton explained, "no man ought certainly to be a judge in his own cause"[18]—and that would properly recognize the dignity and sovereignty of each involved State. As Hamilton further noted, it would "ill suit [the] dignity [of the states] to be turned over to an inferior tribunal."[19]

For this reason, it was essential to the States and to the preservation of the Union that a mechanism be provided to resolve disputes that already existed, and inevitably would arise in the future, between and among the States. As the Court recounted in *United States v. Texas*,[20] at the time the Constitution was adopted, there already were controversies between eleven states as to their boundaries, which disputes "had continued from the first settlement of the colonies," and it was deemed essential to have a national tribunal "for the

16. *See, e.g.,* Ga. v. Penn. R.R., 324 U.S. 439, 450 (1945).
17. U.S. CONST. art. I, § 10.
18. THE FEDERALIST NO. 80 (Alexander Hamilton) at 538 (J.E. Cooke ed., 1961).
19. THE FEDERALIST NO. 81, *supra* note 7, at 548.
20. 143 U.S. 621 (1862).

settlement of these and like controversies that might arise."[21] Article III delegated this role to the Supreme Court, as a superior, national tribunal to "match the dignity of the parties to the status of the court."[22] As the Court explained in *Rhode Island v. Massachusetts*, a complaining state,

> [b]ound hand and foot by the prohibitions of the [C]onstitution . . . can neither treat, agree, or fight with its adversary, without the consent of [C]ongress: 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.[23]

Article III established the Supreme Court as the impartial forum for the States, to accord them the dignity of sovereigns and serve as a "substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force."[24] By consenting to the Constitution, the States agreed to this method of resolving any disputes between them, and thereby gave up part of their sovereign right to be immune from suit.[25]

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21. *Id*. at 625; *see also* R.I. v. Mass., 37 U.S. (12 Pet.) 657, 723–24 (1838) (describing nature of disputes).

22. Cal. v. Ariz., 440 U.S. 59, 65–66 (1979). Professor Pfander advocates the view that the true purpose of the original jurisdiction clause of Article III was not to provide a dignified forum, but rather to ensure that federal law would be enforced against the States. Pfander, *supra* n. 14, at 558. Professor Amar advocates an alternative view—that the Court's original jurisdiction was largely driven by a desire to establish a geographically convenient and neutral forum for States and foreign diplomats. Akhil Reed Amar, Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 469–78, 489–90 (1989). A full analysis of these competing views is beyond the scope of this article.

23. *R.I. v. Mass.*, 37 U.S. at 726 (noting that "[f]ew, 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 controversies will be settled by compact").

24. Kan. v. Neb., ___ U.S. ___, 135 S. Ct. 1042, 1052 (2015) (recognizing "inherent authority, as part of the Constitution's grant of original jurisdiction, to equitably apportion interstate streams between States," and exercising original jurisdiction in action seeking to allow Nebraska to appropriate more water than interstate compact originally allowed).

25. *See*, *e.g.*, *R.I. v. Mass*., 37 U.S. at 720–21.

C. Congress's Power with Respect to the Court's Original Jurisdiction

The text of Article III significantly curtails the power of Congress to limit or expand the Court's original jurisdiction. Article III, Section 2, states that the Court "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[26] This last clause has long been read to allow Congress to limit and otherwise define the Court's appellate jurisdiction.[27] Yet no such caveat qualifies the grant of original jurisdiction, which states broadly that "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction."[28] Based on this clear textual distinction between the two heads of the Court's jurisdiction, it has long been held that the original jurisdiction is "self-executing and unassailable by Congress"[29]—in the sense that "in all cases where original jurisdiction is given by the Constitution," the Supreme Court "has authority to exercise it without any further act of Congress to . . . confer jurisdiction."[30]

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26. U.S. CONST. art. III, § 2, cl. 2.

27. *See, e.g.*, THE FEDERALIST NO. 81, *supra* note 7, at 552; The Francis Wright, 105 U.S. 381, 386 (1881); Ex Parte McCardle, 74 U.S. 506, 514–15 (1869). The extent of Congress's power to limit the Court's appellate jurisdiction on specific subject matters has been the subject of some academic debate, *see generally* Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 Cath. U. L. Rev. 671 (1997), but that issue is beyond the scope of this article.

28. U.S. CONST. art. III, § 2, cl. 2.

29. Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 632 (2002) (citing Chisholm v. Ga., 2 U.S. (2 Dall.) 419 (1793)); *see also Cal. v. Ariz.*, 440 U.S. at 65 (indicating that Supreme Court's original jurisdiction is effective automatically without legislative authority); Fla. v. Ga., 58 U.S. (17 How.) 478, 492 (1854) (stating that "the omission to legislate on the subject could not deprive the court of the jurisdiction conferred . . . and in the absence of any legislation by congress, the court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given").

30. Ky. v. Dennison, 65 U.S. (24 How.) 66, 98 (1861), *overruled on other grounds by* P.R. v. Branstad, 483 U.S. 219, 230 (1987) (declaring that "*Kentucky v. Dennison* is the product of another time" and "may stand no longer").

The seminal case of *Marbury v. Madison*[31] was the first to enforce this understanding by holding unconstitutional a part of the Judiciary Act of 1789 that purported to grant the Supreme Court the power to issue writs of mandamus. After concluding that the issuance of such a writ necessarily would be an act of "original"—and not "appellate"—jurisdiction, Justice Marshall declared that Congress could not constitutionally grant such power, as the mandamus power was not among those enumerated in Article III as part of the Court's original jurisdiction.[32] And because Marbury was neither an ambassador nor a State, he was not entitled to invoke the Court's original jurisdiction.[33] The Court found that this aspect of the Judiciary Act of 1789 conflicted with the Constitution and was therefore unconstitutional—famously establishing for the first time the Court's power to strike down an act of Congress as inconsistent with the Constitution.[34]

Although the Court repeatedly has stated that Congress may not limit or expand the Court's original jurisdiction, it long has been understood that Congress may make certain aspects of the Court's original jurisdiction concurrent with that of the state or lower federal courts—a point not directly addressed by the text of Article III.[35] Congress enacted this understanding in the first Judiciary Act of 1789, which provided that the Court would have exclusive and original jurisdiction over "all controversies

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31. 5 U.S. (1 Cranch) 137 (1803).

32. *Id.* at 174 ("If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.").

33. *Id.*

34. *Id.* at 189 ("Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.").

35. *See, e.g.*, Ames v. Kan., 111 U.S. 449, 469 (1884) (acknowledging that Court is "unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the constitution with original jurisdiction."). A frequently noted dictum in *Marbury*, 5 U.S. at 174, could be read to suggest that the Court's original jurisdiction in its entirety was exclusive of the states, but that has never been the understanding adopted by Congress or later decisions of the Court. *See generally* Paul M. Bator, Paul J. Mishkin, David L. Shapiro & Herbert Wechsler, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 242–44 (2d ed. 1973).

of a civil nature, where a state is a party" and over any actions or proceedings against ambassadors or foreign officials[36]—and original but nonexclusive jurisdiction over controversies between a state and citizens of another state or actions brought by ambassadors or foreign officials.[37] The current version of this provision further narrows the cases as to which the Court's original jurisdiction shall be "exclusive," limiting that class to "all controversies between two or more states."[38] In 1884, the Court held that the then-extant provisions for nonexclusive jurisdiction in the Supreme Court were consistent with the text of Article III—which the Court found was meant to reserve the Court's original jurisdiction for matters carrying a high level of importance, not to require it to hear "a petty claim of even less than five dollars" merely because the defendant "had been clothed by some foreign government with the consular office,"[39] or to require a State or an ambassador to present any and all grievances in "this one tribunal."[40] Congress's consistent provision for concurrent original jurisdiction over broad categories of subjects identified in Article III as part of the Court's original jurisdiction has significantly narrowed the range of matters over which the Court finds it appropriate to exercise that jurisdiction.

Consistent with the nonexclusive nature of certain heads of the Court's original jurisdiction, the Court has imposed its own limitations on the scope of that jurisdiction. Although the literal text of Article III would appear to authorize original jurisdiction over criminal cases—because a State is almost always a party to such cases—and although Congress in the Judiciary Act of 1789 provided for nonexclusive original jurisdiction over civil controversies between a State and citizens of other States,[41] the Court made clear in early cases that it had no power to entertain an action by a State to enforce its own penal statutes, even

36. An Act to Establish the Judicial Courts of the United States, 1 Stat. 73, § 13 (Sept. 24, 1789) [hereinafter 1789 Act].

37. *Id.*

38. 28 U.S.C. § 1251(a).

39. Börs v. Preston, 111 U.S. 252, 260 (1884).

40. *Ames*, 111 U.S. at 464.

41. 1789 Act, *supra* note 36, at 73, § 13.

where the State sought some form of civil penalty.[42] The Court cited the longstanding rule, grounded in English precedents and in international law, that a sovereign cannot enforce the penal statutes of another sovereign.[43]

The Court also has clarified other aspects of original jurisdiction, particularly as it relates to the relationships of the parties. The Court has held that it has original, nonexclusive jurisdiction over cases between a State and the United States,[44] but that the original jurisdiction does not extend to cases between States and federal agencies.[45] Congress has codified these holdings by providing that the Supreme Court has original but not exclusive jurisdiction over controversies between the United States and a State, actions by a State against the citizens of another State, and proceedings involving ambassadors or foreign consuls.[46]

III. ORIGINAL ACTIONS BETWEEN STATES

One aspect of the Court's original jurisdiction that has been a constant over the years is its role of deciding "Controversies between two or more States"[47]—an aspect of the Court's original jurisdiction that both the Court and Congress have consistently deemed exclusive of other courts. The Court has read the text of Article III to require exclusive jurisdiction over

42. *See, e.g.*, *Pelican Insurance*, 127 U.S. at 290–94 (discussing early precedents).

43. *Id*. at 289–91 (surveying authorities, among them The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825), in which Chief Justice Marshall famously declared that "the courts of no country execute the penal laws of another"); *see also* Ga. v. Pa. R. Co., 324 U.S. 439, 446 (1945) (recognizing that original jurisdiction does not allow States to bring claims for the enforcement of State penal statutes).

44. *See, e.g.*, U.S. v. La., 339 U.S. 699, 700 (1950) (recognizing the rights of the United States against Louisiana for property along the State's coast); U.S. v. Tex., 143 U.S. 621, 643–46 (1892) (reasoning that the presence of a State in the dispute supports original jurisdiction and that the presence of the United States creates federal judicial power).

45. *See*, *e.g.*, Tex. v. Interstate Commerce Comm'n, 258 U.S. 158, 160 (1922) (refusing to exercise original jurisdiction over a claim by a State against two federal agencies because the defendants were not "citizens of any state, but ha[d] the same relation to one state as to another").

46. 28 U.S.C. § 1251(b).

47. U.S. CONST. art. III, § 2, cl. 1.

disputes between two or more States,[48] and Congress—from the first Judiciary Act to the present—has never tested the question by providing for anything other than exclusive jurisdiction over such cases, as reflected in the current codification of the rule.[49] The exclusivity of the constitutional grant was closely bound up with the Court's conclusion—reached early in its original jurisdiction jurisprudence—that States did not enjoy sovereign immunity from the exercise of the Court's original jurisdiction over controversies with other States.[50] The Court held that, in light of the history and rationale underlying the original jurisdiction clause, the States implicitly waived the relevant aspects of their sovereign immunity when they ratified the Constitution and agreed to the dispute resolution mechanism provided by Article III.[51]

A. Early Cases: Boundary Controversies Between States

Over the years, disputes between States have represented the vast majority of the Court's original jurisdiction cases, and also likely would be viewed as the most important. But even so, the numbers are small: by the 1990s, the Court had entertained and decided only about 170 original jurisdiction cases.[52] Many of the earliest such cases—including the first reported original jurisdiction case, *New York v. Connecticut*—involved property disputes or controversies over interstate boundaries.[53] The two

48. *See, e.g.*, La. v. Tex., 176 U.S. 1, 16 (1900) ("[B]y the Constitution and according to the statute, the original jurisdiction of this court is exclusive over suits between states, though not exclusive over those between a state and citizens of another state.").

49. 28 U.S.C. § 1251(a); *see also* Miss. v. La., 506 U.S. 73, 76–78 (1992) (discussing early cases and concluding that "the description of our jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court"); *Cal. v. Ariz.*, 440 U.S. at 63 (noting that "a district court could not hear [California's] claims against Arizona, because this Court has exclusive jurisdiction over such claims").

50. *See*, *e.g.*, *R.I. v. Mass.*, 37 U.S. at 720–21.

51. *Id.*

52. *See generally* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665 (1959) (indicating that 123 cases had been decided by 1959, discussing relevant law, and providing list of cases) [hereinafter *Stanford Note*]. Based on the Court's docket and numbering system, the author estimates that about forty-seven additional cases have been filed since the count reported in the *Stanford Note*.

53. 4 U.S. (4 Dall.) 1, 2 (1799); *see also* Mo. v. Ky., 78 U.S. (11 Wall.) 395 (1870); Va. v. W. Va., 78 U.S. (11 Wall.) 39 (1870); Ala. v. Ga., 64 U.S. (23 How.) 505 (1860); *Fla. v.*

States in that first case had entered into an agreement granting certain lands to New York,[54] but Connecticut then conveyed the same land to private individuals and obtained an injunction in its own courts to enforce the grant.[55] The case thus involved not the boundary between States, but "the right of soil, which . . . results from the right of jurisdiction."[56] The Supreme Court refused to uphold the injunction, holding that New York's absence in the prior state court proceeding deprived it of a fair adjudication.[57]

As the Court observed in 1888, the "most numerous class" of original cases entertained by the Court consisted of

> controversies between two states as to the boundaries of their territory, such as were determined before the Revolution by the king in council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by congress.[58]

Indeed, the Court noted that "[t]he books of reports contain but few other cases in which the aid of this court has been invoked in controversies between two states."[59]

Ga., 58 U.S. 478; Mo. v. Iowa, 48 U.S. (7 How.) 660 (1849); *R.I. v. Mass.*, 37 U.S. 657; N.J. v. N.Y., 30 U.S. (5 Pet.) 284 (1831).

54. *N.Y. v. Conn.*, 4 U.S. at 3.

55. *Id.*

56. *Id.* at 4.

57. *Id.* at 6 (explaining that, "as the State of New York was not a party to the suits below, nor interested in the decision of those suits, an injunction ought not to issue").

58. *Pelican Insurance*, 127 U.S. at 288.

59. *Id*. (citations omitted); *see also La. v. Tex.*, 176 U.S. at 18 (noting that, "[a]s might be expected in view of the nature of the jurisdiction, the cases are few in which the aid of the court has been sought in 'controversies between two or more States,'" and also recognizing that they were "chiefly controversies as to boundaries" (citing *Pelican Insurance*)). In addition to addressing boundaries, a handful of early interstate cases addressed the payment of bonds and the enforcement of quarantine regulations. *See*, *e.g.*, S.D. v. N.C., 192 U.S. 286, 321 (1904) (enforcing North Carolina's obligation to pay on bonds to South Dakota); *La. v. Tex.*, 176 U.S. at 22–23 (dismissing for lack of original jurisdiction because the facts did not support the claim that one State authorized its health officer to issue a quarantine that "place[d] an embargo in fact on all interstate commerce between the state of Louisiana and the state of Texas"); N.H. v. La., 108 U.S. 76, 91 (1883) (denying original jurisdiction on New Hampshire's claims for debts on behalf of private individuals against Louisiana).

B. Expansion of Court's Jurisdiction Beyond Boundary Cases

It is not surprising that most of the Court's early disputes between states addressed boundary disputes and related issues. Not only were there a large number of such disputes brewing at the time the Constitution was adopted,[60] but there existed early in the Court's jurisprudence a strong view that a State's right to invoke the Court's jurisdiction did not extend to suits in which the State sought to vindicate the rights of its citizens—that is, to act as *parens patriae*[61]—but rather encompassed only cases in which the State asserted rights affecting "the property or the powers of the complaining state in its sovereign or corporate capacity."[62] Of course, boundary disputes were of precisely such a proprietary character, so it is not surprising that no question was raised but that such disputes fell squarely within the jurisdictional grant.[63] It was only in 1900 that the Court first suggested, in *Louisiana v. Texas*, that the jurisdiction might permit a State to represent the interests of its citizens in a *parens patriae* capacity.[64] The Court firmly embraced that conclusion

60. *See, e.g.*, U.S. v. Tex., 143 U.S. 621 (1892).

61. Literally, "parent of the country." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979) (defining *parens patriae* as "a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state," and the like).

62. *La. v. Tex.*, 176 U.S. at 24 (Harlan, J., concurring) ("When the Constitution gave this court jurisdiction of controversies between states, it did not thereby authorize a state to bring another state to the bar of this court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of the complaining state in its sovereign or corporate capacity, but which at most affect only the rights of individual citizens or corporations engaged in interstate commerce.").

63. *U.S. v. Tex.*, 143 U.S. at 640 ("[T]hat a controversy between two or more states, in respect to boundary, is one to which, under the constitution, such judicial power extends, is no longer an open question in this court.").

64. *La. v. Tex.*, 176 U.S. at 19 (recognizing that Louisiana believed itself "entitled to seek relief in this way because the matters complained of affect her citizens at large," but also recognizing that "if the case stated is not one presenting a controversy between these states, the exercise of original jurisdiction by this court as against the state of Texas cannot be maintained"). The Court ultimately did not pass on Louisiana's claimed right to proceed in a *parens patriae* capacity, finding that the action did not involve a justiciable dispute between the States. *Id.* at 22–23 (asserting that "this bill does not set up facts which show that the state of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two states are in controversy within the meaning of the Constitution"). In earlier cases, the Court had declined to decide whether a complaining State had to assert its own proprietary interests, rather than more general sovereign interests or the interests of its citizens. In *South*

the following year in *Missouri v. Illinois*.[65] Missouri filed that action against Illinois and the Sanitary District of the City of Chicago, complaining that Chicago was disposing of waste that was finding its way down the Mississippi River, to the detriment of citizens of Missouri who owned property along the river. The Court rejected the contention that the action was not within the cognizance of the Court's original jurisdiction, holding that "if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them."[66] This was a significant expansion of the powers that the Court previously had exercised—such as in boundary and property disputes—where the States' own proprietary interests were at stake. And by permitting the State of Missouri to proceed with its action, the Court entertained its first interstate pollution abatement case.[67]

C. Court's Discretion to Decline Original Jurisdiction

As the Court began to expand the class of cases that it deemed properly within its original jurisdiction, an important question arose as to whether Court had discretion to *decline* jurisdiction over a matter that otherwise qualified for original jurisdiction under Article III and the governing statute. Not surprisingly, given the burden on the Court's docket that might otherwise have resulted, the Court's answer to that question was yes—even in cases, such as controversies between States, in which its jurisdiction was deemed exclusive of the state or lower federal courts. In 1900, the Court explained in *Louisiana v.*

Carolina v. Georgia, 93 U.S. 4, 4 (1876), South Carolina sought to enjoin Georgia, the Secretary of War, and others, from "obstructing or interrupting" the navigation of the Savannah River. In dismissing the bill for want of any showing of an unlawful obstruction, the Court reserved the question whether a State, in asserting such a claim, must "aver and show that it will sustain some special and peculiar injury therefrom, and such as would enable a private person to maintain a similar action in another court." *Id.* at 14. In *Wisconsin v. Duluth*, 96 U.S. 379 (1877), the Court did not address the contention that it could "take cognizance of no question which concerns alone the rights of a State in her political or sovereign character; that to sustain the suit she must have some proprietary interest which is affected by the defendant." *Id*. at 382.

65. 180 U.S. 208 (1901).

66. *Id*. at 241.

67. The subsequent proceedings, reported in *Missouri v. Illinois*, 200 U.S. 496 (1906), are discussed below.

Texas that the original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute."[68] The Court consistently has repeated that its original jurisdiction should be exercised only "sparingly,"[69] and has interpreted both Article III and the operative statute as according the Court "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court,"[70] and making original jurisdiction "obligatory only in appropriate cases."[71]

The Court initially exercised its discretion not to accept original jurisdiction in the context of actions falling within its nonexclusive original jurisdiction, such as actions by States against citizens of other States, and actions between the United States and a State.[72] Later, the Court made clear that the same discretion allowed it to decline jurisdiction even over disputes between States, in which its original jurisdiction always has been deemed exclusive.[73] The Court has said that its determination as to whether a case is "appropriate" for original jurisdiction will be guided by two factors[74]—both of which follow directly from the historical rationale for the jurisdiction. First, the Court looks to "the nature of the interest of the complaining State,"[75] with a focus on the "seriousness and dignity of the claim,"[76] As the Court has explained, "'[t]he model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.'"[77] The Court also will consider whether an alternative forum is available in which the controversy can be resolved—a factor

68. *La. v. Tex.*, 176 U.S. at 15.

69. *See Miss. v. La.*, 506 U.S. at 76 (1992); Wyo. v. Okla., 502 U.S. 437, 450 (1992); Md. v. La., 451 U.S. 725, 739 (1981); Ariz. v. N.M., 425 U.S. 794, 796 (1976).

70. Tex. v. N.M., 462 U.S. 554, 570 (1983).

71. Ill. v. City of Milwaukee, 406 U.S. 91, 93 (1972).

72. *See Miss. v. La.*, 506 U.S. at 77 (citing Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971), and U.S. v. Nev., 412 U.S. 534 (1973)).

73. *See id.* at 77 (citing Ariz. v. N.M., 425 U.S. 794 (1976), Cal. v. W. Va., 454 U.S. 1027 (1981), and Tex. v. N.M., 462 U.S. 554 (1983)).

74. *See id.* at 77 (1992) (describing factors).

75. *Id.* (quoting Mass. v. Mo., 308 U.S. 1, 18 (1939)).

76. *Id.* (quoting *City of Milwaukee*, 406 U.S. at 93).

77. *Id*. (quoting Tex. v. N.M., 462 U.S. 554, 571, n.18. (1983)).

that, although relevant, will not always be dispositive.[78] Both factors draw upon the historic and structural need for a forum in which States can resolve their most serious disputes.

IV. DEVELOPMENT OF THE COURT'S LAWMAKING POWER

Another important question that arose as the variety of cases within the Court's original jurisdiction docket expanded was whether the Court had the power to make affirmative law in the course of exercising its original jurisdiction, or whether it was limited to applying existing state or federal law. This was not an issue that typically arose in boundary cases, which generally were governed by a formal document, such as a grant from the crown or a prior treaty between States, such that the Court's principal role was to interpret the document.[79]

As the limits of the Court's jurisdiction expanded into areas not governed by a treaty or some other external source, some parties argued that Article III was merely a jurisdictional grant that gave the Court the power to entertain a case, and that the power to make law to provide a rule of decision was reserved to Congress—so that if no such law existed to resolve the matter, the Court was powerless to act.[80] The Court ultimately disagreed, holding in *Kansas v. Colorado*[81] that the Court's crucial constitutional role of resolving disputes between States necessarily meant that the Court may have to fashion "interstate common law" to reach a resolution, in the absence of other controlling law:

> One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands

78. *Id*. (citing *City of Milwaukee*, 406 U.S. at 93). In *Arizona v. New Mexico*, the Court declined to exercise its original jurisdiction, concluding that a pending state court action "provide[d] an appropriate forum in which the issues tendered . . . may be litigated." *Ariz. v. N.M.*, 425 U.S. at 797.

79. *See, e.g.*, Ga. v. S.C., 257 U.S. 516, 518–19 (1922) (resolving boundary issues between Georgia and South Carolina by reference to the 1787 Treaty of Beaufort); Ga. v. S.C., 497 U.S. 376, 380–81 (1990) (finally resolving State boundary by reference to the same 1787 Treaty, which succeeded 1732 letters patent chartering colony of Georgia).

80. *See, e.g.*, *R.I. v. Mass.*, 37 U.S. at 677, 717–18 (reproducing both argument by counsel that Congress has the sole power to make federal law to govern such disputes and Court's acknowledgement of State's argument).

81. 206 U.S. 46 (1907).

> on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever . . . the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law."[82]

The Court went so far as to state that its power to fashion federal common law in this area, being a critical part of its constitutional power and duty to resolve controversies between States, extended beyond the limited powers of Congress as enumerated in Article I.[83]

It was based on this set of understandings that the Court began to develop federal common law in one of its most complex areas of original jurisdiction—that of equitable apportionment of the waters of an interstate river or waterway. Although these cases were of enormous importance to the States involved, and concerned complex issues requiring resolution, the precedent available to the Court was extremely limited. Indeed, because there is little existing federal law or other guidance to resolve water-apportionment matters, and because by the very nature and purpose of original jurisdiction no one State's rules can prevail over another's, this area perhaps represents the most expansive manifestation of the Court's federal common law powers within the scope of its original jurisdiction.

From the beginning, the Court made clear that its jurisdiction to determine the extent of one State's rights to the waters of a river over those of another State is very broad.[84] In

82. *Id*. at 97–98 (citation omitted).

83. *Id*. at 95 ("It does not follow . . . that because Congress cannot determine the rule which shall control between the two states . . . the controversy ceases to be one of a justiciable nature.").

84. *See generally* Kristin Linsley Myles, South Carolina v. North Carolina: *Some Problems Arising in an East Coast Water Dispute*, 12 WYO. L. REV. 3 (2012).

Kansas v. Colorado,[85] one of the earliest such cases to reach the Court, Kansas challenged Colorado's diversion of waters of the Arkansas River to irrigate non-riparian arid lands, and claimed that under English common law, Kansas was entitled to receive the flows of the river as they existed "before any human interference."[86] Colorado, for its part, claimed the right of its users under its doctrine of prior appropriation to take the entire flow of the stream, arguing that it had a sovereign right to divert and use any and all water running through its boundaries, without regard to any downstream impact on Kansas.[87] The Court rejected both positions, holding that the dispute would be resolved "upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream."[88]

The Court's solution in *Kansas v. Colorado* neatly captured the unique constitutional design of the original jurisdiction clause to ensure that each State is treated with dignity. This concern also drove the Court's determination that federal common law, and not the underlying law of either state, ultimately would govern the dispute. A significant factor that affected the Court's analysis was that the two States applied different—and inconsistent—state law schemes for allocating private rights from the waters of a river. The Court noted that "[i]f the two states were absolutely independent nations," the dispute "would be settled by treaty or by force," but because neither of these methods was possible, the dispute "must be settled by decision of this court."[89] The resulting inquiry for resolving such water-apportionment matters, best summarized in *Nebraska v. Wyoming*,[90] is very broad:

> Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of

85. 206 U.S. 46.

86. *Id*. at 85, 98 (stating, and then expounding upon, common law rule).

87. *Id*. at 98 (characterizing Colorado's argument as "extreme" and pointing out that "the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable[,] . . . taking from the adjacent territory that which had been the customary natural means of preserving its arable character").

88. *Id*. at 100.

89. *Id*. at 98.

90. 325 U.S. 589 (1945).

> water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.[91]

Although the Court has made clear that it is making federal common law in resolving such disputes,[92] it looks to numerous sources as a means of resolving interstate disputes, in an effort to "recognize the equal rights of both [States] and at the same time establish justice between them."[93] In *Kansas v. Colorado*, the Court held that, depending on the particular case, the Court considers "[f]ederal law, state law, and international law."[94] As for international law, although one would expect this to be a highly valuable source for resolving disputes between States—which, after all, remain sovereign entities to some degree—the Court does not resort to such materials as frequently as one would expect, and generally frames any such references as simply informing the creation of federal common law.[95]

More prominently, the Court frequently (but not always) considers applicable state law in developing a federal common

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91. *Id*. at 618; *accord* Colo. v. Kan., 320 U.S. 383, 393–94 (1944) (discussing benefits flowing from increased use of disputed water source, harms likely to result from its withdrawal, and corresponding harms potentially to be suffered by downstream State, and also noting that "great and serious caution" is "necessary" when endeavoring to determine whether each State's case is proved). This equitable appropriation approach remains the governing doctrine for "resolving high disputes between sovereigns" by ensuring fair and evenhanded water divisions. Joshua Patashnik, Arizona v. California *and the Equitable Apportionment of Interstate Waterways*, 56 ARIZ. L. REV. 1, 43 (2014) (quoting S.C. v. N.C., 558 U.S. 256, 277 (2010) (Roberts, C.J., dissenting)) (footnote omitted)).

92. Colo. v. N.M., 459 U.S. 176, 183 (1982) ("Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream.").

93. *Kan. v. Colo.*, 206 U.S. at 98.

94. Kan. v. Colo., 185 U.S. 125, 146–47 (1902).

95. *See* Vt. v. N.Y., 417 U.S. 270, 277 (1974) (noting that the original jurisdiction extends to adjudications between States based on "principles of law, some drawn from the international field, some expressing a 'common law' formulated over the decades"); *see also* Neb. v. Wyo., 325 U.S. 589 (1945); *Colo. v. Kan.*, 320 U.S. at 393–94.

law rule to govern an interstate dispute.[96] In so doing, the Court has cautioned that state law is "not to be deemed to have controlling weight"[97]—a rule that prevents the inequitable result of choosing one state's laws over another's.[98] As the Court explained in *Connecticut v. Massachusetts*:

> [T]his is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the "equal level or plane on which all the States stand, in point of power and right, under our constitutional system" and that, upon a consideration of the pertinent laws of the Contending states . . . this Court will determine what is an equitable apportionment of the use of such waters.[99]

In *Kansas v. Colorado*, the Court declined to rely on either of the States' competing bodies of water law, and instead simply weighed the relevant factors in a manner designed to "establis[h] justice" between the States.[100] In other interstate water disputes, the Court has affirmatively adopted state law as the federal common law rule for the case—most notably where both States employ the same state-law methodology for apportioning water, such as the Western water law principle of prior appropriation.[101] The Court also looks to state law where state law rights may be considered as part of the equitable apportionment analysis.[102] Under these precedents, the Court's creation of federal common law is not entirely unbounded, but takes into account the delicate task of ensuring that each State is treated with equal dignity before the Court.

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96. *See, e.g.*, *City of Milwaukee*, 406 U.S. at 107 (noting that state standards may be relevant despite the existence of federal common law on nuisance).

97. Conn. v. Mass., 282 U.S. 660, 670 (1931).

98. *Kan. v. Colo.*, 206 U.S. at 98 (recognizing equal status of States).

99. *Conn. v. Mass.* 282 U.S. at 670–71 (citation omitted).

100. *Kan. v. Colo.*, 206 U.S. at 98.

101. In *Wyoming v. Colorado*, 259 U.S. 419, 465, 470 (1922), the Court applied the doctrine of prior appropriation because both States adhered to that doctrine as a means of establishing priorities over waters within their boundaries. *See also Colo. v. N.M.*, 459 U.S. at 183–84 (discussing "equable apportionment" and "prior appropriation"); *Neb. v. Wyo.*, 325 U.S. at 617–18, 622 (discussing "priority of appropriation" and recognizing it as a "guiding principle for an apportionment" when both States follow the doctrine).

102. *See, e.g., Conn. v. Mass.*, 282 U.S. at 670–71.

V. PROCEDURES FOR INTERSTATE DISPUTES WITHIN THE COURT'S ORIGINAL JURISDICTION

The same historical and structural concerns that animate the substance of the Court's original jurisdiction jurisprudence also influence the procedures that the Court follows in such cases—procedures that differ significantly from those governing its appellate docket.

A. Intervention by Non-State Parties

Although the Court certainly could have justified a rule that only sovereign States could be parties to original jurisdiction actions brought under the head of Article III, Section 2, for "controversies between two or more states," the Court long has allowed non-State persons or entities to be named as parties to such actions, in part based on the further provision in Section 2 for suits "between a State and Citizens of another State," as well as the general provision for original jurisdiction over cases "in which a state shall be a party."[103] The practice of allowing such parties began in 1792 with the Court's decision in *Georgia v. Brailsford*,[104] and "for more than two centuries the Court has exercised that jurisdiction over nonstate parties in suits between two or more States."[105] Such actions have involved a wide range of subjects, including claims for equitable apportionment of water.[106]

Consistent with this history, the Court also has permitted non-State parties to intervene in original jurisdiction actions under appropriate circumstances.[107] The Court's criteria for

103. *See generally S.C. v. N.C.*, 558 U.S. at 266 (discussing rules developed in earlier cases).

104. 2 U.S. (2 Dall.) 402 (1792).

105. *S.C. v. N.C.*, 558 U.S. at 266 (citing N.Y. v. Conn., 4 U.S. (4 Dall.) 1 (1799), and *Mo. v. Ill.*, 180 U.S. at 224–25)).

106. *Id.* (citing Ariz. v. Cal., 460 U.S. 605, 608, n.1 (1983); *Tex. v. N.M.*, 343 U.S. 932; N.J. v. City of N.Y., 279 U.S. 823 (1929) (per curiam) (granting motion to add City)).

107. *Id.* at 265 (citing *Md. v. La.*, 451 U.S. at 745, n.21); *see also, e.g.*, Okla. v. Tex., 258 U.S. 574, 581, 598 (1922) (involving boundary dispute threatening armed hostilities with respect to private intervenors' rights in contested land); *Md. v. La.*, 451 U.S. at 745 n.21 (permitting private corporations to intervene in original-action Commerce Clause challenge to State's imposition of allegedly unlawful tax).

permitting such intervention have rested heavily on the original constitutional and historical rationale for original jurisdiction over controversies between two or more States. Generally, the Court has narrowly restricted the scope of intervention for non-state parties in interstate disputes, applying the *parens patriae* doctrine to hold that, because a State is deemed to represent the interests of its citizens, there is no need for such non-State parties to intervene to protect their own rights.[108] When a private party seeks to intervene in a case in which the intervenor's home State is already a party, the intervenor must demonstrate the necessity for its inclusion and that the State will not adequately represent its interests: that is, the intervenor must show "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the same state, which interest is not properly represented by the state."[109]

In *Oklahoma v. Texas*, the Court first addressed the issue of whether non-State party plaintiffs could intervene in interstate disputes. In that case, the United States had intervened to assert claims against the party States over a contested river, and the Court appointed a receiver to take possession of certain disputed property.[110] Various parties then sought to intervene, claiming rights in the land that the receiver controlled.[111] Finding these claims in conflict with one another and "with the claims of one or more of the three principal litigants,"[112] the Court allowed the intervention, which it concluded "would permit all possible claims to the property . . . to be freely and appropriately asserted" such that no other court could govern the receiver's control.[113]

In *Maryland v. Louisiana*, the Court allowed several pipeline companies to intervene in an interstate case that addressed the constitutionality of Louisiana's natural gas tax.[114] The Court found that the pipeline companies had a "direct stake

108. Patashnik, *supra* note 91, at 43.

109. N.J. v. N.Y., 345 U.S. 369, 373 (1953) (denying Philadelphia's motion to intervene, on the ground that the city failed to meet its burden to show that Pennsylvania did not represent its interests); *accord S.C. v. N.C.*, 558 U.S. at 266–67.

110. *Okla. v. Tex.*, 258 U.S. at 579.

111. *Id.* at 581.

112. *Id.*

113. *Id.* at 580 (discussing receiver's appointment).

114. *Md. v. La.*, 451 U.S. at 729.

in th[e] controversy" and concluded that, "in the interest of a full exposition of the issues," it would accept the Special Master's recommendation that they be allowed to intervene.[115] Although the private parties' injuries were identical to that of the State, the Court did not find that this alignment of interests precluded intervention.[116] And in *Arizona v. California*, where Native American tribes sought leave to intervene, the Court found that the tribes were "entitled to take their place as independent qualified members of the modern body politic,"[117] despite the State's claim that the intervention—insofar as it would permit claims by the tribes against the States—would compromise the State's sovereign immunity protected by the Eleventh Amendment and not waived as part of the original Article III provision for resolving disputes between the States themselves.[118]

In some other original jurisdiction cases, the Court has found that the putative intervenors lacked the requisite independent interest.[119] In *New Jersey v. New York*, the Court denied a motion by the city of Philadelphia to intervene in a dispute in which New Jersey challenged a diversion by New York of the waters of the Delaware River, holding that the City had not met its burden to show that Pennsylvania would not adequately represent its interest and that it had a "compelling interest" in its own right.[120] The Court explained that it would be unworkable to permit each municipality that might have an interest in the matter to become a party: "If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth."[121]

In *South Carolina v. North Carolina*—in which South Carolina sought an equitable apportionment of the waters of the Catawba River—the Court denied leave for the City of Charlotte

115. *Id.* at 745 n.21.

116. *Id.* at 743–45 (discussing tax burden felt by people of states outside Louisiana and concluding that the case was an "appropriate one for the exercise of our original jurisdiction under § 1251(b)(2)").

117. Ariz. v. Cal., 460 U.S. 605, 614–15 (1983) (discussing tribes' interest).

118. *Id.* at 615.

119. *See*, *e.g.*, Tex. v. N.J., 379 U.S. 674, 677, 683 (1965); *N.J. v. N.Y.*, 345 U.S. at 373.

120. *N.J. v. N.Y.*, 345 U.S. at 373.

121. *Id.*

to intervene as a defendant, but permitted two other parties to do so.[122] As a municipality of North Carolina and a beneficiary of its alleged water use, Charlotte was adequately represented by North Carolina,[123] which shared Charlotte's interest in ensuring that the city received water.[124] By contrast, the Court allowed intervention by Duke Energy, which had eleven power plants along the river, with accompanying dams, on both sides of the state boundary and necessarily would be involved in any resulting allocation plan.[125] The Court also allowed intervention by a bi-state municipal entity that also had operations on both sides of the state boundary.[126] The Court found that these parties had strong interests in the outcome of the dispute that were not aligned with those of either of the two party States.[127]

B. Requirement to Seek Leave

The existence of a dispute between States does not automatically warrant the exercise of the Court's original jurisdiction. The complaining State must seek leave from the Court to file a bill of complaint, and in so doing must meet certain threshold requirements. Before filing an initial pleading, a complaining State invokes the Court's original jurisdiction by making a motion for leave to file in the Court.[128] For the case to commence, the motion must be approved by a majority of the Justices. When deciding whether to grant the motion for leave to

122. *S.C. v. N.C.*, 558 U.S. at 267–74 (discussing potential intervenors' individual situations).

123. *Id.* at 274 ("Charlotte is a municipality of North Carolina, and for purposes of this litigation, its transfers of water from the Catawba River basin constitute part of North Carolina's equitable share. . . . Charlotte, therefore, occupies a class of affected North Carolina users of water, and the magnitude of Charlotte's authorized transfer does not distinguish it in kind from other members of the class." (citations omitted)).

124. *Id.*

125. *Id.* at 268–73.

126. *Id.*

127. *Id*. at 271, 273 (holding that "neither State [had] sufficient interest . . . to represent the full scope of the [municipal entity's] interests," and that the "importance" and "relevance" of Duke Energy's interests indicated that they "should be represented by a party," but that "neither State [was] situated to do so properly").

128. SUP. CT. R. 17(3) (providing that "[t]he initial pleading [in an action invoking the Court's original jurisdiction] shall be preceded by a motion for leave to file, and may be accompanied by a brief in support of the motion").

file, the Court considers several important requirements, which largely follow from the "grave and delicate" nature of the jurisdiction and the corresponding need to exercise it sparingly.[129]

First, the complaining State must establish standing to bring the action against the defendant State or States. It does so by showing "a direct interest of its own" and "not merely seeking recovery for the benefit of individuals who are the real parties in interest."[130] As *Maryland v. Louisiana* demonstrates, for example, the State "may act as the representative of its citizens in original actions" when the injury "affects the general population of a State in substantial way."[131] In that case, the Court held that the plaintiff States could sue for the injury to their citizens' property interests as a result of an alleged unconstitutional tax imposition.[132] The Court reasoned that the States had a broad interest "in protecting [their] citizens from substantial economic injury" because the citizens could not bring suit in Louisiana.[133] Although the need to establish standing may preclude some types of interstate claims, the Court has recognized standing for interstate disputes over boundaries, pollution, tax, and—as this article itself demonstrates—water allocation.[134]

Second, the Court imposes a heightened pleading standard that must be met before it "exercise[s] its extraordinary power under the Constitution to control the conduct of one [sovereign]

129. *See Miss. v. La.*, 506 U.S. at 76–77.

130. Kan. v. Colo., 533 U.S. 1, 8–9 (2001) (indicating that injury to Kansas as a State gave it standing to bring an action against Colorado for water disputes rooted in the Arkansas River Compact).

131. *Md. v. La.*, 451 U.S. at 737 (citations omitted).

132. *Id.* at 739.

133. *Id.* (pointing out that "individual consumers cannot be expected to litigate . . . given that the amounts paid by each consumer are likely to be relatively small").

134. *See*, *e.g.*, Mont. v. Wyo., 563 U.S. 368, 375 (2011) (involving dispute over appropriation of water under a compact); Ala. v. N.C., 560 U.S. 330, 338 (2010) (involving dispute over a compact addressing storage of low-level radioactive waste); *Wyo. v. Okla.*, 502 U.S. at 452 (involving effects on Wyoming coal-severance-tax receipts of Oklahoma statute requiring power plants located in Oklahoma to burn a specific percentage of coal mined in Oklahoma); Ohio v. Ky., 410 U.S. 641, 652 (1973) (involving boundary dispute over the Ohio River).

state at the suit of another."[135] This standard creates a much higher burden for the complaining State than would apply in a private suit between individuals.[136] Among other things, the Court will not grant leave unless "the threatened injury is clearly shown to be of serious magnitude and imminent."[137]

Third, even if the complaining State meets these minimum prerequisites, the Court still may refuse to entertain the action. As noted above, the Court has refused to exercise its original jurisdiction even in cases within its exclusive, original jurisdiction, where the requisite "seriousness and dignity of the claim" was lacking.[138] In addition, because of the Court's limited resources, the Court considers whether the issue can appropriately be litigated in an alternative forum.[139] The Court may choose to send the case to a district court, provided that it involves a federal question.[140] Yet, even when the parties do not have access to another forum in which to litigate, the Court still may use its discretion on a case-by-case basis to deny leave to file an original action.[141]

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135. N.D. v. Minn., 263 U.S. 365, 374 (1923) (holding in an interstate water dispute that Minnesota's construction of drainage ditches and straightening of a river channel was not responsible for floods affecting North Dakota) (internal quotation marks omitted).

136. *See id.*

137. Ala. v. Ariz., 291 U.S. 286, 292 (1934) (determining that the amended bill did not meet the requirements to grant leave).

138. *City of Milwaukee*, 406 U.S. at 93, 108 (declining to exercise original jurisdiction because the claim at issue lacked "seriousness and dignity," and "remit[ting] the parties to an appropriate district court whose powers are adequate to resolve the issues" (footnote omitted)); *see also Wyandotte Chemicals*, 401 U.S. at 495 (concluding that although case falls within original jurisdiction, the Court "should nevertheless decline to exercise" original jurisdiction); Mass. v. Mo., 308 U.S. 1, 18–19 (1939) (declining to exercise original jurisdiction over a matter involving state taxes, finding that another proper and adequate remedy was available); Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, 190 (1993) (noting that the Court rejected fifty State-party cases between October 1, 1961, and April 25, 1993, and provided only nine published opinions explaining its reasons for refusing to hear most of them).

139. Ariz. v. N.M., 425 U.S. at 797 (finding that state court action provided an "appropriate forum" in which to resolve the controversy).

140. *City of Milwaukee*, 406 U.S. at 105 (indicating that the "question of apportionment of interstate waters is a question of 'federal common law' upon which state statutes or decisions are not conclusive").

141. *Miss. v. La.*, 506 U.S. at 76 (recognizing that original jurisdiction is to be exercised only sparingly and with discretion); *see also Wyandotte Chemicals*, 401 U.S. at 495.

C. High Barrier to a Decree Affecting Sovereign Interests

Even if a State succeeds in invoking the Court's original jurisdiction and establishing its case by a preponderance of the evidence, the complaining State is not necessarily assured a victory in the form of a decree. Based upon the same delicate sovereign interests that may cause the Court to decline to entertain an original jurisdiction action between States, the Court may decline to enter a decree in such an action, even where one State seemingly has proven its case. This is particularly true in equitable apportionment cases involving interstate waters, where the requested decree normally would take the form of an order enjoining the defendant State from certain uses or actions with respect to the disputed waters. The Court has stated that, at a minimum, the complaining State must establish "proof by clear and convincing evidence of some real and substantial injury or damage."[142] But even a showing of such injury may not be enough to warrant a decree from the Court. Rather, before the Court will exercise its extraordinary powers to enjoin a State's actions, it must also be shown that the "countervailing equities" that benefit the defendant State do not "justify the detriment to existing users" in the complaining State.[143] The complaining State must demonstrate, with "clear and convincing evidence," a substantial injury caused by the other State, such as "unreasonably wasteful" use,[144] such that the Court would be prepared to defend its decree "against all considerations on the other side."[145] And the defendant State may prove that the benefits of its uses or proposed uses of water "substantially outweigh the harm[s]" alleged by the complaining State, in which case no decree will issue.[146]

The Court's decision in *Kansas v. Colorado* illustrates this point and also the degree to which the Court is reluctant to intervene in a way that will disrupt the balance of sovereign

142. Neb. v. Wyo., 507 U.S. 584, 591 (1993); *see also Colo. v. N.M.*, 459 U.S. at 187 n.13 (discussing burden of proof); *Conn. v. Mass.*, 282 U.S. at 669; N.Y. v. N.J., 256 U.S. 296, 309 (1921).

143. *Colo. v. N.M.*, 459 U.S. at 187.

144. *Id.* at 189–90 (remanding for further findings).

145. *Mo. v. Ill.*, 200 U.S. 496, 521 (1906) (using this characterization in a case in which the bill was dismissed after trial because Missouri failed to meet the standard of proof).

146. *Colo. v. N.M.*, 459 U.S. at 187.

interests between States. As discussed above, this case resulted in the first expression of the Court's doctrine of equitable apportionment with respect to interstate waters.[147] After a trial, the Court agreed with Kansas that the "diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas."[148] Nonetheless, the Court found that comparing the amount of detriment to Kansas with the "great benefit" to Colorado led to the conclusion that "equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for the purposes of irrigation."[149] The Court made much the same point in its later decision in *Colorado v. Kansas*:

> [I]n such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in 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 as of the date when the controversy is mooted.[150]

In *Connecticut v. Massachusetts*, the Court again displayed a reluctance to disrupt the status quo between two sovereign States by issuing a coercive decree. Connecticut had challenged a plan by Massachusetts to divert waters of the Connecticut River, claiming that the diversion plan inevitably would harm Connecticut's agriculture and hydropower capabilities.[151] After taking jurisdiction and holding a full trial on the merits—and also making findings that agreed with many of the assertions

147. *See* text accompanying notes 85–89, *supra*.

148. *Kan. v. Colo.*, 206 U.S. at 113–14.

149. *Id*. at 114.

150. *Colo. v. Kan.*, 320 U.S. at 393–94 (footnote omitted).

151. *Conn. v. Mass.*, 282 U.S. at 663–67 (setting out facts alleged by Connecticut and findings of special master).

Connecticut had made—the Court ultimately dismissed the bill of complaint because Connecticut had not offered "clear and convincing" evidence of serious injury so as to provide the Court a warrant to "exert its extraordinary power to control the conduct of one State at the suit of another."[152]

Similar factors affected the outcome in *Missouri v. Illinois*. Although the Court granted leave to file the action—thereby establishing the principle that a State may bring an original action in a *parens patriae* capacity[153]—the Court ultimately found that Missouri had failed to meet the high bar for the Court's original jurisdiction. Missouri had complained of the alleged discharge of Chicago sewage that sent "poisonous filth daily into the Mississippi,"[154] but the Court found that the river experienced "no visible increase of filth" and "no new smell," further noting the unlikelihood that the Court would have found this "a nuisance of the simple kind" known to the "older common law."[155] The Court also considered whether the alleged contamination appeared to have any effect on year-over-year statistics tracking the number of typhoid-fever cases in St. Louis and independent research into the ability of the bacteria to travel through the river.[156] Because the factual findings introduced by the two States made "the case weaker in principle as well as harder to prove," the Court ultimately dismissed the bill.[157]

V. THE COURT'S RELIANCE ON SPECIAL MASTERS

Because the Court has limited resources that are not well suited to the day-to-day activities of a trial court, it typically delegates the initial management of an original jurisdiction case, as well as the development of the factual record and initial findings of fact and law. In early original jurisdiction cases, the Court sometimes appointed a commissioner to assist with these

152. *Id.* at 666–67, 669; *see also* Colo. v. N.M., 467 U.S. 310, 319, 320 (1984) (determining that Colorado failed to meet its burden of demonstrating injury by providing only "generalizations" and "mere assertions").

153. *See* text accompanying notes 65–67, *supra*.

154. *Mo. v. Ill.*, 200 U.S. at 517.

155. *Id.* at 522.

156. *Id.* at 523–25.

157. *Id.* at 526.

duties,[158] including by taking testimony from witnesses.[159] In the nineteenth and early twentieth centuries, the Court appointed commissioners to assume the task of enforcing judicial decrees, specifically those involving state boundaries.[160]

Over the years, the Court expanded its use of third parties to assist in managing original cases. In 1908, the Court created the office of the Special Master, through which the Court could designate individual Special Masters for specific cases to assist its decisionmaking by making initial factual findings and legal conclusions.[161] Since then, the scope of the authority wielded by Special Masters has expanded to include hearing evidence, developing the case record, and issuing a report to the Court.[162] In so doing, a Special Master often interprets compacts and other relevant documents and precedents, and makes recommendations as to any appropriate disposition or relief.[163] The Special Master also is authorized to "fix the time and conditions" for the filing of pleadings, to direct proceedings and summon witnesses, and to issue subpoenas,[164] and to entertain motions and preside over trials.[165] In some cases, a Special Master may take years to prepare a case for review by the Court, amassing a substantial and lengthy record, including expert testimony on technical or scientific matters.[166] In the seminal original jurisdiction case of *Arizona v. California*, the litigation lasted for decades and the trial lasted for two years.[167]

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158. *See*, *e.g.*, Vanstophorst v. Maryland, 2 U.S. 401, 401 (1791) (appointing commissioners in the first original jurisdiction case filed in the Supreme Court).

159. *See id.* (indicating that the commissioners were to "examine witnesses in Holland").

160. *See* Carstens, *supra* note 29, at 643.

161. *See* Va. v. W. Va., 209 U.S. 514, 534–37 (1908) (ordering that case be referred to a Special Master to report factual findings to the Court).

162. *See, e.g.*, Vt. v. N.H., 282 U.S. 796, 796 (1930).

163. *See e.g.*, Okla. v. N.M., 501 U.S. 221, 221 (1991) (remanding to Master for further proceedings to be followed by recommendations on the merits).

164. *See e.g.*, Neb. v. Iowa, 379 U.S. 996, 996 (1965) (describing authority given to the Special Master and allowing him to recover expenses).

165. *See*, *e.g.*, Ariz. v. Cal., 466 U.S. 144, 144 (1984) (approving Special Master's recommendation that additional parties be permitted to intervene).

166. *See, e.g.*, N.J. v. Del., 552 U.S. 597, 608 (2008) (observing that the Special Master "carefully considered nearly 6,500 pages of materials presented by the parties").

167. Ariz. v. Cal., 373 U.S. 546, 551 (1963) (noting that, in the course of the two-year trial, "340 witnesses were heard orally or by deposition, thousands of exhibits were received, and 25,000 pages of transcript were filled"); *see also* Ariz. v. Cal., 531 U.S. 1

After collecting the evidence and examining the applicable law, the Special Master prepares and submits a report of findings, conclusions, and recommendations to the Court for *de novo* review.[168] Any party to the action may challenge the Special Master's report by filing exceptions to all or part of the findings,[169] a process that requires the parties to select their strongest available arguments.[170] The Court may sustain or overrule the exceptions and either reject or adopt the Special Master's report in whole or in part. The Court also may remand the case to the Special Master to take additional evidence.[171] And although the Court has no obligation to defer to any aspect of the Special Master's report, certainly there have been cases where the Court has appeared to do so.[172]

Some commentators have criticized aspects of the Court's use of Special Masters, including the lack of transparency in the process by which Special Masters are appointed, the impropriety of deference to decisionmakers who are not subject to the Constitutional appointment process, and the absence of rules governing the manner in which Special Masters conduct

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(2000) (entering final supplemental decree filed after motion to re-open was granted in Ariz. v. Cal., 493 U.S. 866 (1989)).

168. *See, e.g.*, *Vt. v. N.H.*, 282 U.S. at 796 (indicating that any "findings, conclusions, and recommendations of the special master shall be subject to consideration, revision, or approval by the Court").

169. *See, e.g.*, U.S. v. La., 485 U.S. 88, 89 (1988) (overruling exceptions by the State of Mississippi that would have expanded the scope of the litigation); Stuart A. Raphael, *Practical Considerations in Original Action Litigation:* Virginia v. Maryland *and* New Jersey v. Delaware, 12 WYO. L. REV. 15, 22 (2012) (noting that, in light of word limits on exceptions, "a state that loses an argument before the Special Master may be forced to abandon it when choosing the best issues to raise on exceptions"); *see also id.* at 22–23 (discussing consequences of issue choice and assessing outcome in an illustrative case).

170. One group of commentators has observed that the standard appointment order for a Special Master authorizes "fairly extensive powers," including broad discretion in "conduct[ing] the proceedings." Jeffrey L. Bleich et al., *Supreme Court Watch: Very Special Masters—Handling the Supreme Court's Original Jurisdiction Cases*, 35 S.F. ATT'Y 45, 47–48 (2009).

171. *See Okla. v. N.M.*, 501 U.S. at 221.

172. In *Virginia v. Maryland* and *New Jersey v. Delaware*, for example, the Court appointed the same Special Master. *See N.J. v. Del.*, 552 U.S. at 617 (referring to Special Master Ralph I. Lancaster, Jr.); Va. v. Md., 540 U.S. 56, 64 (2003) (same). The Special Master analyzed and reconciled the differences in the two cases in his recommendations, which the Court found persuasive, noting that "both original actions were referred to" Mr. Lancaster in his capacity as Special Master. *N.J. v. Del.*, 552 U.S. at 617.

proceedings.[173] But in the end it is the Court that ultimately determines the facts and law in any original jurisdiction case, and the Court certainly is free to develop its own procedures for developing the record that will allow it to make those determinations.

VI. CONCLUSION

Although original jurisdiction cases rarely generate the kind of national press that attends other categories of cases, the Court's role in resolving controversies between States remains a vital feature of our constitutional government. Having given up aspects of their sovereignty to become part of a federalist government, the States need a means of resolving their disputes in an evenhanded way that respects the residual sovereignty of each State. The Court's jurisprudence in original cases under Article III has consistently reflected that fundamental purpose.

173. *See, e.g.*, Carstens, *supra* note 29, at 668–69 (characterizing involvement of Special Masters in original jurisdiction cases as "disquieting," decrying their acting in "the absence of either delineated rules or a vast body of precedent," and expressing concern that the use of Special Masters can lead to "outcomes that result from processes not in conformity with the public's notion of fair adjudication").