# Rethinking the Supreme Court's Interstate Waters Jurisprudence

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TABLE OF CONTENTS



## INTRODUCTION

*"Interstate waters have been a font of controversy since the founding of the Nation."*[1]

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1. Arkansas v. Oklahoma, 503 U.S. 91, 98 (1992) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

States' interests in interstate waters have defied stout efforts to clarify them. From the time of its first equitable decree, the bare idea that the Supreme Court could resolve an interstate fight over a flowing river has been uncontroversial.[2] Reaffirmations have been confident, even poetic.[3] But over the past century, as the Court refined its understanding of the limits of federal judge-made law,[4] the theory that Article III grants authority to delineate states' rights and duties over shared waters has become an increasingly prominent and problematic anomaly. Prominent because of the growing complexity of our water disputes; problematic for its substitution of an esoteric history of remedial discretion—and the search for law's place therein—for workable legal standards applicable in any forum where an interstate waters dispute arises. This article offers a new synthesis grounded in the Court's voluminous work on these interests and the hope that they may be better sorted and protected in our legal system as it has evolved.

Article III's judicial federalism began from landmarks like *Chisholm v. Georgia*,[5] *Martin v. Hunter's Lessee*,[6] and *Cohens v. Virginia*.[7] But it matured at milestones like *Gibbons v. Ogden*,[8] *Cooley v. Board of Wardens*,[9] *Pennsylvania v. Wheeling & Belmont Bridge Co.*,[10] and others where the contours of federal power over states' interests in interstate waters were set.[11] Equitable remedial

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2. *See, e.g.*, L. Ward Bannister, *Interstate Rights in Interstate Streams in the Arid West*, 36 HARV. L. REV. 960, 978 (1922) ("Nothing is more axiomatic in our federal constitution than that the states are equal in rank and equal in economic opportunity.").

3. *See, e.g.*, New Jersey v. New York, 283 U.S. 336, 342 (1931) ("A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. . . . Both States have real and substantial interests that must be reconciled as best they may . . . without quibbling over formulas.").

4. *See* O'Melveny & Myers v. FDIC, 512 U.S. 79, 85–89 (1994) (reviewing cases).

5. 2 U.S. (2 Dall.) 419, 451 (1793) (construing the scope of the Court's original jurisdiction over "all cases . . . in which a state shall be a party"); *see* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 12–14 (1987) (quoting U.S. CONST., Art. III, § 2, and its construction in *Chisholm*).

6. 14 U.S. (1 Wheat.) 304, 342 (1816) (construing the Court's appellate jurisdiction to review and revise state court judgments).

7. 19 U.S. (6 Wheat.) 264, 393–94 (1821) (construing the Court's appellate jurisdiction over appeals of a state's criminal conviction). *See* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 15–39 (1988).

8. 22 U.S. (9 Wheat.) 1, 221 (1824) (holding that state-granted monopolies of shipping in interstate waters were invalid as against federal licenses to operate).

9. 53 U.S. (12 How.) 299, 321 (1852) (holding that federal statute enacted in 1789 made provision for state laws requiring competent local pilots to be used in navigating local waters and that Pennsylvania law fit within that valid savings of state law requirements).

10. 54 U.S. (13 How.) 518, 578 (1852) (holding in original jurisdiction action brought by state that bridge over interstate river which obstructed shipping traffic was actionable injury to upstream state and that relief would be the "abatement" of the bridge by order of the Court).

11. *See* The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 457–58 (1851); Waring v. Clarke, 46 U.S. (5 How.) 441, 464 (1847); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845). The Nineteenth-century expansion of the admiralty jurisdiction on the basis of "locality" (and of Congress's legislative powers in turn) is traced carefully by David Robertson. *See* DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM: HISTORY AND ANALYSIS OF PROBLEMS OF FEDERAL-

discretion has long animated Article III scholars.[12] Indeed, it has long been the basis of appeals to "law of the river" on interstate waters, law that is mystical and ineffable.[13] But this has kept federal courts locked in an unstable tension between the Constitution's federalism and its separation of powers.[14] The categorical interests states claim equally according to the Court evoke timeless notions of sovereignty.[15] Since *Massachusetts v. EPA*,[16] however, an outpouring of work on state standing under Article III has revealed deep fault lines.[17] State standing has

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STATE RELATIONS IN THE MARITIME LAW OF THE UNITED STATES (1970); *see generally* Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954).

12. *See generally* Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217 (2018); Kristin A. Collins, "*A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249 (2010); David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 354 (2004); David Crump, *The Twilight Zone of the* Erie *Doctrine: Is There Really a Different Choice of Equitable Remedies in the "Court a Block Away"?*, 1991 WIS. L. REV. 1233; David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 548–50 (1985); Robert F. Nagle, *Separation of Powers the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532–33 (1972) (discussing Bivens v. Six Unknown Agents, 403 U.S. 388 (1971)); Alfred L. Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969).

13. *See* DAVID OWEN, WHERE THE WATER GOES: LIFE AND DEATH ALONG THE COLORADO RIVER 24 (2017) (noting that invocations of the 'Law of the River' refer to a "complex but loosely defined and minimally circumscribed body of rules, precedents, habits, treaties, customs and compacts that isn't written down all in one place," but which is invoked "almost any time two water users disagree about who's entitled to what").

14. *See e.g.*, Morley, *supra* note 12, at 219–24; Collins, *supra* note 12, at 252–55; Hill, *supra* note 12.

15. *See, e.g.*, Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1868 (2009) ("[s]tates are not sources of ends in the same sense as are persons. Instead, states are systems of shared practices and institutions within which communities of persons establish and advance their ends." (quoting CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 180 (1979))); *cf.* New York v. United States, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.").

16. 549 U.S. 497, 518 (2007) (holding that states "are not normal litigants for purposes of invoking federal jurisdiction" and relaxing at least two elements of standing doctrine for state plaintiffs).

17. *See e.g.*, Seth Davis, *The Private Rights of Public Governments*, 94 NOTRE DAME L. REV. 2091 (2019) [hereinafter Davis, *Private Rights*]; Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229 (2019) [hereinafter Davis, *Public Standing*]; F. Andrew Hessick, *Quasi-Sovereign Standing*, 94 NOTRE DAME L. REV. 1927 (2019); Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43 (2018); James Pfander, *Standing, Litigable Interest, and Article III's Case-or-Controversy Requirement*, 65 UCLA L. REV. 170 (2018); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851 (2016); Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637 (2016); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1081–84 (2015); Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209 (2014); Katherine Mims Crocker, Note—*Securing Sovereign State Standing*, 97 VA. L. REV. 2051 (2011); Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens? Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008); Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law's Growing Shadow*, SUP. CT. REV. 111 (2008).

an inordinately complex past,[18] one that unfortunately has become entangled in today's bitter politics. Rethinking the Court's work on interstate waters, and derivatively its work on states' remediable injuries there, thus, means reckoning with a large canon of opinions and judgments.[19] Part I considers the legacy of dispute resolution in the Court's original jurisdiction, while Part II compares an equally deep legacy of appellate cases involving interstate waters. Part III charts a convergence of those two streams and offers a synthesis grounded in basic choice of law methods.

## I. DOCTRINAL CONFLUENCE: STATE DIGNITY, EQUITY, AND SHARED WATERS

The Supreme Court's interstate waters jurisprudence stems from what we know as the states' equal sovereignty.[20] Many of the benchmarks have arisen within the Court's original jurisdiction over "controversies" between two or more states and are extensions of the judge-made doctrine that the Nation "was and is a union of States, equal in power, dignity and authority."[21] This doctrine is not found in the Constitution's text, its historical roots are tangled, and it generates considerable friction with other structural principles that are embedded in the Constitution.[22] In short, the Court's dignitarian approach to interstate waters has created a turbulent doctrinal confluence that has resisted organization.

### A. SOVEREIGN INTO QUASI-SOVEREIGN INTERESTS: OF DIGNIFIED TRIBUNALS

The Constitution, Article III, Section 2, vests original jurisdiction in the Court over "Controversies between two or more States," a jurisdiction that has always been exclusive by statute.[23] For any claim that is necessarily against another state, it is the only forum unless and until Congress changes a statute first enacted in

18. *See e.g.*, Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 287 (1995); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555 (1994); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988).

19. *See generally* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665 (1959); Vincent L. McKusick, *Discretionary Gatekeeping: The US Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185 (1993); James G. Mandilk, Note, *The Modification of Decrees in the Original Jurisdiction of the Supreme Court*, 125 YALE L. J. 1880 (2016).

20. Interstate waters have featured in several of the Court's "equal footing" doctrine landmarks. *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845); Barney v. City of Keokuk, 94 U.S. 324, 333–34 (1877); Illinois Central R. Co. v. Illinois, 146 U.S. 387, 451–59 (1892); Shively v. Bowlby, 152 U.S. 1, 57 (1894); *see also* Phillips Petro. Co. v. Mississippi, 484 U.S. 469, 473–76 (1988) (reviewing cases); Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1210 (2016) (finding at the core of cases like *Pollard's Lessee* and *United States v. Louisiana*, 363 U.S. 1, 16 (1960), a "historic tradition that all the States enjoy equal sovereignty.").

21. Coyle v. Smith, 221 U.S. 559, 567 (1911).

22. *See* Litman, *supra* note 20, at 1212.

23. *See* U.S. CONST., art. III, § 2; 28 U.S.C. § 1251(a). The Judiciary Act of 1789 first provided exclusive original jurisdiction to the Supreme Court over "all controversies of a civil nature, where a state is a party," with some exceptions. *See* Act of Sept. 24, 1789, Sess. I, ch. 20, at § 13. In 1948,

1789.[24] The Court has repeatedly explained that this jurisdiction requires an injury of a certain kind and magnitude which follows from the sort of *interests* properly protected there.[25] Boundary disputes—many involving interstate waters—were long the exemplar.[26] Beyond claims for territory, though, specifying the requisite injury has been a challenge.[27] Territorial disputes are zero-sum contests where one state's gain is another's loss.[28] The pliant, often cryptic quality and extent of waters make whatever injuries result from their over- or misuse considerably less forthright. The Court's procedures and means of decision, arising in equity, have seemed uniquely bound to own its discretion.[29] As the Court has struggled with the claims that states have asserted over time, however, its signals to would-be litigants have gone from feint to crossed.

1. Dignified Tribunal: A Forum of State-State Controversies

The Court's first encounter with a state seeking to vindicate special interests in shared waters came in *Pennsylvania v. Wheeling & Belmont Bridge Co*.[30] The

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Congress trimmed the exclusivity to its present scope—controversies between "two or more states." *See* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1573–1602 (1990).

24. Several dissents from denials of leave to file have emphasized the point. *See, e.g.*, Nebraska v. Colorado, 136 S. Ct. 1034, 1035 (2016) (Thomas and Alito, JJ., dissenting); Louisiana v. Mississippi, 488 U.S. 990, 990 (1988) (White, Stevens, Scalia, JJ., dissenting); California v. West Virginia, 454 U.S. 1027, 1027 (1981) (Stevens, J., dissenting).

25. *See* Woolhandler & Collins, *supra* note 18, at 446–79.

26. Many of the Court's boundary disputes have been so contentious and protracted precisely *because* waters so often serve as interstate boundaries. Texas' and Oklahoma's Red River rivalry is emblematic. *See* Arthur Stiles, *The Gradient Boundary—The Line Between Texas and Oklahoma Along the Red River*, 30 TEX. L. REV. 306, 308–12 (1952) (recounting that, following decades of litigation in the Supreme Court, field surveyors were forced to follow the Court's decree to the letter as they located boundary comprised of a topographical gradient). Indeed, water-boundary disputes have involved recourse to specialized doctrines for dealing with hyper-litigious parties. *See, e.g.*, New Jersey v. Delaware, 552 U.S. 597, 603–06 (2008) (reviewing two prior iterations of same boundary dispute then pending to narrow what could be contested); New Hampshire v. Maine, 532 U.S. 742, 749–56 (2001) (applying "judicial estoppel" to New Hampshire's attempt to reopen boundary settlement with Maine).

27. *See* Davis, *Private Rights*, *supra* note 17, at 2098–2100; Fallon, *supra* note 17, at 1080–84; Crocker, *supra* note 17, at 2056–66; Mank, *supra* note 17, at 1756–75; Woolhandler & Collins, *supra* note 18, at 397–433.

28. There is arguably no more sovereign attribute than territory. *See* Rhode Island v. Massachusetts, 37 U.S. 657, 726 (1838). Yet even in the Court's boundary dispute docket it has employed equitable discretion in lieu of pure legal entitlement. *See, e.g.*, New Jersey v. New York, 523 U.S. 767, 810–12 (1998) (adjusting state boundary to fit existing buildings wholly in one state or the other despite boundary's having been found precisely as dissecting buildings).

29. By the Rules Enabling Act of 1934, as well as its own Article III authority, the Court possesses considerable discretion over the rules of evidence and procedure to be followed in its own proceedings. *See* Sibbach v. Wilson, 312 U.S. 1, 9–11 (1941); 28 U.S.C. § 2071(a); *see also* 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, 642–58 (2002); James E. Beaver, *Common Law vs. International Law Adjective Rules in the Original Jurisdiction*, 20 HAST. L.J. 1, 4–5 (1968).

30. 54 U.S. (13 How.) 518 (1852) (*Wheeling Bridge I*). Initial proceedings charged a "commissioner" with fact-finding on Pennsylvania's pleadings. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 50 U.S. 647, 658–59 (1850). The first suspension bridge of its kind, the footings were all in Virginia soil

evidence showed that the bridge at Wheeling, Virginia (now West Virginia) obstructed the largest steamboats' passage up the Ohio River to Pittsburgh, where the state, railroads, shippers, and other investors had established a substantial port.[31] Completion of the bridge in December 1849 came just after Pennsylvania's filing in July.[32] Virginia specifically endorsed the bridge by statute in 1850 in its support of Wheeling's bid to become a hub city on the river.[33] Justice McLean's opinion for the majority declared the bridge an "injury" to Pennsylvania that entitled it to equitable relief.[34] McLean's opinion studiously avoided stating the source of *law* by which the bridge was judged.[35] Pennsylvania had argued that Congress had repeatedly declared the Ohio a "public highway of commerce,"[36] but the Court's opinion grounded its authority to abate this injury in the complaining state's "dignity"[37] and the Court's own equity powers under Article III and the Judiciary Act of 1789.[38] According to the Court, because Pennsylvania was not suing "in virtue of its sovereignty,"[39] nor had it claimed anything "connected with the exercise of its sovereignty,"[40] but rather had only sought the

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from the Wheeling shore to then-Zane's Island, more than 500 feet to the west. *See* ELIZABETH BRAND MONROE, THE WHEELING BRIDGE CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND TECHNOLOGY 42–47 (1992).

31. *See* 54 U.S. at 558. Wheeling's mid-century population of about 13,000 was dwarfed by Pittsburgh's—which was also the much larger commercial hub. *See* Monroe, *supra* note 30, at 30–38.

32. *See* Elizabeth B. Monroe, *Spanning the Commerce Clause: The Wheeling Bridge Case, 1850-1856*, 32 AMER. J. LEGAL HIST. 265, 278–79 (1988).

33. *See* 54 U.S. at 558–59. Virginia's statute was enacted in January 1850, amending the bridge company's charter to include the bridge's actual elevation, location, and dimensions. Monroe, *supra* note 32, *Id.* at 279–80, 280 n.62. Although Pittsburgh's shipping interests led the fight against Wheeling's bridge, its railroad interests were also active opponents, recognizing Wheeling as a competitor in the east-west Ohio Valley trade. *See* Monroe, *supra* note 30, at 48–49.

34. *See* 54 U.S. at 576–78. The Ohio's being a shared river among the states distinguished Wheeling's bridge from an earlier case, Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829), where a minor tributary of the Delaware River—located wholly within Delaware—had been dammed and the Court held that state law protected the dam from self-help by an aggrieved captain. *See id.* at 566.

35. *See* 54 U.S. at 579–80. (Taney, J., dissenting). The Virginia statute was an amendment to the company's charter that directed the bridge meet the parameters which had already been achieved in design and construction. *See* Monroe, *supra* note 30, at 47–49.

36. *See* 54 U.S. at 520.

37. *Id.* at 560.

38. In quoting the Act of 1789, the Court first reasoned that "Chancery" jurisdiction had been conferred with the limitation that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." 54 U.S. at 563 (quoting Act of Sept. 24, 1789, Sess. I, ch. 20, at § 16). It then inferred that because, in "exercising this jurisdiction the courts of the Union are not limited by the chancery system adopted by any State," nor prohibited from it in "a State where no court of chancery has been established," *id.*, "where relief can be given by the English chancery, similar relief may be given by the courts of the Union." *Id.* at 564. What the majority did *not* do is claim that *federal* common law governed, or that a federal statute had prohibited obstructions like the bridge. *See id.* at 564 ("The common law could be made part of our federal system only be legislative adoption.").

39. 54 U.S. at 559.

40. *Id.* at 561.

"protection of its property" in the port and associated infrastructure of and about Pittsburgh,[41] its injury was redressable in equity.[42] Chief Justice Taney's dissent took issue with every one of these premises,[43] with one exception: that "[t]he State, in this controversy, ha[d] the same rights as an individual, and nothing more."[44] Then, as now, the precise nature of the state's interest and injury—sovereign yet seemingly derivative of the tangible harms actually being suffered—challenged the Court.

An important coda came four years later when the Court confronted Congress's intervention.[45] In August 1852, barely three months after the decree, Congress enacted a statute declaring the bridge to be a "lawful structure[]", "anything in the law or laws of the United States to the contrary notwithstanding."[46] By the time the full Court assembled to rehear the matter in the December 1854 Term, times had changed. The bridge had been blown down by a storm in May.[47] Justice McKinley's death left his seat to President Pierce's appointment of southerner (and eventual Confederate) John Campbell.[48] An era of road, railroad, and bridge building was dawning,[49] and Justice Grier, sitting in chambers during the Court's summer recess, had enjoined the bridge's reconstruction and ordered the company to answer Pennsylvania's renewed application for relief—which the company had refused to do.[50] The full Court reversed Grier, holding that the

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41. This sort of injury, the majority declared, was "irreparable" by suit at common law and thus sufficiently suited to equity. *See* 54 U.S. at 560–62. It thereby denied that Pennsylvania's complaint was actually a claim in *public* nuisance—a common law crime which the Court had long held beyond Article III, *see id.* at 563 (discussing Robinson v. Campbell, 16 U.S. (3 Wheat.) 212 (1818))—and that the bridge was forbidden by law. *See id.* at 580 (Taney, C.J., dissenting). Ultimately, Pennsylvania's injury was pled and argued in terms of lost revenues from the freight tonnage excluded and from sea-going vessels not being built in Pittsburgh. *See* Monroe, *supra* note 30, at 60–64.

42. *See* 54 U.S. at 578 (announcing that if raising the bridge "or some other plan shall not be adopted which shall relieve the navigation from obstruction, on or before the 1st day of February next, the bridge must be abated"). After a further two months of argument and submissions, the Court left the defendants with eleven months to raise the bridge to an elevation of at least 111 feet over the middle 300 feet of the river's channel. *See id.* at 627.

43. *See* 54 U.S. at 579–93 (Taney, C.J., dissenting). Taney argued that "although the suit is brought in this court, the law of the case and the rights of the parties [should be] the same as if it had been brought in the Circuit Court of Virginia [the federal trial court at the time], in which the bridge is situated." *Id.* at 579. Because no federal law declared the bridge a nuisance and because the bridge was not a nuisance by Virginia law, he argued, "[w]e can derive no jurisdiction. . . ." *Id.* at 580. In response, the majority declared only that "[t]he *fact* that the bridge constitutes a nuisance is ascertained by measurement." *Id.* at 568 (majority opinion) (emphasis added). Taney also argued that, even assuming the bridge was an actionable nuisance, the balance of equities should favor the bridge—which he noted had cost more than $200,000 to build—over Pennsylvania's "speculative, questionable, and at most, inconsiderable loss." *See id.* at 589–90 (Taney, C.J., dissenting).

44. 54 U.S. at 579 (Taney, C.J., dissenting).

45. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1856) (*Wheeling Bridge II*).

46. *Wheeling Bridge II*, 59 U.S. at 429 (quoting 10 Stat. 112 (1852)).

47. *See* Monroe, *supra* note 30, at 150.

48. *See* Note, *supra* note 19, at 1228 n.105.

49. *See* Monroe, *supra* note 30, at 163–76.

50. *See Wheeling Bridge II*, 59 U.S. at 422–23.

original decree, because it was "executory,"[51] left Congress free to change the underlying law such that there was "no longer any interference with the enjoyment of the public right inconsistent with law."[52] The Court fractured over what to do about challenges to its authority,[53] as well as about Congress's power to *change* the entitlements to the river.[54]

Equally conspicuous was disagreement over the legal grounds of the original decree.[55] Justice Nelson's majority opinion made the curious assertion that the original decree was granted because the bridge "was in conflict with . . . acts of congress,"[56] a claim Pennsylvania had argued but which Justice McLean's opinion in *Wheeling Bridge I* had carefully avoided.[57] Justice Wayne's dissent cast the original decree as having declared the bridge a *nuisance* that denied Pennsylvania its constitutional right of "navigating the Ohio River at all stages of its waters."[58] Justice Daniel reiterated his argument from his dissent in *Wheeling Bridge I* that the Court lacked jurisdiction in the matter.[59] All of this is notable for

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51. *Id.* at 431.

52. *Id.* at 432.

53. The 1854 statute was regarded by at least two justices as some form of affront to the Court's power to hear and decide cases and controversies. *See* 59 U.S. at 449 (Grier, J., concurring and dissenting); *id.* at 440–42 (McLean, J., dissenting). The contempt charges for the company's refusal to appear split the Court 5–4 (the dissenters favoring contempt sanctions included Justice Nelson—who otherwise wrote for the majority). *See id.* at 436. The two-and-a-half-hour session spent announcing the different opinions was reportedly "stormy." *See* 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 418, 1836–64 (1974).

54. *See* SWISHER, *supra* note 53, at 415–22 (noting later bridge cases marked by the same uncertainties).

55. In five opinions and two separate orders the justices split their votes on the three principal motions argued: the validity and effect of Congress's 1852 statute; the validity of Justice Grier's orders in chambers; and the status of the contempt charges against the defendants. *See* 59 U.S. at 422–27.

56. *See* 59 U.S. at 430 ("This being the view of the case taken by a majority of the court, they found no difficulty in arriving at the conclusion, that the obstruction of the navigation of the river, by the bridge, was a violation of the right secured to the public by the constitution and laws of congress . . . .").

57. The case would have been much simpler had a federal statute prohibited the span. In describing the river and Congress's many statutes and appropriations surrounding its improvement and navigation, McLean's opinion prefaced the discussion by noting "[t]hat the Ohio River is navigable, is a historical fact, which all courts may recognize." 54 U.S. at 561. McLean's answer to the Chief Justice's denial that there existed "any act of Congress regulating the height of bridges over the river," *id.* at 580 (Taney, C. J., dissenting), was that Congress had not legislated as much "in terms." *See id.* at 565 (majority opinion). This was the same Court, through Chief Justice Taney, that had just expanded the admiralty jurisdiction of the lower federal courts to the Great Lakes in *The Genesee Chief v. Fitzhugh*, in part because of its perception of admiralty jurisdiction's importance to a state's commercial development and the western states' lack of jurisdictional waters absent the expansion. *See* 53 U.S. (12 How.) 443, 454 (1851). Taney's interpretation of the legislation (legislation that Justice Joseph Story had drafted) was part of a grand expansion throughout the Nineteenth century of the admiralty jurisdiction to all "navigable" waters. *See* ROBERTSON, *supra* note 11, at 104–22. The legal significance of the Ohio's *navigability* and the states' interests therein, thus, were hardly matters that the Court would have felt compelled to leave to Congress.

58. *See* 59 U.S. at 450 (Wayne, J., dissenting).

59. *See id.* at 453 (Daniel, J., concurring); *Wheeling Bridge I*, 54 U.S. at 594–97 (Daniel, J., dissenting).

how the Wheeling Bridge saga foreshadowed the Court's century-long struggle with its interstate waters controversies: as an *equitable* action with unparalleled potential for confusion.

As time passed, the Court came to recognize *Wheeling Bridge* through Nelson's gloss.[60] The irony, given how many times Congress had been invited but had declined either to fund a federal bridge at Wheeling or to legislate,[61] was lost. But other state bills would arrive at the Court's original docket before century's end.[62] Wisconsin would allege an injury to its use of the St. Louis River, which serves as the Minnesota-Wisconsin border at its confluence with Lake Superior, caused by Duluth's canal cut that had the effect of diverting the river's flow.[63] This time the Court denied relief on grounds paralleling *Wheeling Bridge II*: Minnesota's and Congress's tacit legislative approval of Duluth's canal.[64] The stage had been set for state dignity-based equity jurisdiction to emerge into federal prerogatives over interstate waters.

### 2. The Equitable Action

Twin holdings in 1901 and 1902 confirmed that states could sue each other in the Court seeking equitable relief against the overuse and misuse of their shared waters.[65] Complaining states had alleged injuries being caused in upstream states[66] and the Court declared its readiness to compel upstream state responses as warranted.[67] It is worth noting that, as it had in both *Wheeling Bridge* and

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60. *See, e.g.*, South Carolina v. Georgia, 93 U.S. 4, 12 (1876); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 15–17 (1888); Missouri v. Illinois, 180 U.S. 208, 227 (1900); Missouri v. Illinois, 200 U.S. 496, 518 (1906); Cuyler v. Adams, 449 U.S. 433, 438–39, 438 n.7 (1981).

61. *See* Monroe, *supra* note 30, at 30–38, 70–71.

62. *See e.g.*, *South Carolina*, 93 U.S. at 5; Wisconsin v. Duluth, 96 U.S. 379 (1878).

63. *See Wisconsin*, 96 U.S. at 381; *see also South Carolina*, 93 U.S. at 11–12 (describing channel cuts improving Georgia's part of the river to the detriment of South Carolina's).

64. *Cf. Wisconsin*, 96 U.S. at 387 ("If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this court can have no lawful authority to forbid the work."). The Court was emphatic—if not particularly precise—that "[w]hen Congress appropriates $10,000 to improve, protect, and secure [Duluth's] canal, this court can have no power to require it to be filled up and obstructed." *Id.* at 388; *see also South Carolina*, 93 U.S. at 13–14 (holding that an appropriation for "the improvement of the harbor of Savanah" was sufficient congressional endorsement of engineering choices advantaging Georgia's over South Carolina's use of Savanah River to defeat the claim).

65. *See* Missouri v. Illinois, 180 U.S. 208, 241 (1901); Kansas v. Colorado, 185 U.S. 125, 147 (1902).

66. In *Missouri*, after a lengthy review of its precedents, the majority held 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." *Missouri*, 180 U.S. at 241. In *Kansas*, the Court held that "proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas river in Kansas." *Kansas*, 185 U.S. at 147.

67. *Cf. Kansas*, 185 U.S. at 145 (finding Kansas' bill of complaint "sufficient to present the question as to the power of one state of the Union to wholly deprive another of the benefit of water from a river rising in the former and, by nature, flowing into and through the latter," supplying the Court with jurisdiction); *Missouri*, 180 U.S. at 241 (declaring that it would be "objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought

*Wisconsin*, the Court regarded the waters as shared *wholes*—not as so many territorial slices border to border.[68] This was important legally given the Court's conception of state sovereignty, then as now.[69] The complainant's dignity, mirroring that of the defendant(s), overcame the Court's considerable inhibitions[70] to compelling states to regulate their residents in order to protect these resources.[71] The Court would go on to clarify in 1907 that states' interests would be subject to the Court's own "equitable apportionment of benefits between the . . . states resulting from the flow of the [water]."[72] This divisionary solution was designedly open-ended, potentially reaching anything about the waters that could be advantageous,[73] and it has since been turned toward resources besides the flow itself.[74]

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within the original jurisdiction of th[e] court"). Chief Justice Fuller's dissent in *Missouri* argued that redressing such an injury would entail coercing "the lawmaking function of the state of Illinois." *See id.* at 249–50 (Fuller, C.J., Harlan & White, JJ., dissenting).

68. This was at least in part the rejection of an opinion issued by Attorney General Judson Harmon (the "Harmon doctrine") regarding a territorial sovereign's right, in Harmon's estimation, to deplete fully the flow of any water rising within it. *See* Stephen C. McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised*, 36 NAT. RES. J. 549, 557–69 (1996).

69. The Court's dignitarian conception of state sovereignty has elevated immunity from suit to the core of the states' sovereign attributes. *See* Litman, *supra* note 20; Nagle, *supra* note 12, at 681–706.

70. *See Kansas*, 185 U.S. at 140–41 ("[the] Constitution made some things justiciable 'which were not known as such at the common law'" (quoting Hans v. Louisiana, 134 U.S. 1, 15 (1890)); *cf.* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 523 (1954) (noting that even after a finding of prohibited state action, federal courts have always been reluctant to remediate abuses of state authority). The Court has repeatedly held that the federal government may not *compel* states to act upon their own citizens. *See e.g.*, Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861), *overruled by* Puerto Rico v. Branstad, 483 U.S. 219, 226–27 (1987); New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 98 (1997); Nat'l Fed'n of Indep. Bus. v. Sebellius, 567 U.S. 519 (2012); Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

71. Justice Holmes had, by the time of *Missouri v. Illinois* and *Kansas v. Colorado*, famously reasoned that "[i]f the state has a case at all, it is somewhat *more certainly entitled* to specific relief than a private party might be" when vindicating its interests in the health and safety of its residents. Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907) (emphasis added). *Tennessee Copper* was a state's case against private defendants in a neighboring state, however, and its 'special solicitude' for states has ever since remained an enigma within the Court's standing doctrines. *See* Mank, *supra* note 17, at 1775–80 (arguing that *Tennessee Copper* and *Missouri* support the Court's finding of state standing in *Massachusetts v. EPA*); Woolhandler & Collins, *supra* note 18, at 450–55 (tracing "police power standing" to *Tennessee Copper*).

72. Kansas v. Colorado, 206 U.S. 46, 118 (1907). This was the same opinion in which the Court suggested (in dicta) that Congress lacked Article I authority to legislate the parties' rights to the river. *See id.* at 94–96.

73. In appraising the *benefits* being had from the Arkansas River, the Court weighed the disparity between an extensive Colorado irrigation economy that had taken root in the valley beginning in the 1880s against what it found to be a much weaker version in western Kansas. *See Kansas*, 206 U.S. at 107–14, 116–17. This reportedly reinforced a sense on the ground that "[t]he first man that gets the water keeps it." James E. Shernow, *The Contest for the "Nile of America": Kansas v. Colorado (1907)*, 10(1) GRT. PLAINS Q. 48, 57–58 (1990).

74. *See, e.g.*, Idaho *ex rel.* Evans v. Oregon & Washington, 462 U.S. 1017, 1024 (1983) (holding that the "doctrine of equitable apportionment is applicable" to dispute between states over management of anadromous fish); *cf.* Hood *ex rel.* Miss. v. City of Memphis, 570 F.3d 625, 630 (5th Cir. 2009) (holding that differences between aquifers and surface waters are of "no analytical significance" and that equitable apportionment of aquifer by the Supreme Court was the appropriate forum and remedy).

The Court has entered four apportioning decrees on flows of the Laramie, Delaware, and North Platte Rivers[75] and constraining Illinois's diversions from Lake Michigan.[76] A fifth decree interpreting and further specifying allocations made by an interrelated compact, federal statute, and reservations, still controls the lower Colorado River.[77] A sixth enjoined New York City's dumping in international waters at New Jersey's behest because so much of the trash was reaching New Jersey's beaches.[78] Each decree addressed what, to the complainants, represented a threat insulated from liability by "foreign" law.[79] Each is non-substitutionary,[80] mandatory, and grew out of what the Court has called the states' "real and substantial interests" that, when rivalrous, "must be reconciled as best they may."[81] Perhaps most importantly, each decree was increasingly characteristic of the forum granting it. For the Supreme Court progressively broadened states' immunities from suit throughout the Twentieth century right up to—*but not including*—this state-state controversy docket.[82] There is no other forum today

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75. *See generally* Wyoming v. Colorado, 259 U.S. 419 (1922) (Laramie); New Jersey v. New York, 283 U.S. 336 (1931) (Delaware); Nebraska v. Wyoming, 325 U.S. 589 (1943) (North Platte).

76. *See* Wisconsin v. Illinois, 278 U.S. 367, 420 (1929). *Wisconsin* was the coda to the 1907 denial of Missouri's case against the Chicago Sanitary Canal's diversion of Lake Michigan the better to flush its sewage down the Des Plaines, Illinois, and Mississippi rivers. *See* infra notes 174–81 and accompanying text. The Court's decree grew out of the complaining states' interests in the navigability of the Great Lakes, *see* 278 U.S. at 420–21, but was expressed like any other cap on consumptive use. *See* Wisconsin v. Illinois, 281 U.S. 179, 201–02 (1930).

77. *See generally* Arizona v. California, 376 U.S. 340 (1964); *see also* Arizona v. California, 547 U.S. 150 (2006) (amending 1964 decree).

78. *See* New Jersey v. City of New York, 283 U.S. 473, 483 (1931). Notably, Section 13 of the Rivers and Harbors Act of 1899 (known as the Refuse Act) did not apply because the dumping was thought to be outside the territorial jurisdiction reached by that statute. *Id.* at 476. The Court held that *it* had jurisdiction over the respondent and the claims against it because of the situs of the harm. *Id.* at 482. The decree was held in abeyance for a "reasonable time" to allow the city to devise other means of disposal. *Id.* at 483.

79. In each case the decree entered targeted particularized and proven practices, either imminent or completed, and, in the diversion cases, specified mass limits to be observed. *See Wyoming*, 260 U.S. at 1–2; *City of New York*, 283 U.S. at 805–07; *Wisconsin*, 281 U.S. at 201; *Nebraska*, 325 U.S. at 665–72; *Arizona*, 376 U.S. at 340–53. The decreed mass limits in *Wisconsin* in effect reflected system interests. *See Wisconsin*, 278 U.S. at 408–11.

80. Equity's signature has long been specific relief. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 677–80 (5th ed. 1956). The original jurisdiction waters decrees have been no exception and, because state-state controversies have been exclusive to the Supreme Court's original docket by statute since the Founding, there are no reported precedents in inferior courts adjudicating the claims adjudicated there.

81. *City of New York*, 283 U.S. at 342.

82. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. In *Hans v. Louisiana*, the Court declared that the Amendment's bare text did not confine the immunity for which it stood and held that a suit by a State's *own* citizen was also barred from a federal court. 134 U.S. 1, 19–21 (1890). In *In re New York*, it extended this immunity to federal courts' admiralty jurisdiction. 256 U.S. 490, 500 (1921). In *Principality of Monaco v. Mississippi*, it extended the immunity to suits brought by foreign states. 292 U.S. 313, 330 (1934). In *Seminole Tribe of Florida v. Florida*, it held that Congress's Article I powers could not abrogate state immunity from suit in

that can grant the kind of relief against U.S. states that these decrees embody.[83] In explaining its decisions, though, the Court has elaborated the grounds of this unique authority in increasingly uneven fashion even as the demands on shared waters have grown more urgent, varied, and contentious.[84]

3. Equity's Burdens

Procedural and evidentiary rules are characteristically forum specific.[85] For example, the Supreme Court has repeatedly and emphatically declared that a complaining state must plead a "threatened invasion of rights . . . of serious magnitude" and prove it by "clear and convincing evidence."[86] Occasionally labeling them *parens patriae* interests,[87] however, the Court has insisted that these are the unique interests of the *state*—not (just) those of its impacted residents.[88] The

federal courts. 517 U.S. 44, 58–73 (1996). In *Alden v. Maine*, it held that Congress's Article I powers were insufficient to abrogate the immunity from suit in states' own courts. 527 U.S. 706, 754–55 (1999). Yet the Court has refused to immunize states from suits by one another or by the United States in its original jurisdiction. *See e.g.*, United States v. Louisiana, 389 U.S. 155 (1967); United States v. California, 332 U.S. 19 (1947); United States v. Texas, 143 U.S. 621, 646–47 (1892).

For "more than a century," then, the Court has "invoked the tenets of strong purposivism to hold that the Eleventh Amendment means far more than it says." John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1749 (2004). But its purposivism has never reached its own original jurisdiction. *See* Kansas v. Colorado, 533 U.S. 1, 7 (2001) ("In proper original actions, the Eleventh Amendment is no barrier, for by its terms it applies only to suits by citizens against a State.").

83. In *Franchise Tax Bd. v. Hyatt*, the Court held that states are immune from private suits in the courts of sibling states. 139 S. Ct. 1485 (2019) (overruling Nevada v. Hall, 440 U.S. 410 (1979)). It found in the Constitution's silence on the issue a latent understanding that "took as given that States could not be haled involuntarily before each other's courts." *Id.* at 1494.

84. *See supra* notes 229–46 and accompanying text.

85. *See* Beaver, *supra* note 29, at 12–37 (tracking the emergence of the Court's "common law adjective rules" in the original jurisdiction to its proclamation of August 1791 on equity procedures). Other Supreme Court rules have come from its common law powers. *See* Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1292–94 (1986) (describing a "continuous pattern of unnecessary self-restraint" by the Court following its own practice rules of refusing appellate jurisdiction in many federal question "cases").

86. *See e.g.*, Colorado v. New Mexico, 467 U.S. 310, 315–17 (1984) (*Colorado II*); Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931) (citing New York v. New Jersey, 256 U.S. 296 (1921)); Missouri v. Illinois, 200 U.S. 496 (1906)). The Court's most recent restatement of this standard in *Florida v. Georgia*, emphasized the division of an "initial burden" for leave to file suit from the proofs required once the Court is moved to apply its factored consideration of the competing interests. 138 S. Ct. 2502, 2514–16 (2018). Note that the Court has held in other contexts that burdens of proof are elements of any underlying entitlement, see Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212–13 (1939), and that, unless constitutionally required, they are subject to Congress's (re)alignment. *See* Vance v. Terrazas, 444 U.S. 252, 265–66 (1980).

87. *See, e.g.*, South Carolina v. North Carolina, 558 U.S. 256, 266 (2010) (quoting New Jersey v. New York, 283 U.S. 336, 342 (1931); *see also* New Jersey v. New York, 345 U.S. 369, 371–74 (1953); Kansas v. Colorado, 185 U.S. 125, 142 (1901).

88. *See, e.g.*, *New Jersey* 345 U.S. at 372–73; North Dakota v. Minnesota, 263 U.S. 365, 375 (1923).

Court has famously equivocated on states' standing to assert any such interests against the United States.[89]

As to the states' interests themselves, little is certain. The oft-quoted opinion in *Nebraska v. Wyoming*[90]—naming factors by which to prioritize competing claims on over-appropriated waters[91]—was recently relegated in favor of a generic "equal right" to "reasonable use."[92] Yet, as malleable as such descriptions sound, their ties to one use in particular—irrigation—have enfeebled them in the face of so many other interests in interstate waters in our Constitution's third century.[93] Their repetition by the Court, thus, frames a basic question: have they *made* a law of interstate waters?

### B. REMEDIAL BOOTSTRAPS: EQUITY MAKING THE LAW?

The Court's jurisprudence has opened a considerable law/equity rift. It declares that interstate compacts apportioning waters, unless unconstitutional, are binding law,[94] as are federal statutes that allocate.[95] In *Arizona v. California*[96] the Court

89. In *Massachusetts v. Mellon*, 262 U.S. 447 (1923), the Court held that the state lacked standing to sue the United States to vindicate its interests under the Tenth Amendment. Id. at 483. Yet, in *South Carolina v. Katzenbach*, 383, U.S. 301 (1966), it held that states could sue the United States to protect interests under the Fifteenth Amendment. Id. at 323–27. This has left states' standing to sue the United States as *parens patriae* rather muddled. *See* Massachusetts v. EPA, 549 U.S. 497, 520–21, 520 n.17 (2007).

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

91. *See Nebraska*, 325 U.S. at 618 (citing Wyoming v. Colorado, 286 U.S. 494 (1922); Washington v. Oregon, 297 U.S. 517 (1931)) (observing that "[a]pportionment calls for the exercise of an informed judgment on a consideration" of "physical and climatic conditions, the consumptive use of 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").

92. *See* Florida v. Georgia, 138 S. Ct. 2502, 2513 (2018) (quoting United States v. Willow River Power Co., 324 U.S. 499, 505 (1945)); Colorado v. New Mexico, 459 U.S. 176, 184 (1982).

93. *Cf*. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 21–22 (1992) (depicting irrigation and irrigated agriculture as a characteristic "Lord of Yesterday"). Many have isolated the *Nebraska* factors, keyed as they are to irrigation claims, for attention. *See, e.g*., Kristen A. Linsley, *Original Intent: Understanding the Supreme Court's Original Jurisdiction in Controversies Between the States*, 18(1) J. APP. PRAC. & PROC. 21, 39–40 (2017) (noting that the "resulting inquiry" is "very broad"). This includes the Court itself. *See, e.g*., Colorado v. New Mexico, 459 U.S. 176, 183 (1982); South Carolina v. North Carolina, 130 S. Ct. 854, 866 (2010); *Florida*, 138 S. Ct. at 2515. Such factors' relationship to still more generic notions like "reasonable use" apparently remains fluid. *See Florida*, at 2513–15 (linking "reasonable use" as an initial threshold to "*all relevant factors*" as a final choice method) (emphasis in original).

94. *See, e.g*., Kansas v. Nebraska, 135 S. Ct. 1042, 1053 (2015) (observing that the Court's "remedial authority gains still greater force because the Compact, having received Congress's blessing, counts as federal law"); Texas v. New Mexico, 462 U.S. 554, 564 (1983).

95. When it finally reached the interests on the Colorado River, the Boulder Canyon Project Act and federal water delivery contracts convinced the Court that the waters of the lower Colorado had already been fully allocated by law. *See* Arizona v. California, 373 U.S. 546, 565 (1963) ("Where Congress has so exercised its constitutional power over waters courts have no power to substitute their own notions of an "equitable apportionment" for the apportionment chosen by Congress.").

96. 373 U.S. 546 (1963).

was unequivocal on the point: it was without authority to allocate waters contrary to the Boulder Canyon Project Act and the authority delegated to the Secretary of Interior thereby.[97] Yet the Court has also said that its equitable apportionments are "neither dependent upon nor bound by existing legal rights to the resource being apportioned" because "although existing legal entitlements are important factors in formulating an equitable decree, such legal rights must give way in some circumstances to broader equitable considerations."[98] It has held that weighing these interests in reviewing federal agency actions that have incidental allocative effects misconstrues the judicial role in such contexts.[99] The Court has at least once set aside a federal permit as contrary to these interests: Illinois's Lake Michigan diversions.[100] It has fashioned—or allowed its special masters to fashion—damage awards for downstream states injured by upstream breaches of interstate compacts that make no mention of remedies for breach.[101] Indeed, it went so far in one recent decision as to select the rule on interest accruing from a judgment that a majority thought fairest to the parties.[102] The Court has, in short, demonstrated quite a tolerance for declaring what appear to be constitutional (or perhaps *sub*-constitutional) norms protecting these interests.[103]

Yet it may be the Court's *refusals* of relief—and of access to this docket—that show the rift at its widest. At least four times the Court has rejected claims as premature under Article III's case/controversy requirement,[104] seemingly in line with familiar standing doctrines.[105] It has also denied relief where the United

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97. *See id*. at 597 (calling equitable apportionment a "method of resolving disputes," not a substitute for laws stemming from duly exercised congressional powers). This was arguably implicit from *Wheeling Bridge II*. *See supra* notes 51–54 and accompanying text.

98. Idaho *ex rel*. Evans v. Oregon & Washington, 462 U.S. 1017, 1025 (1983).

99. *See* Arkansas v. Oklahoma, 503 U.S. 91, 107, 107 n.12 (1992) (*reversing* Oklahoma v. EPA, 908 F.2d 595, 616 (10th Cir. 1991)).

100. *See* Wisconsin v. Illinois, 278 U.S. 367, 416–21 (1929).

101. *See* Texas v. New Mexico, 482 U.S. 124, 130–34 (1987) (holding that damages may substitute for compact's remedy of repayment in water where latter would be inequitable); *see also* Kansas v. Nebraska & Colorado, 135 S. Ct. 1042, 1051–52 (2015).

102. *See* Kansas v. Colorado, 533 U.S. 1, 14–16 (2001). Technically, the majority only seemed to agree on their rejection of the dissenters' preferred rule. *See id*. at 16 n.5.

103. *Cf*. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 28 (1975) (noting that the Court's use of prophylactic doctrinal rules and remedial discretion in protecting civil liberties has been its resort to "subconstitutional" norms that must suffice unless and until Congress responds with legislation).

104. *See* Arizona v. California, 283 U.S. 423, 464 (1931); New York v. Illinois, 274 U.S. 488, 489–90 (1927); Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931); New Jersey v. New York & Pennsylvania, 283 U.S. 336, 345–46 (1931); *cf*. United States v. Nevada & California, 412 U.S. 534, 540 (1973) (denying the United States' petition for leave to file a complaint against the states of the Truckee River basin as premature); Nebraska v. Wyoming, 325 U.S. 589, 657–62 (1945) (Roberts, Frankfurter, and Rutledge, JJ., dissenting) (arguing that Nebraska's withdrawals from the North Platte River were wasteful and that a true shortage did not exist).

105. *Cf*. Vermont Agency of Nat. Resources v. United States *ex rel*. Stevens, 529 U.S. 765, 774–78 (2000); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–23 (1974); Coleman v. Miller, 307 U.S. 433, 437 (1939); Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 73 (1927). It may be worth noting that standing doctrine's historical underpinnings have been challenged as forcefully as has

States was an immune but indispensable party that had not consented to suit.[106] Although not free from doubt,[107] this too seems consistent with other, more familiar doctrines and the Constitution's text.[108] Yet, in at least nine denials of leave to sue,[109] and a dozen full-opinion denials of relief,[110] the Court has made manifest its reluctance to judge and to enjoin states.[111] It has repeatedly justified such

its conceptual coherence. *See* Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 800–51 (2004); Fallon, *supra* note 17, at 1095–1104.

106. *See* Arizona v. California, 298 U.S. 558, 571–72 (1936); Texas v. New Mexico 352 U.S. 991, 991 (1957); *cf.* Florida v. Georgia, 138 S. Ct. 2502, 2512 (2018) (noting Special Master's recommendation that the case be dismissed for lack of United States as indispensable party). Although it granted leave to file, the Court ultimately denied relief to Idaho in its Columbia-Snake River salmonid case in good part because of how bound up with the United States' dam operations the salmon run declines had been. *See* Idaho *ex rel*. Evans v. Oregon & Washington, 462 U.S. 1017, 1025–29 (1983).

107. In *United States v. Texas*, the Court rejected the state's argument that it could not be sued over a boundary dispute involving the Red River, establishing that the United States could sue states in the Court's original jurisdiction. 143 U.S. 621, 646–47 (1892) (overruling Texas' demurrer denying that it could be sued by United States as *parens patriae*). Curiously, in granting the United States' leave to bring compact claims against New Mexico in the pending dispute over the Río Grande, Justice Gorsuch's opinion suggested that leave was being granted at least in part because the United States was "seeking substantially the same relief" as Texas and because Texas had not objected to the leave. *See* Texas v. New Mexico, 138 S. Ct. 954, 960 (2018).

108. Article III differentiates "cases" surrounding legal topics of core national importance from "controversies" where its jurisdiction is defined not by subject matter but by party alignments. *See* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 494–511 (1994). Article III's inclusion of "Controversies to which the United States shall be a party" was construed to allow the Union to sue in its own courts but narrowed to exclude disputes in which the Union was the *defendant* but had not consented to suit. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 336 (1816).

109. *See* Arizona v. California, 292 U.S. 341, 360 (1934); Wisconsin v. Minnesota, 382 U.S. 935, 935 (1965); Ohio v. Wyandotte Chems. Co., 401 U.S. 493, 505 (1971); Illinois v. City of Milwaukee, 406 U.S. 91, 108 (1972); United States v. Nevada & California, 412 U.S. 534, 539–40 (1973); Arkansas v. Oklahoma, 488 U.S. 1000, 1000 (1989); South Dakota v. Nebraska, 485 U.S. 902, 902 (1986); Mississippi v. City of Memphis et al., 559 U.S. 901, 901 (2010).

The denials of leave to sue foreground certain practical similarities between the original and appellate dockets. *See* Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970s*, 91 HARV. L. REV. 1711, 1764 (1978); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1704–13 (2000) (describing the Court's discretionary control of its appellate jurisdiction since 1925). Quite simply, "[a] court that can simply refuse to hear a case can no longer credibly say that it had to decide it." *Id.* at 1717. A series of motions for preliminary injunction and leave to file surrounding the same controversy ended in nine separate denials in early 2010. *See e.g.*, Wisconsin v. Illinois, 559 U.S. 1091 (2010); Michigan v. Illinois, 559 U.S. 1091 (2010); New York v. Illinois, 559 U.S. 1091 (2010).

110. *See* Kansas v. Colorado, 206 U.S. 46, 117–18 (1907); Missouri v. Illinois, 200 U.S. 496, 526 (1906); New York v. New Jersey, 256 U.S. 296, 314 (1921); North Dakota v. Minnesota, 263 U.S. 365, 288 (1923); Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931); Washington v. Oregon, 297 U.S. 517, 530 (1936); Texas v. New Mexico, 352 U.S. 991, 991 (1957); Vermont v. New York, 417 U.S. 270, 277–78 (1974); Illinois v. City of Milwaukee, 451 U.S. 304, 331–32 (1981); *Idaho*, 462 U.S. at 1029; Colorado v. New Mexico, 467 U.S. 310, 323–24 (1984); Oklahoma & Texas v. New Mexico, 501 U.S. 221, 236–40 (1991).

111. The Court's notorious reluctance to grant relief has evidently spurred compact negotiations in several instances. *See* G. EMLEN HALL, HIGH AND DRY: THE TEXAS-NEW MEXICO STRUGGLE FOR THE

decisions in utilitarian terms: to remedy was said to entail more harm than the help to be given.[112] Petitioning states, thus, may actually have a footing before the Court like that of most other petitioners: contestants in a lottery they are unlikely to win.[113] This is curious because the Court's theory of states' sovereign dignity is at least nominally a *rejection* of utilitarian balancing.[114] The state is owed its sovereign dignity regardless of who is harmed or helped.[115] Even putting aside the folklore that a denial of relief is a denial of right,[116] thus, the states' legal interests in shared waters are both increasingly focal and increasingly opaque.

The Court's docket has turned noticeably in the last three decades to adjudicating the breach of interstate waters compacts.[117] As in other compact fields,[118] its dignitarian theory of state sovereignty has featured here, too.[119] The Court recently reasoned that any bargain struck for waters in a compact must be

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PECOS 4–5 (2002); *see generally* NORRIS HUNDLEY, JR., DIVIDING THE WATERS: A CENTURY OF CONTROVERSY BETWEEN THE UNITED STATES AND MEXICO (1966). Some commentary has lately argued that the Court's tendency has invariably prejudiced states' interests. *See generally* Jonathan Horne, *On Not Resolving Interstate Disputes*, 6 N.Y.U. J. L. & LIB. 95 (2011).

112. *See, e.g.*, *Kansas*, 206 U.S. at 107–18; *Connecticut*, 282 U.S. at 672–74; *Washington*, 297 U.S. at 522–29; *See* Colorado v. Kansas, 320 U.S. 383, 393–94 (1943) (*Colorado I*); *Colorado II*, 467 U.S. at 319–23. Only in *Colorado II* did a dissent contest the Court's denial of relief. *See* 467 U.S. at 824 (Stevens, J., dissenting).

113. *See Colorado II*, 467 U.S. at 324–26 (1984) (Stevens, J., dissenting) (arguing that complaining State's burden of proof and majority's approach to special master's report made it effectively impossible to gain relief); *see also* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 216 (1991). Perry even concluded that this rendered the original docket unworthy of separate consideration within a study of the Court's 'deciding to decide.' *See id*. at 24–25 (observing that the original docket "need not detain us").

114. *See* Litman, *supra* note 20, at 1253–55 (describing the Court's dignitarian theory of state sovereignty as "expressive," as entitling states to a certain kind of respect regardless of how they may have wronged citizens, and as absolving states from burdens they might otherwise bear); *cf*. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018) ("The [Court's] anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution . . . to withhold from Congress the power to issue orders directly to the States.").

115. *Cf*. Goldsmith & Levinson, *supra* note 15, at 1852 ("Once the sovereign 'state' is identified with the people, sovereignty comes close to meaning democracy, and the difficulty comes in explaining how constitutional law legitimately can place limits on the democratic exercise of popular will.").

116. *See, e.g.*, KARL LLEWELLYN, THE BRAMBLE BUSH 83–84 (1960) ("Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do."); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court—and so of a legal right.").

117. *See, e.g.*, Texas v. New Mexico, 482 U.S. 124 (1987); Kansas v. Colorado, 533 U.S. 1 (2001); Kansas v. Nebraska and Colorado, 135 S. Ct. 1042 (2015); Montana v. Wyoming & North Dakota, 136 S. Ct. 1034 (2016).

118. *See, e.g.*, Alabama v. North Carolina, 560 U.S. 330, 351–53 (2010) (holding that interstate compacts do not imply a duty of good faith or fair dealing and that a federal court may not order punitive relief against a state that strategically withdraws from compact to the great detriment of other states).

119. *See, e.g.*, Virginia v. Maryland, 540 U.S. 56, 67–69 (2003) (reading 1785 compact and 1877 arbitral award between Virginia and Maryland to reserve to Virginia the traditional incidents of sovereignty over Potomac River because they were not expressly foreclosed).

understood as having emerged "in the shadow of [the Court's] equitable apportionment power,"[120] confessing that it was "'difficult to conceive' that a downstream State 'would trade away its right' to [an] equitable apportionment if, under such an agreement, an upstream State could avoid its obligations."[121] Yet it is hardly clear that the Court can actually distinguish these aggregate interests in shared waters (or their accommodation) from the adjudication of particularized private claims to the same resource(s).[122]

Finally, because the Court has repeatedly rejected utilitarian balancing of states' sovereign prerogatives,[123] these interests in interstate waters have grown increasingly opaque. The Court allows that the Constitution itself presupposes a measure of judicial commandeering in its requirements that state courts adjudicate federal claims and defenses.[124] But that speaks not at all to a federal court—even the Supreme Court itself—ordering state authorities around by decreeing that *they* rebalance the private entitlements to their waters.[125] That sort of

120. Kansas v. Nebraska & Colorado, 135 S. Ct. 1042, 1052 (2015). Citing *Kansas v. Colorado*, the Court announced that it "ha[d] recognized for more than a century its inherent authority, as part of the Constitution's grant of original jurisdiction, to equitably apportion interstate streams between States." *Id.*

121. *Kansas*, 135 S. Ct. at 1052 (quoting Texas v. New Mexico, 482 U.S. 124, 134 (1987), as a basis for awarding damages). This was remarkable because one of the very few interstate compacts done in the shadow of the Supreme Court's original jurisdiction was done after the Court had twice denied any relief to the downstream state. *See* David W. Robbins & Dennis M. Montgomery, *The Arkansas River Compact*, 5 U. DENV. WATER L. REV. 58, 92 (2001).

122. As just one example, in a dispute over their Yellowstone River Compact, Montana and Wyoming differed in their interpretation of the compact's controls on changes of use—specifically, the upstream state's users' wholesale change from flood to drip irrigation technology. *See* Montana v. Wyoming & North Dakota, 563 U.S. 368, 375–78 (2011). In resolving that this kind of technological shift, because it was not expressly forbidden by the compact, was at least not *per se* violative of the downstream state's rights, the Court reasoned that the absence of individual litigation over such changes of use by private appropriators in either of the states "strongly implie[d]" that wholesale technological change did not deny the downstream state's rights under the "no injury rule" and so was not within the compact's prohibitions either. *See id.* at 379–81. Of course, the risk/reward balance of individual claims brought in a no-injury state law regime bear *no* necessary relation to the analogous balance(s) of *aggregate* state interests claimed before the Supreme Court. Deterrence of the former, thus, is hardly probative of the latter.

123. *See* Nat'l Fed'n Indep. Business v. Sebelius, 56 U.S. 519, 580–81 (2012) (invalidating conditional federal funds for Medicaid insurance coverage expansion as an overly coercive "gun to the head" of the states); Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 498–99 (2003) (refusing to balance state interests in the application of California and Nevada's competing statutory policies for full faith and credit purposes out of a perceived futility in doing so); New York v. United States, 505 U.S 144, 175 (1992) (invalidating provision of Low Level Radioactive Waste Policy amendments for having "crossed the line distinguishing encouragement from coercion" of states).

124. *See, e.g.*, Printz v. United States, 521 U.S. 898, 907 (1997) ("It is understandable why courts should have been viewed distinctively . . . unlike legislatures and executives, they applied the law of other sovereigns all the time."); Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018) ("[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.").

125. *See* New York v. United States, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."); *Printz*, 521 U.S. at 935 ("The Federal Government may neither issue directives requiring States to address

equitable relief may be "commandeering" in its purest form. Even in the epic litigation over Virginia's public debt as of its secession[126] the Court had pointed misgivings about ordering the West Virginia legislature to pay its share.[127]

The only evident way to square the Court's disparate accounts of our judicial federalism and waters is that the shared waters injuries actuating the Court's remedial powers have been and are *constitutional* at base.[128] One might, following Hohfeld, classify the many denials of relief as the complaining state's *no-right*,[129] but even this would make more out of the Court's work than it has usually allowed. The large majority of the denials have been without prejudice,[130] *i.e.*, non-final.[131] In fact, the Court has at

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particular problems, nor command the States' officers . . . . It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."). Despite the roots in standing analysis, *see* Woolhandler & Collins, *supra* note 18, at 395 ("Allowing states to sue as plaintiffs to vindicate their general interest in protecting their citizens signaled that majoritarian interests in exercising power were considered to be the rough equivalents of individualized, common-law claims of right, at least insofar as standing was concerned."), the Court's remedial authority over states is surely an *exception* to its declared understandings of the Tenth Amendment today. *Cf.* Alabama v. North Carolina, 560 U.S. 330, 351–52 (2010) (distinguishing normal contract law from relief to be granted in compact dispute on the grounds that the Court is powerless to "'order relief inconsistent with [the] express terms' of a compact, 'no matter what the equities of the circumstances might otherwise invite.'" (quoting New Jersey v. New York, 523, U.S. 767, 811 (1998))).

126. *See* Orth, *supra* note 5, at 90–109; Anne Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 118–20 (1997).

127. *See* Virginia v. West Virginia, 246 U.S. 585, 593–601 (1918); *cf.* Note, *supra* note 19, at 692 (calling this the "hardest question" raised by the State-State original jurisdiction docket). Although the Court ultimately concluded that Article III *did* vest it with such authority, see 246 U.S. at 600, it has rarely *ordered* states to do anything.

128. Given the Court's precedents, the Tenth Amendment may ground these injuries in the Constitution. *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 114–15 (1995) (discussing *New York & FERC v. Mississippi*); *cf.* David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987, 1030–38 (1965) (raising but rejecting the prospect that a federal common law of interstate waters entails that state interests in the waters must be constitutional for jurisdictional purposes). If so, it is of considerable consequence to the injuries' legal effect. *See* Thomas W. Merrill, *The Common Law Powers of the Federal Courts*, 52 U. CHI. L. REV. 1, 55–56 (1985) (contrasting "delegated" and "preemptive" lawmaking by federal courts and their legitimacy).

129. Hohfeld's account of "jural opposites" and "correlatives" in judicial reasoning aligned one party's "privilege" to some other party's (or parties') "no-right" where a *privilege* to enter is "the negation of a duty to stay off." WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 37–39 (Walter Wheeler Cook ed., 1919) (Greenwood Press 1978). Duty-negation is at least presumably adjudicable.

130. The Court explicitly declared that the denial of relief (or of leave) was without prejudice in numerous opinions. *See e.g.*, Missouri v. Illinois, 200 U.S. 496, 526 (1906); Kansas v. Colorado, 206 U.S. 46, 117 (1907); New York v. New Jersey, 256 U.S. 296, 314 (1921); North Dakota v. Minnesota, 263 U.S. 365, 388 (1923); New York v. Illinois, 274 U.S. 488, 490 (1927); Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931); Arizona v. California, 283 U.S. 423, 464 (1931); Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 505 (1971); United States v. Nevada and California, 412 U.S. 534, 540 (1973); Idaho *ex rel.* Evans v. Oregon & Washington, 462 U.S. 1017, 1029 (1983). Justice Cardozo's meticulous opinion in *Washington v. Oregon* remains the only instance where the Court

least once expressly rejected an argument that a prior denial of relief was a judgment in favor of the defending state.[132] Indeed, that was the very opinion by which the Court granted what amounted to an anti-suit injunction to that state—the successful defendant in the prior proceedings—against private claimants pressing downstream injuries in *its* courts and in the lower federal courts.[133] As Professor Sherk put it, "the Court established the precedent that the initiation of litigation in lower courts . . . may meet the 'injury or damage' requirement."[134] Shielding its own water users from repetitive litigation of *their* interests was evidently enough stake for the state before the Court. Thus, although the Court has in general guarded federal courts' remedial discretion assiduously—even in the face of statutory interventions[135]—its apparent tendency to take jurisdiction over these injuries is matched to a less predictable tendency to deny relief absent extraordinary circumstances.[136]

One response may be that *fairness* to the states comes one case at a time—starting with whether to take jurisdiction.[137] Yet if, as it declared in 1987, "[b]y ratifying the Constitution, the States gave [the Court] complete judicial power to

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conclusively denied relief in a decree affirming a special master to the effect that the complaining state could not make a case. *See* 297 U.S. 517, 530 (1936).

131. A dismissal without prejudice will generally not bar future litigation of the same claim(s) by the same claimant. *See* Semtek, Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505 (2001) (observing that an "'adjudication upon the merits' is the opposite of a 'dismissal without prejudice'"). The Court has dismissed certain waters complaints with prejudice, however, as, for example, the dismissal owing to a settlement the parties reached in *Kansas v. Nebraska & Colorado*, 538 U.S. 720, 720 (2003) (No. 126 Orig.).

132. *See* Colorado I, 320 U.S. 383, 391 (1943) ("Colorado urges that our decision in [*Kansas*] amounted to an allocation of the flow of the Arkansas River between the two States. We cannot accept this view.").

133. *See id.* at 400. Colorado's bill in the Court's original jurisdiction detoured it around several otherwise delicate questions of its remedy's place in equity or law, arising under federal or state law, and available jurisdictional bases in the Court's appellate jurisdiction. *Id.*

134. GEORGE WILLIAM SHERK, DIVIDING THE WATERS: THE RESOLUTION OF INTERSTATE WATER CONFLICTS IN THE UNITED STATES 8 (2000).

135. *See generally* Jared Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV 485 (2010); Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513 (1984); Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524 (1982).

136. *See, e.g.*, Linsley, *supra* note 93, at 45–49; Lauren D. Bernadett, *Equitable Apportionment in the Supreme Court: An Overview of the Doctrine and the Factors Considered by the Supreme Court in Light of* Florida v. Georgia, 29 J. ENVTL. L. & LITIG. 511, 517–21 (2014). Interestingly, the Court has been especially open to modifying its decrees in the interstate waters cases. *See* Mandilk, *supra* note 19, at 1901–02, 1919.

137. This much is manifest in the Court's opinions on denying leave to file. *See* McKusick, *supra* note 19, at 197 ("In practice, the Court's exercise of discretion in determining the 'appropriateness' of a state-party suit has entailed a three-dimensional analysis, focusing on three factors: (i) the *parties* to the suit; (ii) the *subject matter* of the suit and its "seriousness and dignity," that is, its importance; and (iii) the existence or not of an *alternative forum*, for the cause of action or for at least the controlling issue." (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972))).

adjudicate disputes among them,"[138] then decisions weighing "*all* the factors which create equities in favor of one State or the other"[139] which are explained in deliberately reasoned and officially reported opinions would be misleading at best if they were *not* what the Court does elsewhere under Article III: set precedent.[140] Equity is supposed to follow the law, of course, and even minimalistic decisions—assuming they *are* precedents—should inform a proper fairness inquiry in later suits.[141] The fairness answer, thus, begs the real question: may the Court *shape* a law of interstate waters through its jurisprudence?

1. Original Jurisdiction Opinions as Sources of State Interests

At first pass, original jurisdiction precedents' binding force appears limited.[142] The original jurisdiction differs from what we may call "revisory" jurisdiction.[143] For claims only the Court may adjudicate, the institutional hierarchy charging high court opinions with their familiar force is missing: only the Court itself need decide whether to follow its own precedent.[144] Where the Court

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138. Texas v. New Mexico, 482 U.S.124, 128 (1987) (citing Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 720 (1838)).

139. *Colorado I*, 320 U.S. 383, 393–94 (1943) (emphasis added).

140. As the literature on precedent documents in depth, judicial decisions and their communication entail costs and the more often the same decision must be made repeatedly the more excessive those costs. *See* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 21–26 (2009); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 46–60 (1999); *cf.* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572–75 (1987) (explaining forward-looking and backward-looking decision costs). Here, besides mounting decision costs, the Court would be denying the equality of states if it refused to be bound by past precedents in present controversies.

141. The fairness of deciding like cases alike is (and has long been) among the core justifications for following precedent. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?* 46 STAN. L. REV. 817, 849–56 (1994); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 145–46 (1996) (noting that factored decision-making is typically attentive to precedent because it is so often the core of aspiring to fair treatment); Schauer, *supra* note 140, 595–97.

142. Not only is the original jurisdiction a tiny fraction of the Court's caseload. For those disputes falling within the Court's exclusive original jurisdiction, only the Court's members and its special masters *may* be bound. *Cf.* Caminker, *supra* note 141, at 824 ("The duty to obey hierarchical precedent tracks the path of review followed by a particular case as it moves up the . . . judicial tiers."); Schauer, *supra* note 141, at 599 ("When a precedent has no decisional significance as a precedent, the conscientious decisionmaker must look at each case in its own fullness.").

143. *See* Caminker, *supra* note 141, at 824 ("[A] court can ignore precedents established by other courts so long as they lack revisory jurisdiction over it."). Official reporters played a key role in the formation of our judicial hierarchies. And the Supreme Court's opinions grew more focal as its capacity as a court of error waned. *See* Grove, *supra* note 140, at 47–50. What remains considerably less clear is the place of a Supreme Court opinion in subsequent *Supreme Court* original jurisdiction proceedings. *Cf. id.* at 45–56 (describing trend toward a "vertically maximal" approach to opinion writing on the Supreme Court throughout the Twentieth century and the Court's focus on law declaration over error correction); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 945–46, 945 n.114 (2016) (collecting sources and noting that the Supreme Court exists today largely to create uniform national precedents binding inferior courts).

144. Compare Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019) (noting that "*stare decisis* is 'not an inexorable command'" and noting that the Court itself will employ a multi-factored approach to

has done so in boundary disputes over time,[145] its equitable apportionments have shown an unsettling tendency toward highly specific decisions[146]—as well as a tolerance for letting conflicts linger unresolved for years or decades.[147]

For its part, the Court has signaled repeatedly that it regards its interstate waters original jurisdiction controversies as precedents for similar future cases.[148] Yet it has just as emphatically declared that everything in such a controversy turns on how *the Court* balances the equities[149]—seemingly reserving any ultimate judgment(s) as completely unfettered.[150] So are these signals to inferior courts that they regard the opinions as precedent (to whatever extent *they* may)—or merely to the Court's own (future) proceedings?[151] The Court almost surely

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decide whether to overrule its own precedent interpreting the Constitution), *with* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (holding that the Court's revisory jurisdiction over state courts as provided by Section 25 of the Judiciary Act of 1789 is necessary to protect both private rights and public interests that would be jeopardized by the excessive conflict among jurisdictions if a single final adjudicator did not exist).

145. For example, the Court's consistent adherence to the 'rule of thalweg,' or the use of the middle of a flowing channel of a navigable water as the location of any interstate boundary, has hardened that principle as "interstate common law." *See* Louisiana v. Mississippi, 516 U.S. 22, 24–25 (1995) (reviewing four prior disputes between Louisiana and Mississippi over the location of the state boundary in the Mississippi River and the Court's constant application of the rule) (citing Arkansas v. Tennessee, 397 U.S. 88 (1970); Indiana v. Kentucky, 136 U.S. 479 (1890); Missouri v. Kentucky, 78 U.S. (11 Wall.) 395 (1871)); *see also* Arkansas v. Tennessee, 246 U.S. 158, 177 (1918).

146. *See* Mandilk, *supra* note 19, at 1899–1902; Linsley, *supra* note 93, at 39–40; Rhett B. Larson, *Inter-State Water Law in the United States of America: What Lessons for International Water Law?*, 2 (3) INT'L WATER L. 1, 19–20 (2017); Bernadett, *supra* note 136, at 534. This much was evident early on. *See* W.J. Wehrli, *Decrees in Interstate Water Suits*, 1 WYO. L.J. 13, 21 (1946).

147. The Court has at least twice admonished states to settle their dispute given its perception of the low stakes and mounting dispute costs. *See, e.g.*, Montana v. Wyoming & North Dakota, 135 S. Ct. 1479, 1479 (2015) ("Parties are . . . directed to consider carefully whether it is appropriate for them to continue invoking the jurisdiction of this Court."); Texas v. New Mexico, 462 U.S. 554, 576 (1983) ("[I]t is difficult to believe that the bona fide differences in the two States' views of how much water Texas is entitled to receive justify the expense and time necessary to obtain a judicial resolution to this controversy."). In a third case it observed that litigation in general was unlikely to resolve the sewage disposal crisis then afflicting major urban centers. *See* New York v. New Jersey, 256 U.S. 296, 313 (1921).

148. *See, e.g.*, Florida v. Georgia, 138 S. Ct. 2502, 2513 (2018) ("Our prior cases clearly establish that equitable apportionment will only protect those rights to water that are 'reasonably required and applied.'" (quoting Colorado II, 459 U.S. 176, 184 (1982))); *Colorado II*, 459 U.S. at 182 (concluding that the "criteria relied upon by the Special Master comport with the doctrine of equitable apportionment as it has evolved in our prior cases").

149. *See, e.g.*, *Florida*, 138 S. Ct. at 2513 (quoting United States v. Willow River Power Co., 324 U.S. 499, 505 (1945)); *Colorado II*, 459 U.S. at 184.

150. *See, e.g.*, Colorado v. Kansas, 320 U.S. 383, 391–94 (1943) (*Colorado I*); *Colorado II* 467 U.S. at 325–39 (1984) (Stevens, J., dissenting) (challenging majority's analysis of Special Master's proceedings and arguing that it was without precedent and without deference to the master's findings and conclusions).

151. In *Illinois v. City of Milwaukee*, quoting the *Nebraska* factors in a case about pollution, it stated that "[t]he question of apportionment of interstate waters is a question of "federal common law" upon which state statutes or decisions are not conclusive." *Id.* at 105–06.

possesses the *practical* authority for either directive.[152]

The consequences loom large. How should states decide whether to bear the substantial cost and considerable risk of an original action if *not* by comparing their claims to the relevant precedents?[153] Fairness to states would seem to demand that the past holdings serve as binding precedent.[154] Equal dignity means, if anything, that that which is protected to one state is owed to all reciprocally.[155] Indeed, how could a dignified state decide whether to "give up" its so-called "rights"[156] in whatever bargain it might strike with its peer(s) and/or Congress by interstate compact except by measuring the Court's extant decisions?[157] As Congress and compacts govern more of the disputes arising from interstate waters, a plurality of forums must confront these questions. Part II refocuses there.

## II. REVISORY JURISDICTION AND JUDICIAL HIERARCHY: INTERESTS OVER REMEDIABLE INJURIES

Some of the interstate waters jurisprudence has arisen from the Court's "revisory" or non-original dockets.[158] These cases subtly highlight the importance of

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152. The Court's place in our judicial hierarchies, though not free from doubt, is probably at least "'supreme' in defining the content of federal law." Grove, *supra* note 140, at 40; *see also id.* at 31–40; Caminker, *supra* note 141, at 818 (noting that "longstanding doctrine dictates" that a court is bound to follow a precedent established by a court "superior" to it); Adam Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1739–43 (2013). It is worth noting that inferior courts' handling of high court precedents often results in important "narrowing" and sharpening thereof, often to the advantage of all concerned. *See* Re, *supra* note 143, at 951–71.

153. *See* Caminker, *supra* note 141, at 850 (noting that obedience to higher court precedents facilitates uniformity, predictability, and accuracy because of the proficiency in deciding issues of law that comes from being an appellate court). *But cf.* Horne, *supra* note 111, at 104–16 (describing the Court's "general aimlessness" in its original jurisdiction cases and the conflicting signals sent to would-be litigants).

154. *See* Pushaw, *supra* note 108, at 475, 475 n.143 (noting that, among the hallmarks of "cases" in the Founders' understanding, the concept of *stare decisis*, "decided cases as binding authority on lower courts," had emerged in the Sixteenth and Seventeenth centuries). The original jurisdiction grants in Article III arguably bolster this reasoning. *Cf.* California v. Arizona, 440 U.S. 59, 65–66 (1979) ("The Framers seem to have been concerned with matching the dignity of the parties to the status of the court . . . ."); United States v. Texas, 143 U.S. 621, 643 (1892) ("Such exclusive jurisdiction [as was made exclusive by the Judiciary Act of 1789] was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation."). This "dignified tribunal" theory of the original jurisdiction grants, however, has been problematic when that jurisdiction is concurrent or when a federal question is present. *See generally* Pfander, *supra* note 18.

155. *Cf.* Shelby County v. Holder, 570 U.S. 529, 544 (2013) (observing that "[n]ot only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the States"); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 733–34 (1988) [hereinafter Monaghan, *Stare Decisis*] (observing that *stare decisis* accounts for much of why our present-day Constitution differs so considerably from an original understanding of our federalism or separation of powers).

156. *See* Kansas v. Nebraska & Colorado, 135 S. Ct. 1042, 1052 (2015).

157. On some of the first compacts and the interplay between their negotiation and the Court's jurisprudence, see DANIEL TYLER, SILVER FOX OF THE ROCKIES: DELPHUS E. CARPENTER AND WESTERN WATER COMPACTS (2003).

the forum within our judicial systems and the contours of the Court's (evolving) appellate jurisdictions.[159] "In [our] pyramidal judiciary, precedent's primary role is vertical."[160] Yet, over time, this verticality has shifted for our Supreme Court and interstate waters. State sovereign claims to waters began from the federal judge-made law of equal sovereignty.[161] Any such interest protected to one state is owed to all equally.[162] Thus, as the judge-made doctrines evolved, so too did the states' shared waters interests.[163] For example, the Court struggled for more than a century with the law to be applied where riparian rights to shared waters

158. *See e.g*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851); The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870); United States v. Rio Grande Dam & Irr. Co., 174 U.S. 690 (1899); Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908); Bean v. Morris, 221 U.S. 485 (1911); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925); Oklahoma *ex rel*. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941); Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Sporhase v. Nebraska *ex rel*. Douglas, 458 U.S. 941 (1982); Arkansas v. Oklahoma, 503 U.S. 91 (1992). A long history of Congress changing the Court's "appellate" (or "revisory") jurisdiction thwart straight-line comparisons.

159. Article III may oblige "inferior" *federal* courts to follow Supreme Court precedents, but its silence as to *state* cases and courts and the Supreme Court's revisory jurisdiction therein has remained contentious. From *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), continuing through the sweeping changes to the judicial code during Reconstruction, *see* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875), more such changes in the Twentieth century, *see* Michigan v. Long, 463 U.S. 1032, 1037–44 (1983), to the contemporary differentiations of state from federal law, the Court's own crooked path to its current account of its revisory jurisdiction records a varied sense of the significance of its own precedents. *See* Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 CORNELL L. REV. 243 (2018); Matasar & Bruch, *supra* note 85, at 1382–89; *cf.* Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 798–810 (1957) (tracing the many questions surrounding the state-federal law boundary that emerged in the wake of *Erie v. Tompkins* and the Court's shifting approaches thereto).

160. Re, *supra* note 143, at 971.

161. In *Martin v. Waddell's Lessee*, the Court held that title to submerged lands in New Jersey's Raritan Bay were an incident of sovereignty that had passed to the State as successor to the Crown's prerogatives and not as private property retained by one of the Crown's proprietors. 41 U.S. (16 Pet.) 367, 417–18 (1842). *Martin* arguably established this as federal constitutional common law—which then became an incident of sovereignty to which all states were entitled under the Court's equal footing doctrine. *See* Pollard's Lessee v. Hagan, 44 U.S. (13 How.) 212, 223 (1845).

162. *See* Coyle v. Smith, 221 U.S. 559, 580 (1911) ("[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."); *Pollard's Lessee*, 44 U.S. at 223 (declaring that admission to the Union "on an equal footing with the original states" entails the State's having "succeeded to all the rights of sovereignty, jurisdiction, and eminent domain" claimed by original states).

163. In *Pollard*, the Court's equal footing doctrine and the law of nations were said to require that the ownership of submerged lands in navigable waters be reserved to the State. *See* 44 U.S. at 221–24. The bed and banks of Alabama's Mobile River, the product of three interstate tributaries intersecting to form the river and Mobile Bay and flowing shortly into the Gulf of Mexico, were the subject of a title dispute tracing to a federal grant. *See id*. The Court's majority held up Alabama's place in the Union equal to that of the original states to decide that the federal grant could not have reserved any sovereign prerogative to the United States for those prerogatives were merely being held in trust for the State. *See id.* at 221. *Pollard*'s equal footing holding would become a bedrock principle of law in both the

were being adjudicated.[164] It held repeatedly that state law should ordinarily decide while also maintaining that, regardless of that default, federal legislation, federal common law, or federal jurisdiction could affect the rules of decision.[165] But with the systems of such rights varying so from state to state and *Wheeling Bridge* and other shared waters opinions lingering about, a long stream of cases probed the many federal and state interests—challenging the Court to become increasingly precise in its accounts thereof.[166]

A core example of this increasing precision is interstate export. Although the Court once held that states could forbid the export of their waters[167] due in large part to the public interest in water supply,[168] it was eventually persuaded to narrow that holding considerably.[169] State laws can obviously be a significant influence in the scarcity or abundance of local water resources, leaving simple 'dormant' commerce clause analyses ill-fitting.[170] Balancing state autonomy with obligations to the Union, in short, demands considerable finesse.[171] If that finesse is not legislative, it must be judicial and that implicates the availability and choice

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Supreme Court and inferior courts. *See, e.g.*, ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989); *Coyle*, 221 U.S. at 567; Stearns v. Minnesota, 179 U.S. 223, 245 (1900).

164. *See* Shively v. Bowlby, 152 U.S. 1, 15–46 (1894) (reviewing cases); Oregon *ex rel.* State Land Bd. v. Corvallis Sand and Gravel Co., 429 U.S. 363, 372–82 (1977) (reviewing cases and overruling Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973)).

165. *See* United States v. Holt State Bank, 270 U.S. 49, 55–56 (1926); Hardin v. Jordan, 140 U.S. 371, 380–402 (1891); *see also* Packer v. Byrd, 137 U.S. 661, 669–70 (1891); Railway Co. v. Renwick, 102 U.S. 180, 183 (1880); Jennison v. Kirk, 98 U.S. 453, 461 (1879); Barney v. Keokuk, 94 U.S. 324, 336–38 (1876).

166. In an interstate dispute decided after *Wheeling Bridge I* but before *Wheeling Bridge II*, the Court held in *Rundle v. Delaware and Raritan Canal Co.*, that the parties—riparians on opposite banks of the Delaware River dividing Pennsylvania and New Jersey—were holders of what it called *revocable licenses* to the river's flow. 55 U.S. 80, 94 (1853). The Court, through Justice Grier for a 5–4 majority, upheld the lower court's dismissal on the grounds that New Jersey law specifically authorized the dam and diversion at issue and Pennsylvania law, were the diversion on its side, would have immunized the defendant from liability. *See id.* at 90–94. That overall approach appeared in several subsequent cases. *See* Transp. Co. v. Chicago, 99 U.S. 635, 640–43 (1879); St. Louis v. Myers, 113 U.S. 566, 567–68 (1885). Even as the Court's jurisdictional grounds shifted to the due process claims from a state's having allegedly 'deprived' riparian property, the Court *first* applied state law defining the riparian interest(s) as either in being or not in being. *See, e.g.*, Kaukauna Water-Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254, 269–72 (1891); St. Anthony Falls Water Power Co. v. St. Paul Water Comm'n, 168 U.S. 349, 358–71 (1897) (reviewing cases); Green Bay & Miss. Canal Co. v. Patten Paper Co., 172 U.S. 58, 68–82 (1898); Scranton v. Wheeler, 179 U.S. 141, 152–65 (1900).

167. *See* Hudson County Water Co. v. McCarter, 209 U.S. 349, 356–58 (1908).

168. *See Id.* at 356 ("[F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.").

169. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 945–54 (1982); *see also* Weiland v. Pioneer Irr. Co., 259 U.S. 498, 502–03 (1922).

170. *See Sporhase*, 458 U.S. at 956–57; Tarrant Regional Water Dist. v. Herrmann, 569 U.S. 614, 632 & n.11 (2013).

171. *See* Larson, *supra* note 146, at 44–50.

of forum(s).[172] Although few of the Court's revisory jurisdiction holdings have turned upon waters' being interstate, many have turned on waters' being wholly *intra*-state.[173] The negative implication parallels the equitable apportionment docket: interstate waters are unique jurisdictionally, equitably, and perhaps legally. Section A explains the horizontal dimensions of this implication and Section B the vertical.

### A. FROM DIGNIFIED TRIBUNAL TO PYRAMID PEAK

No better exploration of forum-independence exists than the generations-long struggle over Lake Michigan's diversion into what is now known as the Chicago Area Waterway System (CAWS).[174] This engineered reversal of several small streams originally flowing into Lake Michigan began as an effort to flush Chicago's sewage down the Illinois and Mississippi Rivers.[175] In holding that the

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172. The admiralty jurisdiction and the lawmaking powers taken to inhere therein remain exemplary. The Court expanded the admiralty jurisdiction's territorial reach throughout the Nineteenth century—often in view of interstate waters' many shared advantages. *See, e.g.*, The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1870); The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 457–58 (1852). That expansion then implied more lawmaking authority—for the Court as well as for Congress. Consider *Atlee v. Packet Co.*, 88 U.S. 389 (1875). It began as an admiralty libel in the lower federal courts concerning a pier piling built in the main channel of the Mississippi with which the libellant's barge collided. *Id.* Reversing the judgment, the Court cut a damages award by half on the grounds that the pilot's ignorance of the pier's location was contributory negligence given the common standards of care that Mississippi River pilots were held to maintain. *See id.* at 396–98. Similarly, in the famous *Chelentis* and *Jensen* cases the Court held that state law rights—including those conferred by state statute—yielded to federal maritime law and procedure as construed by the Court. *See* So. Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 383 (1918).

173. The Black-Bird Creek case, distinguished in *Wheeling Bridge I* as involving the obstruction of a minor, wholly *intra*-state tributary of the Delaware River, affirmed a judgment from the Delaware high court that *state law* controlled the parties' rights exclusively. *See* Willson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 250–52 (1829). Similarly, in *Veazie v. Moor*, the Court held that the very same federal coasting license that immunized vessels from state-granted monopolies in *Gibbons v. Ogden* did *not* do so on rivers like the Penobscot that were wholly intra-state and had non-navigable reaches separated from the coasts. 55 U.S. (14 How.) 568, 575 (1853). Finally, shortly after *Wheeling Bridge*, in a diversity action against the city in *Gilman v. Philadelphia*, bridges obstructing navigation on a Pennsylvania tributary of the Delaware were held to be immunized from liability by state law. 70 U.S. 713, 732 (1866) (Schuylkill River, Pennsylvania). *Gilman*'s choice of law was enforced uniformly thereafter. *See* Sands v. Manistee River Improvement Co., 123 U.S. 288, 293 (1887) (Manistee River, Michigan); Hamilton v. Vicksburg, Shreveport & Texas R. Co., 119 U.S. 280, 282 (1886) (Bouff River, Louisiana); Cardwell v. Amer. Bridge Co., 113 U.S. 205, 205 (1885) (American River, California); Escanaba Co. v. Chicago, 107 U.S. 678, 679 (1883) (Chicago River, Illinois); Pound v. Turck, 95 U.S. 459, 462 (1878) (Chippewa River, Wisconsin); *cf.* The Passaic Bridges, 70 U.S. (3 Wall.) 782, 792 (1865) (Passaic River, New Jersey).

174. The public nuisance action pursued by Michigan and others against the Corps of Engineers' operation of that system is reviewed in *Michigan v. U.S. Army Corps of Eng'rs*. *See* 758 F.3d 892, 894–99 (7th Cir. 2014).

175. The project's first stage spurred the litigation in *Missouri v. Illinois*, 180 U.S. 208, 248 (1901), which became the Court's first denial of relief in a state's nuisance action against another state, *see* Missouri v. Illinois, 200 U.S. 496, 526 (1906)—*after* the Court had first published an exhaustive analysis confirming its exclusive jurisdiction to hear the dispute. *See Missouri*, 180 U.S. at 220–41.

United States could seek and be awarded an injunction capping Chicago's diversions into the Illinois/Mississippi watershed, the Court first affirmed a district court's recognition of the Nation's (non-statutory) cause of action arising under the Commerce Clause and certain treaty responsibilities to Canada.[176] Indeed, it believed the Nation's interests in the lakes might well be superior to those of the adjacent states.[177]

Later litigation of the states' interests in the lakes and in the CAWS confirmed, however, that the states' quasi-sovereign interests *could* be adjudicated outside the Supreme Court.[178] Those courts were undeterred by the Supreme Court's having supervised the CAWS diversion and its abatement for decades.[179] Thus, although the Court's equitable power to apportion shared waters' benefits as between states may be exclusive to the Court by statute,[180] that jurisdiction was

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176. *See* Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 425–26 (1925). That decree was only entered after years of dilatory delays by the district judge, Kenesaw Mountain Landis, that ended with his leaving the bench to helm major league baseball. *See* Herbert H. Naujoks, *The Chicago Water Diversion Controversy*, 30 MARQ. L. REV. 149, 158 (1946).

177. *See Sanitary Dist*., 266 U.S. at 425–26. This part of Holmes' opinion answered the defendant's argument that the City of Chicago's health and welfare were dependent upon the diversion which had been authorized by Illinois law. *See id*. at 426 ("As to the ultimate interest in the Lakes the reasons seem to be stronger than those that have established a similar standing for a state, as the interests of the nation are more important than those of any state."). The scope and relative priority of the Union's interests in shared waters have reappeared periodically in the Court's opinions. *See* Int'l Paper Co. v. United States, 282 U.S. 399, 406–07 (1931); State of Oklahoma *ex rel*. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 521–28 (1941); United States v. Willow River Power Co., 324 U.S. 499, 509–11 (1945); First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152, 170–75 (1946); United States v. Twin City Power Co., 350 U.S. 222, 225–26 (1956); United States v. R.B. Rands, 389 U.S. 121, 122–24 (1967).

178. *See, e.g*., Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 770–71 (7th Cir. 2011); *see also* South Dakota v. Ubbelohde, 330 F.3d 1014, 1021–27 (8th Cir. 2003) (Missouri River); Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1252 & n.8 (11th Cir. 2002) (Flint River).

179. Only two terms after *Sanitary District* the Court heard the complaint of Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania and New York against Illinois and the Sanitary District. *See* Wisconsin v. Illinois, 278 U.S. 367 (1929). Special Master Charles Evans Hughes had recommended that the Secretary of War's permit to the Sanitary District capping its diversion be enforced as issued—even as the District ignored its mass limits. *See* Naujoks, *supra* note 176, at 164–65. In an opinion that delicately set aside the permit as insufficient to protecting the complaining states, the Court noted that immediately enjoining the diversion would drown the city in its own sewage but that the Great Lakes States' interests in the lake levels nevertheless required action. *See* Wisconsin, 278 U.S. at 416–18. The next term saw the Court enjoin the diversion, *see* Wisconsin v. Illinois, 281 U.S. 179, 201–02 (1930), a decree that would become one of its longest-lived "open" decrees demanding continuous attention, frequent adjustment, and abundant interstate tensions. *See* Mandilk, *supra* note 19, at 1901 (calling *Wisconsin* a "case with intriguing decree modifications that bear no resemblance to res judicata"). Congress eventually legislated the Corps of Engineers' authority over the CAWS system. *See* Energy and Water Development Appropriation Act of 1982, Pub. L. No. 97-88, § 107, 95 Stat. 1137 (1981).

180. In *California v. Arizona*, the Court once declared in dicta that, although State party jurisdiction was "conferred not by the Congress but by the Constitution itself," 440 U.S. 59, 65 (1979), its exclusivity with the Court was not similarly constitutional in origin and, thus, although the Congress might be free to vest concurrent jurisdiction elsewhere, it was not necessarily free to deprive the Court of jurisdiction over suits between a State and the United States. *See id*. at 66 ("Congress has broad powers over the jurisdiction of the federal courts and over the sovereign immunity of the United States,

quite separate from the real *interests* that other courts might adjudicate with proper jurisdiction.[181]

If Congress may elect to make the Court's state-state jurisdiction exclusive, it may elect *not* to do so, as 28 U.S.C. § 1251(b) confirms.[182] In *Ohio v. Wyandotte Chem. Corp.*,[183] the Court famously refused Ohio leave to file its interstate nuisance suit in the Court's *concurrent* original jurisdiction.[184] It did so in part because of the dispute's complexity,[185] in deference to other courts' jurisdiction to apply "the same common law of nuisance upon which [its own] determination would have to rest,"[186] and because the Court had evolved "to perform as an appellate tribunal," leaving it "ill-equipped" and "awkward" in "the role of fact-finder without actually presiding over the introduction of evidence."[187] The State's plea, in short, was outweighed by other considerations.

The next Term the Court held that states' interstate nuisance claims against non-state defendants should normally be filed in district court through the "arising under" jurisdiction there vested by § 1331.[188] This, it reasoned, followed from that statute's use of the term "laws"—the "natural meaning" of which supposedly

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but it is extremely doubtful that they include the power to limit in this manner the original jurisdiction conferred upon this Court by the Constitution.").

181. This was the conclusion in the lower federal courts prior to *Milwaukee II*, as well. *See, e.g.*, Illinois and Michigan v. City of Milwaukee, 599 F.2d 151, (7th Cir. 1979), *rev'd*, City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981) (*Milwaukee II*); *see also* City of Evansville v. Kentucky Liquid Recycling Inc., 604 F.2d 1008, 1019–20 (7th Cir. 1979); Texas v. Pankey, 441 F.2d 236, 240–42 (10th Cir. 1971).

182. *See* RICHARD FALLON JR., JOHN MANNING, DANIEL MELTZER, & DAVID SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 271 (7th ed. 2016); Pfander, *supra* note 18, at 565 ("[F]or their part, the Justices have consistently upheld the power of Congress to grant the lower federal courts concurrent jurisdiction over matters within the Court's original jurisdiction.").

183. 401 U.S. 493 (1971).

184. Under the current statute, 28 U.S.C. § 1251(b), the "actions or proceedings by a State against the citizens of another State or against aliens" was within the Court's original but not exclusive jurisdiction. *See* 401 U.S. at 495.

185. *Id.* at 501–02 (quoting New York v. New Jersey, 256 U.S. 296, 309 (1921)).

186. *Wyandotte*, 401 U.S. at 500. It was unclear from the context whether the Court expected this would be state or federal common law nuisance.

187. *Wyandotte*, 401 U.S. at 498. Justice Harlan's opinion was carefully tailored to the party-alignments there presented: A State suing citizens of sibling- and foreign-states. Among the reasons for denying leave was the growth of "long-arm" jurisdictional statutes to hail alleged tortfeasors into the forum state's courts and the enforceability in foreign state courts of any forum state judgment(s) obtained. *See id.* at 497–501.

188. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 100–01 (1972) (*Milwaukee I*) (holding that federal common law could be among the federal "laws" by which a claim arises for purposes of § 1331); *cf. Wyandotte*, 401 U.S. at 497–98 ("We have no claim to special competence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issues of federal law."). Without irony, the day it announced *Milwaukee I* the Court granted Vermont leave to file suit against New York and a New York corporation for the latter's pollution of Lake Champlain. *See* Vermont v. New York, 406 U.S. 186, 186 (1972). Vermont had argued that the corporation would be precluded from taking the action a Vermont court would order it to take because the remediation itself would constitute a nuisance under New York law. Transcript of Oral Argument, Vermont v. New York, 406 U.S. 186 (1972) (No. 50 Orig.).

included federal common law.[189] It was not the first to reach this conclusion.[190] At the same time, the Court also credited many of its original jurisdiction landmarks mentioned above as "leading" cases in that domain.[191] The implication was clear: not only could sovereign interests be litigated in inferior courts, those courts could look to the Supreme Court's past equitable apportionment opinions to define and prioritize state interests.[192]

Given the sweep of federal legislation on discharged water pollution, however, the Court soon finished its arc by holding that the states' federal common law claims had been "displaced" by Congress.[193] It said nothing of any state interest in remedies Congress may have neglected.[194] Yet, despite this displacement, *state* law claims were said still to survive due in part to the legislation's savings clauses—as long as it was the law of the state where the discharge occurred[195]

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189. This interpretation followed, the Court reasoned, from a dissenting opinion in *Romero v. Int'l Terminal Operating Co*., 358 U.S. 354, 377–80 (1959). The *Romero* majority never reached that issue. The fact that a *state* had brought the case was also significant in *Milwaukee I*. *See* 406 U.S. at 100–01 (observing that the Court's jurisdiction over the matter was not exclusive) (citing Ames v. Kansas, 111 U.S. 449, 470 (1884)).

190. *See Milwaukee I*, 406 U.S. at 99–100 (citing Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971); Murphy v. Colonial Fed. Savings & Loan, 388 F.2d 609 (2d Cir. 1967); Mater v. Holley, 200 F.2d 1231 (5th Cir. 1952)).

191. *See e.g*., *id*. at 104–08 (citing Kansas v. Colorado, 206 U.S. 46 (1907); Nebraska v. Wyoming, 325 U.S. 589 (1945); Arizona v. California, 373 U.S. 546 (1963); New York v. New Jersey, 256 U.S. 296 (1921); New Jersey v. City of New York, 283 U.S. 473 (1931); Missouri v. Illinois, 200 U.S. 496 (1906); Connecticut v. Massachusetts, 282 U.S. 660 (1931); Kansas v. Colorado, 185 U.S. 125 (1901)). The novelty in *Milwaukee I* was not that federal common law might serve as the basis of a claim for relief in the "arising under" jurisdiction. *Cf*. Bell v. Hood, 327 U.S. 678, 680–84 (1946) (holding that jurisdiction was available for a claim of trespass against the FBI's alleged seizure of money in derogation of governing Fourth Amendment doctrine). The novelty lay in this reference to the original jurisdiction controversies as the *source* of that federal common law and that such claims could be pressed in district court.

192. *See Milwaukee I*, 406 U.S. 105–08.

193. *See Milwaukee II*, 451 U.S. at 317–23.

194. *Cf. id*. at 316 (declaring that "the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law" and that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"). *Milwaukee II* was indeed reinforced that Term by a notably more general pledge of deference to Congress. *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–43 (1981). But this was hardly unprecedented for interstate waters. Following the Court's announcement that no federal common law checked the obstruction of navigable waters in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 (1888), Congress wasted no time in enacting the Rivers and Harbors Act of 1890. Section 10 thereof prohibited any such obstruction without a federal permit (or Congressional permission). That lateral shift from the federal courts to Congress, and Congress's delegation of permitting authority to the executive branch, were upheld repeatedly in subsequent cases. *See e.g*., Union Bridge Co. v. United States, 204 U.S. 364 (1907); Monongahela Bridge Co. v. United States, 216 U.S. 177, 192–95 (1910); United States v. Republic Steel, 362 U.S. 482, 492 (1960).

195. *See* International Paper Co. v. Ouellette, 479 U.S. 481, 494–99 (1987); *Milwaukee II*, 451 U.S. at 329.

and assuming an appropriate venue.[196] In short, lower federal courts' equity powers to abate interstate injuries might well support *jurisdiction*—including for sovereign claimants—where the law supplying the underlying entitlement was state law.[197]

This intersection of jurisdiction and law is key to understanding the Court's interstate waters interests and their reconciliation with each other. Far from an indivisible, forum-bound whole, they are bundles. Indeed, as several diversity suits over interstate waters illustrated before equitable apportionment emerged,[198] states' interests in shared waters *include* the fullest possible scope and priority for their own laws.[199] The more precise question for the Court and others, thus, is whether, as delineated in its holdings, any of these several interests can displace or preempt inferior law and, if so, how that inferiority is determined.[200]

First, we should agree that the Court's *decrees* were surely binding on even the Congress as a function of Article III[201]—supposing Congress did not *change* the

196. *Cf. Ouellette*, 479 U.S. at 500 ("[T]he Act preempts laws, not courts. In the absence of statutory authority to the contrary, the rule is settled that a district court sitting in diversity is competent to apply the law of a foreign State."); *Wyandotte*, 401 U.S. at 497–98, 498 n.3 (noting that the Court itself will not ordinarily adjudicate claims predicated on local law). States are not "citizens" for purposes of the diversity jurisdiction statute, although state claims arising under federal law do trigger the arising under jurisdiction. *See e.g.*, Postal Tel. Cable Co. v. Alabama, 155 U.S. 482 (1894); Stone v. So. Carolina, 117 U.S. 430 (1886); Ames v. Kansas, 111 U.S. 449 (1884).

197. *Cf. Ouellette*, 479 U.S. at 502 (Brennan, Marshall, Blackmun, JJ., concurring and dissenting in part) (noting that majority's holding means that the downstream, affected state's common law is preempted by federal law, leaving only the discharging state's law for a federal district court in the downstream state to apply). It is a matter of some debate whether, when *Missouri* and *Kansas* were decided at the turn of the Twentieth century federal courts' equity jurisprudence was regarded as federal *law* for purposes of Articles III, IV or VI of the Constitution. Equity may have been part of the "general law" so famously tapped in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), and skewered in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *See* Collins, *supra* note 12, at 271–90; William A. Fletcher, *General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*,, 97 HARV. L. REV. 1513, 1529–30 (1984).

198. *See infra* notes 345–58 and accompanying text.

199. *Cf.* Michael Steven Green, *Horizontal* Erie *and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1241–66 (2011) (tracing a state's interest in its law being applied in federal and sibling-state courts). This may have considerable significance for states' standing to sue. *Cf.* Grove, *supra* note 17, at 880–85 (arguing that state standing to protect the operation of state law is the core of state standing to sue the United States); Davis, *supra* note 17, at 2117–19 (noting the disparity between a state's interest in pressing Tenth Amendment issues and a criminal defendant's and arguing that a state's "public rights" under the Tenth Amendment which do not implicate private rights may have to be shared with the Nation and/or other states).

200. The text and structure of our Supremacy Clause complicate the second question considerably, as already suggested. It deems "Laws of the United States which shall be made in Pursuance" of the Constitution "supreme Law of the Land," and commands "the Judges in every State" to be "bound thereby[,] any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art.VI. This second "judges clause," thus, distinguishes between law *within* and law *outside* of court while the first clause permits—but hardly entails—that federal common law does *not* preempt inconsistent state law. *See* Henry P. Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 767–68 (2010).

201. *Cf.* Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 218–19 (1995) (holding that Article III vests power "not merely to rule on cases, but to *decide* them"); United States v. Stauffer Chem. Co., 464 U.S.

operative law before that decree's execution.[202] Just as surely the executive branch was (and is) obliged to enforce Article III court decrees to whatever extent they are final and valid.[203] Second, inferior courts (state and federal) are bound to recognize final, valid Supreme Court judgments in any subsequent proceedings.[204] Yet none of this engages with the canon of opinions in the *United States Reports* construing the law of interstate waters and what it means to these actor-institutions individually. What of the holdings those reports record?[205]

1. Holdings on State Interests as "Law"?

The Court's dignitarian conception of state sovereignty, backed by its own sense of plenary authority over the Constitution's meaning, has lately become a

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165 (1984). Note, for example, that the original decree in *Wyoming v. Colorado* was dissolved upon joint motion in 1957 because both states wished to amend the bargain. *See* 353 U.S. 953, 953 (1957). By contrast, the decree in *Arizona v. California*—being predicated largely, though not entirely, on the Boulder Canyon Project Act—presumably would not be subject to such uninhibited bargaining by the states. *See* 373 U.S. 546, 565–66 (1963). Change of the statute, however, could annul that much of the decree. Finally, several decrees have been a sustained draw on the Court's equitable discretion—involving multiple adjustments, amendments, and re-litigation. *See* Mandilk, *supra* note 19.

202. As the Court observed in *Wheeling Bridge II*, "[i]f, in the mean time [sic], since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced." Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 431–32 (1856) (*Wheeling Bridge II*); *see also* The Clinton Bridge, 77 U.S. (10 Wall.) 454, 462–63 (1870) (discussing *Wheeling Bridge II*'s holding that legislation had changed "the rule of decision for the court"); United States v. Klein, 80 U.S (13 Wall.) 128, 146–48 (1872) (same). Differentiating changes of law from interference with the execution of a decree has remained a delicate inquiry. *See Plaut*, 514 U.S. at 226–27 ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly."); United States v. Sioux Nation of Indians, 448 U.S. 371, 406–08 (1980) (same).

203. Among the first separation of powers pillars brought to the Court was the finality of an Article III court's judgment as against the Executive's discretion. *See* Hayburn's Case, 2 U.S. (2 Dall.) 409, 410–11 (1792). But judgment-finality has remained tied tightly to jurisdiction which, in turn, delimits executive authority. *See Plaut*, 514 U.S. at 224–25; *cf.* Baude, *infra* note 258, at 1862 ("[S]o far as the Constitution is concerned, pedantic questions of jurisdiction mark the boundaries of the judicial and executive powers.").

204. *Cf.* Deposit Bank v. Frankfort, 191 U.S. 499 (1903) (holding that a federal judgment determining federal rights has preclusive effect in later proceedings whether in state or federal court, despite no constitutional or statutory provision to that effect); Restatement (2d) Judgments § 87 (1982) ("Federal law determines the effects under the rules of res judicata of a judgment of a federal court."); *see also Wheeling Bridge II*, 59 U.S. at 431 (declaring that "if the remedy in this case been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress"); Goodtitle v. Kibbe, 50 U.S. (9 How.) 471, 478 (1850) (holding that judgment of title in *Pollard v. Hagan* was final and could not be reversed by Congress). There are still significant doubts about the cross-jurisdictional scope of judgment recognition, however. *See infra* notes 369–73 and accompanying text.

205. Any holding purporting to remedy a constitutional injury to a State, even assuming it binds inferior courts, presents distinct questions to Congress and to the President. *See* Monaghan, *Stare Decisis, supra* note 155, at 739–48. *Wheeling Bridge I* may have been the "most dramatic example" of such a holding and decree lacking any firm underlying legal right, Collins, *supra* note 12, at 286, but it has hardly been the exception on interstate waters.

formidable sword.[206] This by itself is good reason to think that the Court's original jurisdiction holdings have forum-independent force. Indeed, it stands to reason that if the interests there adjudicated stem from the states' constitutional dignity, a *ratio decidendi* in past precedent[207] protecting a state-as-state binds inferior courts confronting any same or similar issue(s).[208] Furthermore, these interests are arguably analogous to the preemptive federal interests the Court has held survived *Erie*'s dismissal of federal general common law.[209] Such interests have underwritten the judge-made law of federal reserved water rights, adjudicated in both state and federal forums,[210] among other things.[211]

By parity of reason, then, interference with such state interests could actuate their protection in *any* court of competent jurisdiction—as has sometimes happened with boundary disputes.[212] A plaintiff with standing, some right of action

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206. *See, e.g.*, Murphy v. NCAA, 138 S. Ct. 1461, 1474–79 (2018) (invalidating the Professional and Amateur Sports Protection Act as contrary to states' equal sovereignty); Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013) (invalidating provision of Voting Rights Act of 1965 as infringement on states' equal sovereignty); National Fed'n Indep. Bus. v. Sebellius, 567 U.S. 519, 575–85 (2012) (invaliding Patient Protection and Affordable Care Act's penalization of non-participating states provisions as contrary to states' sovereignty); Printz v. United States, 521 U.S. 898, 925–35 (1997) (invalidating provision of Brady Act requiring local law enforcement officials to perform background checks on potential gun buyers as contrary to anti-commandeering principle of New York v. United States); New York v. United States, 505 U.S. 144, 177 (1992) (invalidating provision of Low-Level Radioactive Waste Policy Amendments Act forcing a state to choose between taking title to low-level radioactive waste or regulating its disposal according to Congressional directive as "inconsistent with the federal structure of our Government").

207. A *ratio decidendi* includes any rule of law expressly or impliedly treated by the judge(s) as a necessary step in reaching a holding or in instructing a jury. *See* Monaghan, *Stare Decisis*, *supra* note 155, at 765 (quoting RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 72 (4th ed. 1991)).

208. *See* Pushaw, *supra* note 108, at 476–84; Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024–28 (1994); Monaghan, *Stare Decisis*, *supra* note 155, at 763–67. The Court several times declared, for example, that it was bound by its equal footing doctrine to interpret the statutes admitting non-original states to the Union as leaving to those states all of the prerogatives over shared and navigable waters that the original states enjoyed. *See, e.g.*, Huse v. Glover, 119 U.S. 543, 546–47 (1886); Hamilton v. Vicksburg S. & P.R. Co., 119 U.S. 280, 284–85 (1886); Cardwell v. Amer. Bridge, 113 U.S. 205, 210–12 (1885).

209. Preemptive federal interests have emerged periodically since *Erie*. *See, e.g.*, Semtek, Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 436–39 (1996); Boyle v. United Techs. Corp., 487 U.S. 500, 509–10 (1988); Cappaert v. United States, 426 U.S. 128, 145 (1976); United States v. Standard Oil Co., 332 U.S. 301, 305, 308 (1947); Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1942). They have occasionally preempted "hostile" or "aberrant" state laws targeting sibling states and/or the Union. *See* United States v. Little Lake Misere Land Co., 412 U.S 580, 595–603 (1973).

210. *See* Jamison E. Colburn, *Don't Go In the Water: On Pathological Jurisdiction Splitting*, 39 STAN. ENVT'L. L.J. 3 (2019).

211. *Cf.* Alfred L. Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1030–68 (1967) [hereinafter Hill, *Preemption*] (arguing that that the "enclaves" of federal common law after *Erie* include interstate controversies, admiralty, the proprietary transactions of the United States, and international relations).

212. Boundary controversies—many over shared waters—have often lay behind private title disputes. *See, e.g.*, Kean v. Calumet Canal & Imprv. Co., 190 U.S. 452 (1903); Mitchell v. Smale, 140 U.S. 406 (1891); Bowlby v. Shively, 30 P. 154 (Or. 1892), *aff'd*, Shively v. Bowlby, 152 U.S. 1 (1894);

against a defendant subject to suit, jurisdiction, and venue could present the question.[213] Some paths to court are surely open to the states themselves.[214] What of others seeking to constrain rival—or to bolster their own—demands on interstate waters?

As with its remedial choices protecting individual constitutional interests,[215] the Court's interstate waters opinions all weigh the remedying of specified injuries.[216] Injuries ordinarily stem, of course, from interests, but interstate waters injuries stem from a permanently open class of interests as benefits and burdens evolve with society, culture, technology, climate, *etc*. These interests distribute variably depending on the spatial and temporal scales of comparison. As quasi-sovereign interests, moreover, interstate waters interests are neither necessarily prior to nor coextensive with the private interests behind them at any given time or place.[217] Yet an "action" involving them could proceed on

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Howard v. Ingersoll, 54 U.S. (13 How.) 381 (1851); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); Poole v. Fleeger, 36 U.S. (11 Pet.) 185 (1837). Indeed, the Court once squarely held that its own precedent controlled a later, private iteration of one of its seminal cases, *Pollard*. *See* Goodtitle v. Kibbe, 50 U.S. (9 How.) 471, 478 (1850). Of course, judgment in a title dispute would not necessarily bind the states as to their boundary dispute(s). *See, e.g*., Durfee v. Duke, 375 U.S. 106, 116–17 (1963) (Black, J., concurring).

213. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). This jurisdictional logic has worked in reverse, too. Even apart from *Wyandotte*, a major factor in the *Idaho v. Oregon & Washington* salmon litigation was the decrees that two lower federal courts had entered protecting Indian treaty rights in the Columbia and Snake river basins. *See* Idaho *ex rel*. Evans v. Oregon & Washington, 462 U.S. 1017, 1022–24, 1022 n.6 (1983) (discussing United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974); Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969)).

214. *Cf*. New York v. United States, 505 U.S. 144, 154 (1992) (noting that the state had filed the case under the Declaratory Judgment Act challenging federal statute and that the states of Nevada and South Carolina had intervened as defendants). State plaintiffs may not sue sibling states in any other forum than the Supreme Court, *see* 28 U.S.C. § 1251(a), but this exclusion would not necessarily apply to non-state parties asserting state *interests*. *Cf*. *New York*, 505 U.S. at 181. ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. . . . [It] divides authority between federal and state governments for the protection of individuals.").

215. *See, e.g*., Woolhandler, *supra* note 126, at 99–111; Monaghan, *supra* note 103, at 3–4; Dellinger, *supra* note 12, at 1532–33 (discussing Bivens v. Six Unknown Agents, 403 U.S. 388 (1971)); Hill, *supra* note 12, at 1112–18.

216. *Legal* remedies characteristically require some statutory right of action. *See Bivens*, 403 U.S. at 396 (noting that, although the Fourth Amendment "does not in so many words provide for its enforcement by an award of monetary damages," that it was "well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done"). Equitable remedies do not necessarily require a specific right of action, *see* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England."), but they remain subject to all relevant statutory and constitutional immunities. *See id*. at 1385.

217. *See* Hessick, *supra* note 17, at 1935–38 (arguing that only states have the duty to protect their public's welfare and that individual standing therefore necessarily differs from quasi-sovereign standing); Grove, *supra* note 17, at 864–68 (discussing Missouri v. Holland, 252 U.S. 416 (1920), and arguing that the Court has long recognized state standing to sue the United States in the lower federal

the basis of a harm to some user/plaintiff(s), realized (or "imminent"[218]) and caused by a defendant(s).[219]

From *Wheeling Bridge* and the Ohio's navigability for large steamboats[220] to Apalachicola Bay's continued decline,[221] clear delineations of the collective interests in sharing a resource like interstate waters have eluded the Court. This may be characteristic of *quasi*-sovereign interests generally.[222] However, the uncertainty is growing deeper and more urgent with interstate waters. Neither sovereign nor proprietary, quasi-sovereign interests were once declared to be the "set of interests that the State has in the well-being of its populace."[223] As the

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courts seeking to protect the continued enforceability of state law); *cf*. Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) (holding that a state may contest another state's legislation requiring in-state resource use over imports); Massachusetts v. Missouri, 308 U.S. 1, 19–20 (1939) (holding that a state's claim to recover taxes from a debtor in another state may be adjudicated in district court and that the Court would therefore deny leave to file in original jurisdiction); Pennsylvania v. West Virginia, 262 U.S. 553, 591–92 (1923) (holding that one state's statute providing for the withholding of natural gas from consumers in neighboring states is a justiciable injury to the latter); Louisiana v. Texas, 176 U.S. 1, 22–23 (1900) (holding that a state's arbitrary enforcement of its health and safety regulations is not a justiciable injury to neighboring state).

218. *Lujan*, 504 U.S. at 560; Massachusetts v. EPA, 549 U.S. 497, 520 (2007); Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 (2013).

219. Following the merger of law, equity, and admiralty, the federal rules provided for one "civil action," FED. R. CIV. P. 2, dependent only upon a plaintiff with the requisite standing suing a culpable, non-immune defendant. *See* Spokeo v. Robbins, 136 S. Ct. 1540, 1550–54 (2016) (Thomas, J., concurring); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 182–88 (2000). Mandatory joinder of immune defendants under Rule 19(b) can obviously be jurisdiction-defeating in shared waters cases as in others. *See, e.g*., Florida Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 859 F.3d 1306, 1318 (11th Cir. 2017). But whether an immune defendant is "indispensable" to an action turns on the potential for injury to the "interests of the absent sovereign." Republic of the Philippines v. Pimentel, 553 U.S. 851, 867 (2008). And that, in turn, rests on the precise nature of the sovereign (or, presumably, *quasi*-sovereign) interests in shared waters that are or are not put at stake.

220. *See supra* notes 30–59 and accompanying text.

221. *See generally* Chris Berry & Amanda Concha-Holmes, *Disaster in Apalachicola: Storms, the Oyster Industry, and Development Decisions, in* DISASTERS IN PARADISE: NATURAL HAZARDS, SOCIAL VULNERABILITY, AND DEVELOPMENT DECISIONS 79 (Amanda D. Concha-Holmes & Anthony Oliver-Smith eds., 2019).

222. *Compare* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel*. Barez, 458 U.S. 592, 600 (1982) (noting that quasi-sovereign and *parens patriae* interests do "not involve the States stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves"), *with* Massachusetts v. Mellon, 262 U.S. 447, 484–86 (1923) (holding that citizens of Massachusetts, also being citizens of the United States, can provide the state no interest as *parens patriae* by which to sue the United States).

223. *Snapp*, 458 U.S. at 602–07 (discussing Georgia v. Penn. R. Co., 324 U.S. 439 (1945); Louisiana v. Texas, 176 U.S. 1 (1900); Missouri v. Illinois, 180 U.S. 208 (1901); Pennsylvania v. West Virginia, 262 U.S. 553 (1923)). Justice White's opinion in *Snapp* differentiated sovereign interests such as "the demand for recognition from other sovereigns" and "the exercise of sovereign power over individuals and entities within the relevant jurisdiction" from *quasi*-sovereign interests. *See* 458 U.S. at 601–02. And although *Snapp* also declared that quasi-sovereign interests "must be sufficiently concrete to create an actual controversy between the State and defendant," *id*. at 602, the Court has repeatedly refused to qualify a State's purely *fiscal* injuries as *parens patriae* interests of any kind. *See Georgia*, 324 U.S. at 468 (Stone, C.J., Roberts, Frankfurter, Jackson, JJ., dissenting); Massachusetts v. Missouri, 308 U.S. 1, 17–20 (1939); *Pennsylvania*, 262 U.S. at 591–98.

Court has acknowledged, litigable interests of that kind depend on the forum in which they are pressed.[224] So may any forum-independent *law* measuring, classifying, or organizing these interests be synthesized?[225] Courts hearing challenges to the Army Corps of Engineers' river management or to the Bureau of Reclamation's storage operations could conceivably find that one federal choice or another diminished or denied some state interest(s) in those waters.[226] If so, though, the Court's own past reasoning about these interests—in opinions that can be "sprawling," "heavily footnoted,"[227] and yet still lacking in simple declarations of "law"[228]—becomes the focal point. Section B tightens the focus there.

### B. AN EQUITABLE AND LEGAL ENCLAVE? FUNCTIONS OVER FORUMS

Federal courts and water rights specialists alike begin from Justice Brandeis's opinion in *Hinderlider v. La Plata*.[229] For it was *Hinderlider*, decided the same

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224. *See Snapp*, 458 U.S. at 603 n.12.

225. The *Snapp* Court categorized the quasi-sovereign interest as inherently dependent upon case-by-case development. *See id.* at 607. This may bind quasi-sovereign interests to the forum in which they are pressed. *See also* Maryland v. Louisiana, 451 U.S. 725, 735–45 (1981) (distinguishing between *parens patriae* standing and standing derived from a "proper 'controversy" involving a "ground for judicial redress" or a "right against the other State which is susceptible of judicial enforcement"). And it may mean that *only* forum-bound rules may be derived from the Court's shared waters precedents. *See, e.g.*, Beaver, *supra* note 29, at 65–72 (calling the standard in *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931) requiring a threatened invasion of rights that is of serious magnitude and clearly proved the Court's "adjectival" rule). If so, though, this holds considerable implications for shared waters disputes and their adjudication. *See infra* notes 273–93 and accompanying text.

226. Two of the Court's three pending controversies, *Mississippi v. Tennessee* and *Florida v. Georgia*, began as cases in the lower federal courts where state interests were raised by states that had voluntarily submitted to suit or were themselves the plaintiffs. *See In re* Tri-State Water Rights Litigation, 644 F.3d 1160 (11th Cir. 2011); Hood *ex rel.* Mississippi v. City of Memphis, 570 F.3d 625 (5th Cir. 2009). A third, in which the Court has repeatedly refused leave to file in the original jurisdiction, involved invasive fish species' reaching the Great Lakes by way of the CAWS. *See* Michigan v. U.S. Army Corps, 758 F.3d 892, 894-99 (7th Cir. 2014). Finally, litigation over states' interests in the Missouri River, as impacted by the Corps' flood control projects, has periodically arisen. *See generally* South Dakota v. Ubbelohde, 330 F.3d 1014 (8th Cir. 2003); In re Operation of Missouri River, 421 F.3d 618 (8th Cir. 2005).

227. *See* Monaghan, *supra* note 155, at 765 n.236 (insisting that the holding/dicta distinction is "particularly necessary with respect to often sprawling, undisciplined, heavily footnoted opinions issued by the Supreme Court"); Grove, *supra* note 140, at 53 (noting that "as the Court focused increasingly on law declaration, its opinions grew in length and in breadth").

228. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

229. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (stating that "whether the water of an interstate stream must be apportioned between two States is a question of 'federal common law' upon neither the statutes nor the decisions of either State can be conclusive"). Federal jurisdiction specialists often invoke *Hinderlider* to this effect. *See, e.g.*, Tobias Barrington Wolff, *Choice of Law and Federal Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV. 1847, 1871–78 (2017); Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 2–3 (2015) [hereinafter Nelson, *Legitimacy*]; CHARLES ALLAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 817 (6th ed. 2002); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1322–31 (1996); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 908 (1986); Merrill, *supra* note 128, at 55–56; Monaghan, *supra* note 103, at 14; Hill, *supra* note 211, at 1031–32, 1073–76. "When the Court

day as *Erie v. Tompkins*[230] and written by the same author, that first characterized the equitable apportionment tradition as a discrete enclave of "federal common law."[231] Yet that baptism came backing the Court's theory of statutory jurisdiction to hear Hinderlider's petition.[232] The precedential force of those past judgments (or holdings) was not in question. Brandeis reasoned that the private claims upon the interstate stream in the petition raised a jurisdictional federal question.[233] Indeed, ironically enough, his reasoning was just as quickly abandoned when the Court held that where, as in *Hinderlider*, an interstate compact allocated shared waters, the compact's construction was the federal question.[234]

The merits question raised in *Hinderlider* did not involve equitable apportionment at all for the good reason that neither state was party to the suit and no collective claims to the water were asserted.[235] Indeed, Brandeis's dictum that equitable apportionments are "binding upon the citizens of each State and all water claimants"[236] was wholly unnecessary to his holding that the state court

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pronounced that '[t]here is no federal general common law,' it set itself the task of determining which of its *Swift*-era precedents would survive that pronouncement." Wolff, *supra* note 229, at 1852 (quoting Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)). And in *Illinois v. Milwaukee*, where the Court characterized its original jurisdiction precedents as "leading" cases in the federal common law of interstate waters, it took the same note of Brandeis's opinion in *Hinderlider*. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 106 n.7 (1972).

230. 304 U.S. 64 (1938).

231. *Hinderlider*, 304 at 110 ("[W]hether the water of an interstate stream must be apportioned between two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive."). The Court itself has occasionally invoked *Hinderlider* for this point. *See, e.g.*, Colorado v. New Mexico, 459 U.S. 176, 183 (1982) ("Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream.").

232. *See* 304 U.S. at 101–03.

233. *See id.* at 101–03. An earlier appeal in the case had to be dismissed for lack of this jurisdiction. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 291 U.S. 650 (1934). Later in his 1938 opinion, Brandeis came to the application of the La Plata River Compact in the judgment below, acknowledging that it might by itself supply the jurisdictional federal question. *See id.* at 109–11, 110 n.12.

234. *Hinderlider* was decided before the Court overruled *People v. Central R. Co.*, 79 U.S. (12 Wall.) 455 (1872), to finally establish that the construction of an interstate compact presents a federal question for jurisdictional purposes. *See* Cuyler v. Adams, 449 U.S. 433, 438–39, 438 n.7 (1981) (discussing Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852) (*Wheeling Bridge I*); Delaware River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419 (1940); Petty v. Tenn.-Missouri Bridge Comm'n, 359 U.S. 275 (1959)). At least one commentator highlighted *Hinderlider*'s key role in that jurisdictional watershed. *See* Engdahl, *supra* note 128, at 991–1003.

235. *See Hinderlider*, 304 U.S. at 105–06. By reversing, the Court annulled the Colorado high court's judgment for the ditch company that the State could not "abrogate[]" by means of a compact any water rights decreed to it under Colorado law. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 70 P. 849, 850 (Colo. 1937). For its part, the Colorado State Engineer had answered that "[a] state adjudication decree operates only on the state's equitable share of the flow" and that, therefore, "the ditch company had not been deprived of any *vested* right [by its actions]." Brief of Appellants at 14, Hinderlider v. The La Plata River & Cherry Creek Ditch Co., No. 437 (emphasis added).

236. 304 U.S. at 106.

was just as bound by the compact was as the State Engineer.[237] Lacking any apportionment judgment at all, it was an aside.[238] This point was later lost in *Hinderlider*'s wake,[239] but *Hinderlider* was undeniably a case involving only Colorado parties. Citing it as deciding the force of the Court's equitable apportionment opinions, thus, raises more questions than it answers.[240]

*Hinderlider*'s picture of jurisdiction and law illustrates how interstate waters trap courts in a choice-of-law dilemma with interlocking vertical and horizontal dimensions.[241] The basic dilemma, whatever the forum, is the juxtaposition of state law that *ought not* to control a multi-sovereign dispute with federal law that remains inchoate or even nonexistent.[242] Decades of experience with *Erie* have

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237. *See id*. at 104 (rejecting the lower court's assumption that "a judicial or quasi-judicial decision of the controverted claims is essential to the validity of a compact adjusting them"). This was *Hinderlider*'s riddle: the Supreme Court has always lacked (statutory) appellate jurisdiction to judge the content of state law contrary to the state's highest court. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210–11 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635–38 (1875). For *Hinderlider*'s jurisdictional ruling to survive, thus, it must have been that state interests in interstate waters "'aris[e] under the Constitution' within the meaning of the jurisdictional statute, and, by implication, within the meaning of the supremacy clause" and of Article III because it is an "area of federal preemption established not by Congress but by the Constitution." Hill, *supra* note 211, at 1076.

238. On the place of an "aside" in judicial opinions, *see* Dorf, *supra* note 208, at 2006. The effect of an apportionment in a state court serving as a subsequent forum (F2) would depend on federal common law given the F1 judgment's origin and basis. *See* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507–09 (2001). Of course, federal common law was exactly what *Hinderlider* and *Erie* aimed to set right.

239. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). In finally reversing the Colorado Supreme Court's holding on the compact, see *id*. at 110–11, Brandeis's opinion for a unanimous Court urged the premise that an 1898 Colorado stream adjudication did not and could not have adjudicated the rights of users in New Mexico. *See id*. at 103. From a sound premise, however, it then (illogically) inferred, likely from the State Engineer's brief, that the compact could not have diminished any "vested" water right of the company's because all Colorado users' claims combined could not be "greater than the equitable share" owed to the state in the aggregate. *Id*. at 108. Here the Court either deemed the compact allocations "equitable" *per se* or mistook other constitutional limits on the reach of judgments as the basis of its premise. *See infra* note 369 and accompanying text.

240. *But cf*. Clark, *supra* note 229, at 1322 (citing *Hinderlider* and observing that "Article III's grant of jurisdiction over "Controversies between two or more States" has given rise to a significant enclave of 'federal judge-made law.'"); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 507–09 (2006) (referencing *Hinderlider*'s recognition of interstate apportionment as one of the "purest enclaves" of federal common law); Wright & Kane, *supra* note 229, at 817 (same). Alfred Hill and Tobias Wolff each noted *Hinderlider*'s unique discovery of (statutory) 'arising under' jurisdiction that paradoxically did not arise under the federal common law cited. *See* Hill, *supra* note 211, at 1074–76; Wolff, *supra* note 229, at 1873.

241. *See* Colburn, *supra* note 210. On the basic *Erie* problems, see Wolff, *supra* note 229, at 1871–74; Clermont, *supra* note 159, at 250–65. On *Erie* as a choice-of-law doctrine, see Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 3–15 (2012).

242. *Compare* Clark, *supra* note 229, at 1325 ("Because states are coequal sovereigns under the Constitution, neither party to an interstate dispute has legislative power to prescribe rules of decision binding upon the other.") (footnotes omitted), *with* Field, *supra* note 229, at 899 ("[S]tate courts of general jurisdiction . . . can fill in any gap, as long as no directive to the contrary exists. Federal judges by contrast (or state judges faced with a federal common law problem) can fill in a gap only if some enactment permits them to do so; otherwise the area is not one for federal rule at all, but is left to the

familiarized many with it, especially in equity.[243] Brandeis's deliberate analysis in *Hinderlider* subtly illustrates the duality of *any* federal judge-made law's troubles with forum-determinative claims. As Justice Harlan observed concurring in *Georgia v. Tennessee Copper*, Article III's jurisdictional grant for controversies between states betrays no intention—if there was one—of empowering the Court to *make* the law of shared natural resources.[244] Any party-configuration jurisdiction, after all, could allow indefinite scope for such law-making[245] and that possibility turns any federal judge-made law of state interests in shared waters horizontally to face a Congress of "limited and enumerated" powers to *make* federal "Laws."[246]

Now the solution for a shared waters legal (or equitable) enclave may well be that found elsewhere: to disable state law from defining or organizing quasi-sovereign interests—as the federal courts are disabled—unless and until Congress acts.[247] If so, though, it consigns a bundle of overlapping interests in shared waters to a 'brooding omnipresence' rarely (if ever) to be sorted out in the

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states.") (footnotes omitted). The option of *making* federal law in the context of the case/controversy itself is available, see, e.g., Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988), but the *Erie* complications from doing so can be severe.

243. *See* Morley, *supra* note 12, at 233–36; Wolff, *supra* note 229, at 1873–78; Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657 (2013); Roosevelt, *supra* note 241, at 10–15; Field, *supra* note 229, at 885–87; Merrill, *supra* note 128, at 54–59.

244. *See* Georgia v. Tennessee Copper Co., 206 U.S. 230, 239–40 (1907) (Harlan, J., concurring). This, of course, anticipated part of Justice Brandeis's reasoning in *Erie*. *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938).

245. *See* Field, *supra* note 229, at 915–16; *cf. Erie*, 304 U.S. at 78 ("Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general" . . . [a]nd no clause in the Constitution purports to confer such a power upon the federal courts.").

246. *See* Merrill, *supra* note 128, at 19–24; Field, *supra* note 229, at 911–27; Clark, *supra* note 229, at 1264–71. The Supremacy Clause's omission of federal common law from its menu of "Laws" that preempt inconsistent state law is a federalism (vertical) issue, of course. *See supra* note 200. But the horizontal issue is also significant (if not necessarily as significant as some would have it): "[t]he Constitution establishes intricate procedures for the adoption of the various forms of positive federal law. Significantly, these procedures neither require nor permit participation by the federal judiciary." Clark, *supra* note 229, at 1269; *see* Monaghan, *supra* note 200, at 772 ("The Founders could not have conceived of an ability of the federal judiciary to impose a common law; otherwise, why would the debates surrounding ratification have focused almost exclusively on the potential for congressional overreaching, without mentioning the even more expansive law-declaring authority of the judiciary?").

247. *See, e.g.*, O'Melveny & Myers, 512 U.S. 79, 83–89 (1994) (acknowledging federal interests in the financial transactions of federal agency but holding that if legal rights and duties are to be created supplementing applicable state law, it is to be done by Congress); United States v. Standard Oil Co., 332 U.S. 301, 305–08 (1947) (holding that liability rule should be a matter of federal not state law but that it was incumbent upon Congress to supply it); So. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("[J]udges do and must legislate, but they can do so only interstitially. . . ."); *cf. Erie*, 304 U.S. at 91–92 (Reed, J., concurring) (rejecting majority's suggestion that *Swift v. Tyson* was unconstitutional and arguing that Congress could prescribe all rules of decision for federal courts sitting in diversity if it so chose). For an account reconciling this solution to the Court's full canon of opinions, see Merrill, *supra* note 128.

precincts of the Court's original jurisdiction (with all the pitfalls already noted).[248] Overruling a demurrer to that effect in the first *Kansas v. Colorado*,[249] the Court famously noted that its task was to "apply Federal law, state law, and international law, as the exigencies of the particular case may demand."[250] Yet, more than a century later, its opinions are still alternatively cast as binding precedent[251] or as but a record of unfettered remedial discretion.[252] Looking ahead to a future where many more shared waters cases and controversies seem all but assured, the federal courts' two distinct yet not wholly separate *functions* should inform a rethinking of this jurisprudence. Part III argues that we do best to keep these twin functions separate in thinking about the law of interstate waters and the Court's jurisprudence.

## III. JURISDICTION TO REMEDY: RETHINKING INTERSTATE WATERS

For quasi-sovereign interests adjudicated in state-state original jurisdiction controversies, understanding the Court's opinions against the fullest backdrop of Article III offers several insights. First, Article III frames a "judicial Power" serving two distinct—if not entirely separate—functions: dispute resolution for its menu of party alignments[253] and the adjudication and exposition of federal

248. As Alfred Hill observed a half-century ago, even Holmes' noted dissent in *Jensen*—where his rejection of *Swift v. Tyson* took its hardest edge in the "brooding omnipresence in the sky" jibe—distinguished Article III's admiralty jurisdiction grant from general diversity jurisdiction. *See* Hill, *supra* note 211, at 1033–34, 1033 n.59 (quoting *Jensen*, 244 US. at 220–22). In the former, as with "controversies between two states," "state competence is excluded by necessary implication from the constitutional grant of jurisdiction," *id.* at 1031, whereas in the latter, the same implication would repudiate much of the rest of the Constitution root and branch. *See* Roosevelt, *supra* note 241, at 7–8.

249. 185 U.S. 125 (1902).

250. *Id.* at 147.

251. *See, e.g.*, Florida v. Georgia, 138 S. Ct. 2502, 2516 (2018) (reversing the Special Master for having "applied too strict a standard" from past opinions); Washington v. Oregon, 297 U.S. 517, 524 (1936) (concluding that Washington had failed to prove its injury from Oregon's diversions of the Walla Walla River by "clear and convincing evidence" and quoting Connecticut v. Massachusetts, 282 U.S. 660 (1931), and New York v. New Jersey, 256 U.S. 296 (1921)).

252. *See, e.g.*, *Florida*, 138 S. Ct. at 2513 (noting that the Court must take the case in an "untechnical spirit" because it may be called upon to "adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either state alone"); Kansas v. Nebraska & Colorado, 135 S. Ct. 1042, 1052 (2015) (observing the "essentially equitable character of our charge"); Idaho *ex rel.* Evans v. Oregon & Washington, 462 U.S. 1017, 1025 (1983) ("[A]lthough existing legal entitlements are important factors in formulating an equitable decree, such legal rights must give way in some circumstances to broader equitable considerations."); Colorado v. New Mexico, 467 U.S. 310, 315–17 (1984) (denying Colorado's petition to apportion Vermejo River because it failed to "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable'"); New Jersey v. New York, 283 U.S. 336, 342 (1931) ("Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war.").

253. *See* U.S. CONST., art. III, § 2, cl. 1 (listing six party-alignment "Controversies" to which "[t]he judicial Power shall extend"); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821).

law.[254] Each function requires a final arbiter in its own right,[255] but they are distinct institutionally.[256] Their relationships are matters of perennial (if not interminable) debate among federal courts enthusiasts.[257] Even a rudimentary sense of this divide, however, reveals that *judgments* can conclusively bind only those party to them.[258] We could scarcely make sense of the Constitution's separation of powers or federalism were it otherwise. Second, precedent may bind future adjudicators.[259] Finally, preclusion law may span this entire divide—as it often has where legal interests are fully and fairly *adjudicated* in prior proceedings.[260]

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254. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). This interpretation of Article III has multiple variants as well. *See* Dorf, *supra* note 208, 2000–2024, 2053–60 (contrasting a narrowing, "facts-plus-outcome" approach to precedent often employed by federal courts with a more encompassing "facts-plus-holding" approach elevating given reasons to the core of Article III judging).

255. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1381 (1997) (arguing that to deny the Constitution a final interpreter like the Supreme Court would deprive it of its reason for being); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 75–78 (1993); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 227 (1990); Monaghan, *Stare Decisis*, *supra* note 155, at 755–67.

Professor Fallon teased the two apart in a recent book. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018). His account of the Court as final arbiter of federal law was that the "ultimate measure of legality . . . inheres in *currently accepted* standards for identifying past events as possessing legal authority." *Id.* at 85 (emphasis added). That, of course, includes the Court's own decisions, *see id.* at 135, but only if the Court itself acknowledges that it *makes* law when it decides—precisely what so many of the Court's interstate waters opinions leave in doubt.

256. On this functional divide, see Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1724–27 (2017); Pushaw, *supra* note 108, at 495; Pfander, *supra* note 18, at 598–617; Bandes, *supra* note 255, at 283; Merrill, *supra* note 255, at 45–49; Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 259–69 (1985); Hart, *supra* note 70, at 489–91, 541–42.

257. *See* Walsh, *supra* note 256, at 1719–22.

258. *Cf.* Ortiz v. United States, 138 S. Ct. 2165, 2184–86 (2018) (Thomas, J., concurring) (describing a fundamental core of adjudicative power as the "disposition" of the interests properly at stake in a contest and distinguishing between "private" and "public" rights' adjudication); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (holding that a federal statute requiring federal courts to reopen final judgments violated Article III); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("[t]he province of the court is, solely, to decide on the rights of individuals"); *compare* Fallon et al., *supra* note 182, at 50–56, 73–76 (describing the emergence of the ban on advisory opinions and *Marbury*'s separation of law declaration from dispute resolution as principal elements in the earliest interpretations of Article III), *with* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1845 (2008) ("Judicial opinions cannot claim authority from the same sources as judicial judgments do. Judgments derive their authority from the combination of judicial power and jurisdiction enshrined by the originally understood text and structure of the Constitution. Opinions must find another path to authority, if they find one at all.").

259. *See, e.g.*, John Bell, *Precedent, in* THE NEW OXFORD COMPANION TO LAW 923, 923 (Peter Cane & Joanne Conaghan eds., 2008) (stating that a case's holding and *ratio decidendi* ("reason for deciding") comprise a precedent and offering four chief criteria for identifying the latter); Dorf, *supra* note 208, at 2049 (arguing that a holding includes any part of a rationale necessary to decision).

260. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 42–43 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present."); Restatement (2d) Judgments

But it would make no sense to require for Article III's sake that parties seeking relief show an injury traceable to the defendant's conduct that is remediable by the court unless the adjudicative powers of that court reached no further.[261] Standing, jurisdiction, the law of remedies, the law of judgments—none of it makes sense if what a court is doing in resolving a dispute is *making* law.[262] This functional division is a useful filter through which to strain the Court's past work on states' interests in interstate waters. Section A does so for claims before the Court while Section B attacks the accommodation of rival sovereign interests in inferior courts of competent jurisdiction.

### A. CASES FROM CONTROVERSIES: RULES OF DECISION AS HORIZONTAL AND VERTICAL CHOICES OF LAW

The Court's embrace of equity and, by implication, federal equity's autonomy from state law,[263] has anchored its original jurisdiction practice.[264] That authority seems bound only by the Court's capacity to form a majority.[265] This punctuates some challenging questions now engulfing the Court's interstate waters jurisprudence—especially its opinions' precedential effects in later cases or controversies arising in inferior courts. First, how (if at all) are private claimants bound by equitable apportionment opinions, decrees, and/or the denials thereof in subsequent litigation? Second, is the United States bound if it was never party to a

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§ 41 (1982) ("A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party.").

261. *See* Walsh, *supra* note 256, at 1729 (discussing the boundary of that which is *coram non judice* or "not before a judge"); *see also* Bandes, *supra* note 255, at 277–81 (noting that the modern Supreme Court has increasingly gravitated toward a "private rights" model of adjudication where the rights of the parties to the suit are the paramount concern); Merrill, *supra* note 255, at 49 ("Until fairly recently, the conventional wisdom in the legal academy appeared to be that statements of law in judicial opinions are binding only on the parties to the judgment under the rules of res judicata and on the courts themselves under principles of stare decisis."); Baude, *supra* note 258, at 1815–41 (same). Where the point has arisen in interstate waters cases, the Court has never suggested anything to the contrary. *See, e.g.*, New York v. Illinois 274 U.S. 488, 490 (1927) ("We are not at liberty to consider abstract questions."); Arizona v. California, 283 U.S. 423, 462 (1931) (holding that the case failed "because it is based, not on any actual or threatened impairment of Arizona's rights, but upon assumed potential invasions").

262. *Cf.* Fallon et al., *supra* note 182, at 52 ("The prohibition against advisory opinions has been termed the oldest and most consistent thread in the federal law of justiciability."); Merrill, *supra* note 255, at 65–67 (arguing that the most expansive conceptions of judicial authority make "every judicial judgment a 'de facto class action'" without adherence to the notice or representation safeguards of Federal Rule 23).

263. *See* Morley, *supra* note 12, at 230–43; Collins, *supra* note 12; Fletcher, *supra* note 197, at 1528–38; Farber, *supra* note 135, at 542–44; Plater, *supra* note 135, at 524–25.

264. *See supra* notes 98–103 and accompanying text.

265. This differs from the Founding perhaps only insofar as the Court's law declaration function has become much the more important of the two. *Cf.* Pushaw, *supra* note 108, at 504 ("Federalists understood that federal jurisdiction over Article III 'Controversies' turned solely on the presence of one of six party configurations listed, regardless of the law involved."); Grove, *supra* note 140, at 54–55 (observing that "broad precedent setting may be the only way that the Supreme Court can oversee lower courts" in subject matters it encounters "but once or twice a decade").

proceeding? Third, may Congress rearrange or reorder these interests by statute? Finally, what force do state law rights to a certain quality or quantity of water possess upstream or downstream on interstate waters?

In a nutshell, although the record of adjudications in the original jurisdiction stems from party-alignment (the presence of a defendant otherwise immune to the relief being sought), the Court's predominant mode of decision there has been to *reconcile* the law of the contending states ("local law"), not to *apply* it.[266] The Court's declared intentions have been to reveal equities from what the state-parties themselves have said should favor some claims on the resource over others.[267] This has settled few if any broadly applicable rules of decision.[268] Indeed, the rival explanation has never been completely foreclosed: that the Court is actually elevating shared local law into a common *federal* rule of decision.[269] Yet its uneven fusion of law declaration and dispute resolution has grown increasingly self-referential over time. Its continued attribution of this function to the equity side of the "judicial Power"[270] has muddled both functions.[271] To move

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266. *See* Wyoming v. Colorado, 259 U.S. 419, 470 (1922) (concluding that because both states had adopted prior appropriation as their law, its application to the controversy between them was just and equitable); Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931) "[W]hile the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight."); Washington v. Oregon, 297 U.S. 517, 525–28 (1936) (noting that if the uses of the river at issue had included offsite transfer, a "different question" would be presented given that such "use is unlawful according to the rule in many courts"); Nebraska v. Wyoming, 325 U.S. 589, 618 (1945) ("Since Colorado, Wyoming, and Nebraska are appropriation States, that principle would seem to be equally applicable here."); Colorado v. Kansas, 320 U.S. 383, 399–400 (1943); Montana v. Wyoming, 563 U.S. 368, 375–85 (2011). The Court has at least once noted the variability and volatility of state water law in this connection. *See Connecticut*, 282 U.S. at 670 (noting that laws "that happen to be effective for the time being in both States do not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented").

267. *See, e.g.*, *Connecticut*, 282 U.S. at 670 ("[W]hile the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight.").

268. *See supra* notes 90–93 and accompanying text.

269. *See, e.g.*, Colorado v. New Mexico, 459 U.S. 176, 182 (1982) ("The laws of the contending States concerning intrastate water disputes are an important consideration governing equitable apportionment. When, as in this case, both States recognize the doctrine of prior appropriation, priority becomes the 'guiding principle' in an allocation between competing States."); Wyoming v. Colorado, 259 U.S. 419, 464 (1922) (noting that Kansas v. Colorado was a "pioneer in its field" but that the opinion was "confined to a case in which the facts and the local law of the two states" were unique). One early interpretation of *Wyoming* was that the Court had consulted each state's law of appropriation and had federalized a common rule of decision. *See* James E. Shernow, *The Latent Influence of Equity in* Wyoming v. Colorado (1922), 2(1) GRT. PLAINS RES. 7, 20–21 (1992); Wehrli, *supra* note 146, at 14–15. Similarly, in the majority opinion in *Florida v. Georgia*, the Court recently declared that, "[g]iven the laws of the States," Florida and Georgia each had an equal right to make "reasonable use" of their shared waters—tracing that notion to Justice Story's riparianism chestnut, *Tyler v. Wilkinson*. *See* 138 S. Ct. 2502, 2513 (2018) (citing Tyler v. Wilkinson, 24 F. Cas. 472 (C.C.D.R.I. 1827)).

270. U.S. CONST., art. III, §§ 1, 2.

271. *See supra* notes 153–57 and accompanying text. There is little reason to expect that more attention to the equity/law divide will straighten things out. *Cf.* Morley, *supra* note 12, at 247–48 (discussing Guaranty Trust Co v. York, 326 U.S. 99, 101, 108 (1945), and noting that federal principles of equity continue to govern federal courts' remedial choices following *Erie*, even in the diversity

forward, the Court should order its compound task more like other choices of law: stepwise. It should *first* identify and explain all the law that applies to the case or controversy and *then* prioritize and order that law which ought to govern as necessary and proper—whether by *application* or *adoption* but not by some indecipherable fusion of the two.[272] Doing that much would better enable other institutions—inferior courts, Congress, and the executive—to identify actual rules of decision for resolving what are increasingly complex disputes. It could further measure and articulate the aggregate interests a state may claim in shared waters by the only available means: clear holdings on contested issues. Idling these other actors with cryptic choices—remedial or otherwise—wastes scarce human and natural capital. In adjudicating the law, the first step is always to distinguish law from non-law and the second is to distinguish the horizontal from vertical conflicts of law to be resolved. Let's take things in that order.

1. 'Procedural' Common Law and Beyond

For any claim-processing, evidentiary, or other recognizably *procedural* rules of decision, the Court possesses Article III and statutory authorities to act.[273] This much is at least consonant with its traditions.[274] Its past opinions offer guidance

jurisdiction); Hill, *supra* note 12 (arguing that federal courts' remedial powers to redress constitutional injuries are vested by Article III and need no statute specifically authorizing them to act against officials who would interpret the law to violate a plaintiff's rights).

272. On these two steps in choice of law methodology more generally, see Roosevelt, *supra* note 241, at 11; Wolff, *supra* note 229, at 1884–85; Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 293–319 (1990). On the importance of distinguishing adoption from application in such choice situations, see Clermont, *supra* note 159.

273. *See* Florida v. Georgia, 138 S. Ct. 2502, 2512–13 (2018) (noting that Court is free to "mould the process it uses in such a manner as in its judgment will best promote the purposes of justice") (quoting Kentucky v. Dennison, 65 U.S. (24 How.) 66, 68 (1861)); Texas v. New Mexico, 138 S. Ct. 954, 958–60 (2018) (fashioning its own test for allowing the United States to context compact claims to Río Grande flows); Kansas v. Nebraska, 135 S. Ct. 1042, 1064 (2015) (Roberts, C.J., concurring and dissenting in part) (agreeing with the majority on its processing of Kansas' claims but disagreeing that its equitable discretion is sufficient to amend accounting procedures set forth in the compact); South Carolina v. North Carolina, 558 U.S. 256, 274 (2010) (declining to adopt Special Master's proposed rule for joinder of private parties); Texas v. New Mexico, 482 U.S. 124, 130–31 (1987) (fashioning an equitable money damages award for compact breach because "[s]pecific performance will not be compelled 'if under all the circumstances it would be inequitable to do so'").

274. *Cf.* 28 U.S.C. § 2072(a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the [inferior federal courts]."); Shapiro, *supra* note 17, at 579 (listing equitable discretion and federalism/comity as two of the four major headings of federal courts' discretionary control over jurisdiction); Merrill, *supra* note 128, at 24–27, 46–47 (distinguishing between federal courts' authority to fashion "rules of decision" which *Erie* and later cases cast into doubt and authority for "procedural and housekeeping rules for the conduct of litigation" which are conventionally accepted forms of adjudicative power); Matasar & Bruch, *supra* note 85, at 1322–67 (tracing long histories of Court's procedural common law, especially docket-control norms like the refusal of jurisdiction in cases decided below on an "adequate and independent" state law basis); Hartnett, *supra* note 109, at 1705–07 (tracing the Court's claiming of authority to shape the issues a writ of certiorari brings to the Court from any proceedings below).

to the Court's litigants if not necessarily the "law" proper.[275] Any preemption from such rules would arguably stem from the forum's procedures.[276] Of course, procedural rules can have substantive significance. For example, because the Court has consistently and emphatically held that the successful complainant-state in the original jurisdiction must prove its injury of "serious magnitude" by "clear and convincing evidence,"[277] the preclusive effects of any adverse ruling by the Court ought not to reach related private claims *not* saddled with such a proof burden.[278]

Second, the bulk of the Court's declarations in the original jurisdiction holdings suggest that, as to the ultimate act of prioritizing rivalrous uses, there exists little governing judge-made *law*.[279] The *necessary* (not to say sufficient) injury any state must plead and must prove to gain effective relief may be found in those past holdings,[280] at least if the Court itself is bound by anything more than present exigencies. Logically, however, the *interests* articulated and acted upon therein belong to all states equally—whether they sue in the Supreme Court or not.[281] State interests stand independent of law, closer to sovereignty itself. If such state

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275. *Cf.* Linsley, *supra* note 93, at 42–50 (reviewing the Court's many claim-processing norms, including burdens of proof, joinder, and the requirement that States seek leave to file, and how outcome-determinative these requirements have proven in past disputes).

276. *Cf.* Sibbach v. Wilson & Co., 312 U.S. 1, 13 (1941) (holding that Rules Enabling Act's proviso limiting Supreme Court's rulemaking authority to exclude changes to "substantive rights" does not reach "adjective law of judicial procedure" like the taking of evidence); Hanna v. Plumer, 380 U.S. 460, 466–69 (1965) (holding that federal court must apply Federal Rule 4(d) on service of process, not state law, even if "outcome determinative" because federal procedural law rightly preempts inconsistent state law).

277. *See, e.g.*, New York v. New Jersey, 256 U.S. 296, 309 (1921); North Dakota v. Minnesota, 362 U.S. 365, 387 (1923); Washington v. Oregon, 297 U.S. 517, 522 (1936); Colorado v. New Mexico, 459 U.S. 176, 187–88 (1982); Florida v. Georgia, 138 S. Ct. 2502, 2514 (2018).

278. *See* Restatement (2d) Judgments § 28(4) (1982) ("[R]elitigation of the issue in a subsequent action between the parties is not precluded [where t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action. . . ."); *cf.* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 504 (1971) (noting that the Court's reticence toward interstate nuisance suits is no reason "to impose on [a plaintiff] an unusually high standard of proof when what is really needed is a forum better suited to litigating the claim(s)").

279. *See supra* notes 149–50 and accompanying text.

280. *Cf.* Fallon, *supra* note 17, at 1070–71 (finding that, despite sustained efforts by the Court, "its decisions reveal that whether a plaintiff has suffered a judicially cognizable injury . . . frequently turns on the provision of law under which a plaintiff seeks relief"). This leaves special masters and litigants to sift past opinions and select declarations for present use in ordering the evidence comprising a litigation. For example, in Special Master Kelly's December 2019 Report recommending dismissal of Florida's case, he began his analysis of the equities of Georgia's consumption of Flint River flows "by observing that '[d]rinking and other domestic purposes are the highest uses of water.'" Report of the Special Master at 52, Florida v. Georgia, No. 142 (issued Dec. 11, 2019) (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 673 (1931)). Metro-Atlanta's consumptive withdrawals thereafter slipped into a kind of safe harbor, *see id.* at 53 & n.33, one that Florida's case never reached. *See id.* at 81 (recommending that Georgia's consumptive uses be deemed "reasonable").

281. *See* Kansas v. Colorado, 206 U.S. 46, 97 (1907) ("One cardinal rule, underlying all the relations of the States to each other, is that of equality of right.").

interests are ignored by inferior courts, that surely is a challenge to the Supreme Court's Article III duty and authority to interpret the Constitution finally.[282]

Asserting claims to shared waters against defendants *outside* a forum state's territory *may* implicate quasi-sovereign interests without necessarily requiring remedies against immune (jurisdiction-defeating) parties.[283] The identities of necessary and sufficient defendant(s) are claim-specific. Moreover, only states have *duties* to protect the public welfare and common heritage.[284] Nonetheless, adjudicating any such inter-jurisdictional claim to waters would entail recourse to some kind of trans-substantive principle(s) of law.[285] Any judgment in such a case, moreover, would likely depend on interjurisdictional recognition for its enforcement.[286] This may not distinguish such cases from so much other civil litigation today, but it does accentuate the importance of forum selection and the interoperability of the law(s), if any, constraining the uses at issue in any given action.

As to that intersection of governing law and forum selection, the states' quasi-sovereign interests must be determinative. These interests surely differ from

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282. *Compare* Caminker, *supra* note 141, at 828–34 (arguing that Founders understood Article III's usage of "inferior" courts to imply the Supreme Court was the "ultimate arbiter of the meaning of federal law"), *with* Dorf, *supra* note 208, at 2067 ("When judges and commentators argue that every aspect of a prior opinion except the facts and outcome may be ignored as dicta, they implicitly assert that the process of public justification of judicial decisions is an exercise in futility.").

Inferior courts' jurisdictions present strategic choices to would-be litigants. Suits in federal district court, though otherwise within the subject matter jurisdiction, could run aground of basic standing's elements if a State were to act as a mere proxy. *Cf.* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602 (1982) ("Quasi-sovereign interests stand apart from . . . private interests pursued by the State as a nominal party."); Warth v. Seldin, 422 U.S. 490, 499 (1975) ("[E]ven when the plaintiff has alleged an injury sufficient to meet the "case or controversy" requirement . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). Similarly, if the State does assert some unique, quasi-sovereign interests establishing standing, it risks having that claim matched by an opposing State's interests, thereby defeating subject matter jurisdiction. *See, e.g.*, Hood *ex rel.* Mississippi v. City of Memphis, 570 F.3d 625, 631–33 (5th Cir. 2009). This at least suggests that state courts may be better fit jurisdictionally for some cases.

283. *But cf. City of Memphis*, 570 F.3d at 632–33 (holding that State's suit claiming foreign city's withdrawal from common aquifer should be enjoined "necessarily" asserted "control over a portion of the interstate resource" being utilized by the city "pursuant to" the law of the foreign state and affirming dismissal for lack of subject matter jurisdiction).

284. *See* Massachusetts v. EPA, 548 U.S. 497, 521 (2007); Hessick, *supra* note 17, at 1935 ("Individuals do not have the duty to protect the well-being of the state's populace or the rightful status of a state. Instead, the state has these responsibilities.").

285. *See* Douglas L. Grant & Bret C. Birdsong, *Private Interstate Suits, in* WATERS AND WATER RIGHTS at § 44.05 (3d ed. 2019). The highest hurdle in such litigation may be the territoriality of judicial jurisdiction—which has continued to structure our courts' effective reach. *See id.* at § 44.03; James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 175–99 (2004) (tracing territorialist service-of-process requirements' origins to the Confederation and early Federal periods).

286. The Court has long held that Article IV's Full Faith and Credit Clause and the full faith and credit statute both require that non-forum state judgments be recognized if rendered with jurisdiction and by due process. *See* Durfee v. Duke, 375 U.S. 106, 115 (1963); Hansberry v. Lee, 311 U.S. 32, 40 (1940).

federal reservations of water now grounded in judge-made law across the West,[287] but they are also similar. The (federal) judge-made law of federal reservations preempts inconsistent state law regardless of forum.[288] The Court has pointedly held that the adjudication of federal reserved rights, whether denying or granting them, *is* a binding final judgment.[289] In the rare instances it has even arguably finally denied an equitable apportionment, it has come when the Court could not avoid sorting favored from disfavored private transboundary claims.[290] On one hand, this should not be surprising. Protecting the States' equal dignity should not entail rewriting their laws.[291] As Ward Bannister observed in the wake of the first decree, "[i]nterstate priority . . . is monopoly in favor of one state against the other, and the percentage of the monopoly is in exact correspondence with the water called for by the aggregate of those of its appropriations" superior in right to that claimed by the subordinated.[292] On the other hand, that the Court would conclusively *deny* a state its remedy only in such contexts shows just how bound its attention has been to states' interests in the fullest possible scope and priority for their own laws. Each decree entered was at pains to define the enjoined state's obligations in the negative, leaving to the burdened state the allocation of the burden as so many private duties.[293] That patterning should inform *any* transboundary claim in the inferior courts.

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287. *See* Colburn, *supra* note 210, at 23–35.

288. *See* Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 818–20 (1976) (observing that state courts, no less than federal courts, are bound by federal reserved rights).

289. *See, e.g.*, Nevada v. United States, 463 U.S. 110, 129–34 (1983).

290. *See supra* notes 130–33 and accompanying text. In *Washington v. Oregon*, Justice Cardozo's opinion traced the then-adjudicated water rights in the basin from within each state, setting up the alleged conflicts between the rivalrous demands. *See* 297 U.S. 517, 520–29 (1936). That denial was conclusive. Likewise, in *Colorado v. New Mexico*, Colorado's proposed diversion by a single would-be industrial user was compared to the extant irrigators in New Mexico and their adjudicated priorities under New Mexico law. *See* 467 U.S. 310, 317–21 (1984). That denial was conclusive as well.

291. The "dignified tribunal" theory of the original jurisdiction has never explained matters within the Court's *concurrent* jurisdiction and says little about the law declaration function. *See* Pfander, *supra* note 18, at 571, 604–12. The Court has declared quite clearly that concurrent jurisdiction in inferior courts is to keep "what was intended as a favor" from becoming a "burden." Ames v. Kansas, 111 U.S. 449, 464 (1884). Exercise of that jurisdiction by another Article III court—whatever the Supreme Court's dignity—should not therefore deprive states of the interests the Court has already declared, at least insofar as that (inferior) court's own institutional position permits.

292. Bannister, *supra* note 2, at 978; *see also* Josh Patashnik, Arizona v. California *and the Equitable Apportionment of Interstate Waterways*, 56 ARIZ. L. REV. 1, 41–48 (2014).

293. *See supra* notes 75–81 and accompanying text. Notably, the Court's exercise of jurisdiction over New York City's garbage dumping *beyond* U.S. territorial waters was sustained rather casually in Justice Butler's opinion. Jurisdiction was grounded in the situs of the harm and by the defendant's willing appearance. *See* New Jersey v. City of New York, 283 U.S. 473, 482 (1931). The decree was held in abeyance allowing the City to construct the incinerators it had argued to the Court could replace its ocean dumping. *See id.* at 482–83. On July 1, 1934, dumping was finally enjoined, beginning the City's modern history of landfilling and incineration.

2. Toward a (Judge-Made) Law of State Interests in Inferior Courts

*Hinderlider* and *Erie* jointly confirmed that state law in a multi-sovereign system will occasionally be rendered inoperable by little or no federal law just for being among a plurality of otherwise applicable state laws.[294] Of course that is no warrant to ignore the rest of the Constitution: separation of powers, due process, and full faith and credit mandates remain intact.[295] Yet it is the rare state law that confines its scope territorially,[296] leaving laws over shared resources to overlap and potentially to intersect. This tasks its adjudicators first with determining the validity and applicability of laws and second with assigning the priority conflicting laws may, shall, or shall not receive.[297]

The federal interests in an interstate dispute like this shift the second, priority-assignment step into a federal interstice.[298] This interstice, however, has permanently uncertain foundations.[299] The lower federal courts may be better suited institutionally than are state courts to operate in that interstice. Federal courts are not expressions of the plurality of sovereigns necessitating the interstice in the first place.[300] Basic water law illustrates why that makes a difference.[301]

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294. *See supra* notes 75–84 and accompanying text.

295. *See* Roosevelt, *supra* note 241, at 6–15; Wolff, *supra* note 229, at 1851–78.

296. *Cf.* Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 484–85 (1924) (arguing that sovereignty is only necessarily confined by other sovereignty).

297. *Cf.* Wolff, *supra* note 229, at 1884 (observing that the "core structural feature of choice of law" is "the distinction between the geographic scope of state law, which is a matter of substantive state policy," and the "method of resolving conflicts when the laws of more than one state extend their geographic reach to cover a given dispute," which is a "question of interstate relations" and therefore sometimes a federal question). This critique of the earlier orthodoxy in conflicts of law was a concerted rejection of the focus on the territorial location in which rights and causes of action were said to "vest." *See generally* Cook, *supra* note 296; David F. Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933).

298. One certain inference from the original jurisdiction opinions is that the Supreme Court has treated interstate waters as wholes, *i.e.*, that their governance is necessarily shared. *See supra* notes 67–69 and accompanying text. Slicing waters up by jurisdictional boundaries, thus, would be to deny the Court's clearest guidance on the nature of these quasi-sovereign interests.

299. *See supra* note 177 and accompanying text. This has been true regardless of forum. Josh Patashnik, for example, revealed from careful study of the justices' papers and conferencing during *Arizona v. California* the considerable difficulties they had agreeing about the force of the Boulder Canyon Project Act, their own past precedents, and the common Western heritage of appropriative rights. *See* Patashnik, *supra* note 292.

300. *See* Field, *supra* note 229, at 933–34, 960–61; Hill, *supra* note 211, at 1036–42. Note that this is less about uniformity *per se* than self-dealing and the perception thereof. In most cases where a preemptive federal interest has been found, state self-interest has been at least as important as any perceived need for national uniformity. *See, e.g.*, Boyle v. United Techs. Co., 487 U.S. 500, 504–12 (1988); Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525, 538–39 (1958); Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471–72 (1942).

301. As Professor Dellapenna has long argued, the diversity of water rights and the patterning therein have stemmed from *continuous* legal evolution driven by climate, topography, technology, and a wealth of other influences—to say nothing of the specific adjudicators' talents. *See* Joseph W. Dellapenna, *The Evolution of Riparianism in the United States*, 95 MARQ. L. REV. 53 (2011). Where water has been

Accommodating rivalrous claims on the same shared asset, whether those claims are public or private, invariably necessitates both substantive and procedural norms and meticulous fact-finding.[302] Federal courts are national yet decentralized and organized around our federalism. They are bound to, and expert at, identifying and following governing precedent, whether federal or state.[303] The progressive clarification of precedent is an institutional imperative of our inferior federal courts—one that has made them indispensable to the Supreme Court.[304] Whatever else a federal forum has going for or against it, it is at least not the arm of a rival sovereign imposing its valuation of a common resource on another sovereign.[305] As Judge Friendly observed in defense of *Erie* in 1964—and as federal reserved rights have illustrated in contrast with quasi-sovereign state interests thus far—the "emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause it is binding in every forum, and therefore is predictable and useful,"[306] could be considerably better than

comparatively abundant, resolving its conflicting uses has mostly been consigned to after-the-fact dispute resolution. *Id*. at 53–55. Where water has been relatively scarce or its utilization relatively capital-intensive, resolving allocative disputes with more assurances of legal entitlement in advance of actual disputes has been required. *Id*. at 75–81.

302. *See generally* JOSHUA GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW (2004) (reviewing a continuous co-evolution of water rights and common law forums and procedures in England from the beginning of servitudes to the establishment of modern riparian doctrines). It may be worth noting here that each of the three cases sweeping away the holding that interstate compacts' interpretation was *not* a federal question—the doctrine prompting *Hinderlider*'s noted jurisdictional ruling—involved interstate river compacts. *See* Delaware River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419, 425–26 (1940); State *ex rel*. Dyer v. Sims, 341 U.S. 22, 24 (1951); Petty v. Tenn.-Missouri Bridge Comm'n, 359 U.S. 275, 278 (1959). As the Court reasoned in *Sims*, every such bargain presumes that a "State cannot be its own ultimate judge in a controversy with a sister State." *Sims*, 341 U.S. at 28. Federal question jurisdiction thus not only assured some availability of an Article III forum (whether original or appellate). *See* Cuyler v. Adams, 449 U.S. 433, 438–42 (1981). It assured that the validity and terms of the states' mutual obligation(s), which would not "rest upon the law of a particular State," *Sims*, 341 U.S. at 27, could not be amended unilaterally. *Cf. Colburn*, 310 U.S. at 431–33 (subordinating New Jersey's general eminent domain statute to the 1934 compact between New Jersey and Pennsylvania, reversing New Jersey court's questionable interpretation of Pennsylvania law on the point, and reversing that court's inverse condemnation writ of mandamus because Compact Commission had been created jointly and was not to be regarded as equivalent of state agencies).

303. *Compare* Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983) (per curiam) (noting that only the Supreme Court may *overrule* its own precedent and that, "[u]ntil that occurs, [it] is the law" lower federal courts must follow), *with* Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967) (explaining a federal court's obligation to follow the precedents of a state's highest court and to give "due regard" to the decisions of its lower courts).

304. *See* Re, *supra* note 143, at 951–66.

305. As the Court held in affirming EPA's application of downstream Oklahoma's water quality standards to a discharge in upstream Arkansas (with its own water quality standards for the receiving river), there is no protecting *all* sovereign interests in the case of conflicting valuations of a shared whole like a river. *See* Arkansas v. Oklahoma, 503 U.S. 91, 106–07 (1992). There are only so many "balance[s] among competing policies and interests." *Id*. at 106.

306. Henry J. Friendly, Jr., *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 405 (1964).

that alternative.[307]

What of the *federal* interests in claims arising under state law? Recall that the Court's *Wyandotte* doctrine consigning most tort claims to inferior courts preceded *Milwaukee II*'s holding that, at least as to *discharged pollution* to shared waters,[308] Congress had displaced all federal judge-made (but not state) law by legislation.[309] This mirrored an earlier, similar evolution on the obstruction or impoundment of interstate waters.[310] But recall finally that, from *Wheeling Bridge* forward the Court refused to permit its jurisdiction to be used by a state to project its law into or upon a sibling state.[311] In trading original jurisdiction for a role more suited to its contemporary self, thus, the Court may have signaled a linkage between jurisdiction and jurisprudence that is vital to aligning the proper choices of law: the Court's holdings on states' quasi-sovereign interests in interstate waters, to whatever extent they are not procedural common law and so bound to the Court-as-forum,[312] must be so much sub-constitutional preemption of state law that orders states' rivalrous interests unless and until those holdings are displaced by valid positive federal law.[313]

There are several reasons to conclude that the Court's holdings occupy this precise footing. First, it is as to the conflicting quasi-sovereign interests—which must be "reconciled as best they may"[314]—that states lack the legislative capacities *Erie* presumed and by which the specialized federal interests described above

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307. *See* Colburn, *supra* note 210, at 62–65. Of course, federal judge-made law comes within the Supremacy Clause only if it is at least arguably constitutional or statutory at base. *See* Monaghan, *supra* note 200, at 748–53; Hill, *supra* note 211, at 1030–35.

308. Then-Justice Rehnquist's opinion in *Milwaukee II* focused on permitted discharges that were at issue in the litigation, holding that "[f]ederal courts lack authority to impose more stringent effluent limitations under federal common law" than those imposed administratively. City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 350 (1981) (*Milwaukee II*). Note, too, that "irrigation return flows," like so many other influences that systematically degrade the quality and/or quantity of shared rivers, are specifically *excluded* from the statute's reach.

309. *See supra* notes 193–97 and accompanying text. The leading treatise suggests that the simplest work-around for private claimants with cross-jurisdictional claims is to plead their cases in tort to avoid any implication that a "local action" involving out-of-state water rights is demanded (given involvement of immovable property). *See* Grant & Birdsong, *supra* note 285, at § 44.04(a).

310. *See supra* notes 166, 173 and accompanying text.

311. *See supra* notes 37–42 and accompanying text.

312. *See supra* note 85 and accompanying text.

313. *Cf.* Hill, *supra* note 211, at 1055 (observing that the "creative aspect" of the adjudicative role cannot be ignored or eliminated because, although the judiciary is "subordinate to the political branches," that subordinacy "bespeaks the supremacy of the political branches, but not their sufficiency"); Manning, *supra* note 82, at 1729–31 (arguing that the Eleventh Amendment's purposes have figured prominently in the Court's interpretation of state sovereign immunity and Article III and that this hardened into constitutional restrictions on state court jurisdiction over states). Even some skeptical of Article III law-making power in those "controversies" falling within its menu of party-configuration subject matter jurisdiction have found within the Court's approach to its own precedents ample authority for such federal judge-made law. *See, e.g.*, Nelson, *supra* note 229, at 63–64.

314. New Jersey v. New York, 283 U.S. 336, 342 (1931).

emerge.[315] Once specified, these interests are preemptive to at least some degree. Second, and in contrast, congressional rebalancing of these interstate waters interests, as seen in *Wheeling Bridge II*,[316] *Arizona v. California*,[317] and throughout the appellate docket,[318] has been determinative wherever the legislation has not *defied* a Court decree.[319] Third, state law specifying these interests has evaded their preemptive effects wherever no *necessary* conflicts have arisen.[320] Finally, interstate compacts meet no mention in the Supremacy Clause and yet the Court has afforded them a congruent priority.[321] *Hinderlider* did not invent that sort of

315. These are the hallmarks of legitimate federal judge-made law—even among skeptics. *See* Clark, *supra* note 211, at 1271–75; *cf.* Nelson, *Legitimacy*, *supra* note 229, at 2–4, 44–45 (analyzing Justice Scalia's approach in *Boyle v. United Techs. Co.*, 487 U.S. 500 (1988), holding that state legislative authority was foreclosed and unique federal interests were in issue); Hill, *Preemption*, *supra* note 211, at 1080-81 (connecting the legitimate enclaves of federal judge-made law to areas in which state authority must be foreclosed); Clark, *supra* note 211, at 1271 (same).

316. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 Howe) 421 (1855) (*Wheeling Bridge II*).

317. 373 U.S. 546 (1963).

318. *See, e.g.*, Arkansas v. Oklahoma, 503 U.S. 91, 101–03 (1992); Illinois v. City of Milwaukee, 406 U.S. 91, 100–01 (1972) (*Milwaukee I*); First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152, 160–62 (1946); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 521–28 (1941); Sanitary Dist. Chicago v. United States, 266 U.S. 405, 425–27 (1925); Monongahela Co. v. United States, 216 U.S. 177, 193–95 (1910); Union Bridge Co. v. United States, 204 U.S. 364, 401–02 (1907); Rio Grande Dam & Irr. Co. v. United States, 174 U.S. 690, 709–10 (1899); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 316–20 (1851); Pollard's Lessee v. Hagan, 44 U.S. (13 How.) 212, 221–24 (1845); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 120–25 (1824).

319. *See supra* notes 60, 96–97, and accompanying text.

320. This approach to reconciling state and federal statutes on shared waters interests was first fashioned in *Cooley v. Board of Wardens*. *See* Robertson, *supra* note 11, at 166, 256 (calling *Cooley*'s approach a "process of accommodation"); Swisher, *supra* note 53, at 422 (same); *see also* Grove, *supra* note 17, at 859–85 (showing the breadth of state standing to sue the United States protecting the enforceability of state law). By the time equitable apportionments like the lower Colorado's involved compacts, federal statutes, adjudicated federal reservations, and adjudicated state law rights, there was no longer any question that an adjudication thereof bound all parties' interests as so judged not because the facts as found were conclusive, but because the declared law deciding the controversy was. *See* Arizona v. California, 460 U.S. 605, 615–28 (1983).

321. *See* Texas v. New Mexico, 462 U.S. 554, 564 (1983) ("[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms."). Of course, "Federal law is enforceable in state court not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum . . . but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." Howlett v. Rose, 496 U.S. 356, 367 (1990). The original jurisdiction has shifted noticeably toward disputes over the meaning or scope of interstate compacts. Of the twelve full opinion decisions since the Colorado River Compact structured the Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), seven have been compact disputes. *See Texas*, 462 U.S. 554; Oklahoma & Texas v. New Mexico, 501 U. S. 221 (1991); Virginia v. Maryland, 540 U.S. 56 (2003); Montana v. Wyoming, 563 U.S. 368 (2011); Kansas v. Nebraska, 135 S. Ct. 1042 (2015); Texas v. New Mexico & Colorado, 138 S. Ct. 954 (2018); Texas v. New Mexico, 141 S. Ct. 509 (2020). Note that, as compared to the five (arguably six) basins where a decree has ever been entered, there are over twenty basins with an interstate allocation compact approved by Congress and at least a dozen more with compacts for managing pollution, navigation, impoundment, *etc.* *See* Sherk, *supra* note 134.

judicially adapted preemption.[322] It simply epitomized it. Ultimately, then, preemptive federal interests bar a state from ignoring its duties to the Union even if those duties have not yet been specified in valid positive law.

Importantly, though, Congress can override federal judge-made law only if Congress can recognize it as judge-made law.[323] It often seems as if the Court itself welcomes Congress to such work. And the Court would undoubtedly draw focused attention to its own law-*making* were it to hold that Congress's rebalancing of interstate waters' benefits and burdens is as constrained by old opinions as by a formally entered decree.[324] This it has been reluctant to do,[325] probably for good reason.[326] When the Court set aside the Secretary of War's permit for Chicago's Lake Michigan diversions,[327] it tacitly confirmed that its jurisdiction is protective of sovereign *interests* regardless of then-extant positive federal law.[328] There is an important caveat: the notion that the *executive branch* is free to disregard the Court's past interpretations of the several states' equal sovereignty merely by declining party status in a suit over a particular resource is not the law, has never been the law, and should not be the law.[329] Congressional and executive prerogatives versus Article III are two different structural equations.

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322. *See* Cuyler v. Adams, 449 U.S. 433, 438–42 (1981) (discussing *Wheeling Bridge I*'s legacy); State *ex rel*. Dyer v. Sims, 341 U.S. 22, 29–32 (1951).

323. *See* Green, *supra* note 199, at 1285. If, by contrast, the Court's equitable apportionment opinions declare interests or rules of decision that are constitutionally *required*, then Congress's authority to override or eliminate would be correspondingly reduced. *See* Monaghan, *supra* note 103, at 14–17. But one of the reasons for better clarity about the choice-of-law methods employed by the Court is to better signal its co-equal branches what has and has not been conclusively adjudicated.

324. If "[j]udicial supremacy is . . . the idea that the Constitution means *for everybody* what the Supreme Court says it means in deciding a case," Walsh, *supra* note 256, at 1715, a judicial supremacist would hold that the Court's declarations on state interests in interstate waters supersede even later federal legislation and compacts on those interests. The Court itself has rejected such thinking in the past, though. *See, e.g.*, Arizona v. California, 373 U.S. 546, 565–66 (1963).

325. *See supra* notes 54–64, 96–97 and accompanying text.

326. *Cf*. Fallon, *supra* note 255, at 159–65 (making the case for judicial restraint in the face of state and federal legislation deviating from judicial opinions); Walsh, *supra* note 256, at 1741 ("[O]ver time, judicial supremacy will result more and more in supremacy that is less and less judicial."); Merrill, *supra* note 255, at 77–78 (contrasting an "authoritarian" approach to judicial opinion writing and interpretation to one in which opinions are understood as explanations of judgments meant only to influence nonjudicial actors and suggesting in the former a tendency to "stultify the capacities of the politically accountable institutions to engage in interpretation").

327. *See supra* note 176 and accompanying text.

328. Congressional displacement of past Supreme Court holdings on states' quasi-sovereign interests, in short, must be explicit and definitive, or else its legislation will surely be assimilated to the jurisprudence by any inferior court bound by both. *See, e.g.*, Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 777–78 (7th Cir. 2011). Of course, as to any decrees binding states-as-states, no Article II actor would be free to interfere with or to frustrate the Court's ordered relief. *See* Baude, *supra* note 258, at 1840–41, 1853–61.

329. *See* Wisconsin v. Illinois, 278 U.S. 367, 416–21 (1929) (holding that, even without the United States a party, the permit granted to Illinois and the Chicago Sanitary District would be set aside and the Court would be responsible for balancing the interests of the concerned states); *cf*. Litman, *supra* note 20, at 1242–52; Grove, *supra* note 140, at 57–58 (contrasting Chief Justice Roberts' view that narrow opinions focused on the precise dispute before the Court should be the Court's norm with the view that

Finally, as readily as the Court has acceded to federal statutes and interstate compacts on pollution[330] and flood control,[331] the diversion, delivery, and consumption of waters has remained considerably more the province of state law and jurisdiction.[332] The statutes empowering the Bureau of Reclamation, Corps of Engineers, and other agencies managing appropriated water are notorious for "saving" state law water rights and powers from preemption.[333] Inferior courts, being within the Supreme Court's revisory jurisdiction in all matters presenting substantial federal questions,[334] stand before the Court's precedents apart from both Congress and the executive branch. *Any* inferior court giving extraterritorial effect to a forum-state law or judgment *may* frustrate the derivative federal interests here—especially with equitable relief—so it is this context where the distinct interests at stake become the most difficult to sort and prioritize. Section B turns to that set of challenges.

### B. CROSS-STATE CLAIMS TO SHARED WATERS: RETHINKING EXTRATERRITORIALITY

Coincidentally, as equitable apportionments were spurring arid states into sorting out domestic water rights through stream adjudications,[335] the

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the role of the Supreme Court is to establish precedents that guide all other courts); Fallon, *supra* note 255, at 105–20 (arguing that each of the Constitution's institutions have "external" constraints on them imposed by the others, chiefly for the Court the adoption of constitutional interpretations that finally state the law); Dorf, *supra* note 208, at 2029–49 (arguing that Article III's case/controversy requirement embraces a broad understanding of a court's holding to include the court's reasons); Merrill, *supra* note 255, at 67–70 (arguing that a "predictive theory" of opinions leads to a broad scope for their effect beyond the parties to the dispute).

330. *Cf.* Arkansas v. Oklahoma, 503 U.S. 91, 99–101 (1992) (observing that the Federal Water Pollution Control Act preempted actions based on the law of the affected state, displaced federal common law, and that the only other law applicable to pollution discharges to interstate waters was "the law of the State in which the point source is located").

331. *See, e.g.*, South Dakota v. Nebraska, 485 U.S. 902 (1988) (denying leave to file suit challenging management of flood control projects on Missouri River); State of Oklahoma *ex rel.* Phillips v. Guy F. Atkinson, 313 U.S. 508, 516–35 (1941) (reviewing federal interests in flood control on Red and Mississippi rivers and rejecting challenges to federal statute).

332. *See* Lawrence J. MacDonnell, *General Stream Adjudications, the McCarran Amendment, and Reserved Water Rights*, 15 WYO. L. REV. 313 (2015); *cf.* ENVTL. LAW INST., AT THE CONFLUENCE OF THE CLEAN WATER ACT AND PRIOR APPROPRIATION 4–12 (2013) (detailing the Federal Water Pollution Control Act's rise, its drafters' strategic exclusion of water "quantity" from the subject matters delegated to federal regulators, and the interrelations of water quality and water quantity in actual surface water governance); Thomas H. Pacheco, *How Big Is Big? The Scope of Water Rights Suit Under the McCarran Amendment*, 15 ECOL. L.Q. 627, 633 (1988).

333. *See* Reed D. Benson, *Reviewing Reservoir Operations: Can Federal Water Projects Adapt to Change?*, 42 COLUM. J. ENV'TL L. 353, 368–78 (2017); Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENV'TL L.J. 363, 374–82 (1997). The era of "general stream adjudications" in which the interrelated water rights of in-state users were adjudicated by a single tribunal yielded a tremendous judicial investment and many "adjudicated" water rights that came at a dear cost. *See* Joseph M. Feller, *The Adjudication that Ate Arizona Water Law*, 49 ARIZ. L. REV. 205 (2007). But as *Wheeling Bridge* itself illustrated, states can and do enact statutes aimed at denying a sibling state its due uses of shared waters.

334. *See* Matasar & Bruch, *supra* note 85, at 1346–50.

Supreme Court was renovating the rules of inter-jurisdictional litigation.[336] State courts' pursuit of their own independence meant horizontal frictions.[337] Distinct but related frictions were also confronted on the territoriality of state legislation.[338] As these foundations were reset, however, one net effect was the practical elimination of transboundary water rights litigation. That is a trend the Court's interstate waters jurisprudence may soon disrupt. For states surely have legitimate constitutional interests in a quality and quantity of advantage not being denied their residents at their borders as the collateral effect of another state's laws.

1. Constitutional (Judge-Made) Choices of Law

In the decades surrounding *Erie*, the Court fashioned several constraints on a forum's extraterritorial application of its own laws.[339] While first hinting that these constraints might be quite robust,[340] they were eventually settled as modest, specific checks grounded in fairness to individuals and in other states' interests in their own laws' scope and priority.[341] Interstate suits were growing more common and older, pre-positivist theories of law were fading. Civil litigation increasingly meant a forum state's choice-of-law rules had to determine whether foreign or

335. *See* Pacheco, *supra* note 332, at 635–43; John E. Thorson, Ramsey L. Kropf, Andrea K. Gerlak, Dar Crammond, *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299, 305–06 (2006).

336. *See* Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850-1940*, 62 U.C.L.A. L. REV. 1240, 1314–25 (2015) (discussing *Home Ins. Co*., 281 U.S. 397; *Clapper*, 286 U.S. 145; *Alaska Packers*, 294 U.S. 532; John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178 (1936); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939)).

337. *See* Wolff, *supra* note 229, at 1881 ("[T]he 1930s brought a series of decisions in which the Court defined more aggressive constitutional limitations on state choice of law, raising the prospect of a significantly increased federal role in supervising state choice-of-law policy.").

338. *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law*, 84 NOTRE DAME L. REV. 1057, 1075–92 (2009) (discussing So. Pac. Co. v. Arizona, 325 U.S. 761 (1945); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Edgar v. MITE Corp., 457 U.S. 624 (1982); Phillips Petro. Co. v. Shutts, 472 U.S. 797 (1985)).

339. *See* Wolff, *supra* note 229, at 1884 ("During the 1930s, the Court reframed the constitutional limits on state choice of law around governmental interests and the avoidance of unfair surprise to litigants."); Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 75 (1958) (concluding from an exhaustive survey that "a state court's choice of law will be upset under the Full Faith and Credit Clause or the Due Process Clause only when the state whose law is applied has no legitimate interest in its application"). Here, too, Brandeis exerted considerable influence. *See id*. at 23–30; Spillenger, *supra* note 336, at 1297–1318.

340. *See, e.g*., Home Ins. Co. v. Dick, 281 U.S. 397, 407–10 (1930); Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 162 (1932); Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 539–50 (1935); Broderick v. Rosner, 294 U.S. 629, 642–45 (1935).

341. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722–29 (1988); *see also* Florey, *supra* note 338, at 1068–82; Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 448 (1982); Frederic L. Kirgis, Jr., *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 119–28 ((1976); Currie, *supra* note 339.

forum law should apply.[342] With jurisdiction over defendant(s), however, the sorting of sovereign interests in interstate waters, whether vertically or horizontally, entailed the existence of a federalized interstice which, in turn, fell into the Supreme Court's revisory jurisdiction.[343]

Even before *Kansas v. Colorado*[344] ever sparked the equitable apportionment ideal or the tradition it became, private interstate claims had forced courts to reconcile potentially rivalrous interests in interstate waters.[345] The Court's own leading case, *Bean v. Morris*,[346] was decided the year *Wyoming v. Colorado* was filed.[347] In *Bean*, a downstream-state appropriator suing an upstream-state appropriator alleged a prohibited diversion in the upstream state's federal court (sitting in diversity).[348] The Montana defendant answered that the Wyoming plaintiff did not have a right valid under *Wyoming law*—which had to be adjudicated given that entitlement's necessity for the court's jurisdiction to hear the case.[349] Applying Wyoming law, the district court found the plaintiff's right valid and then concluded that, because both states maintained similar approaches to appropriations, it would enjoin the out-of-priority diversions.[350] In affirming, the Supreme Court agreed that "*in the absence of legislation*," the two states should

342. *See* Spillenger, *supra* note 336, at 1274–1325; Wolff, *supra* note 229, at 1849–51; Florey, *supra* note 338, at 1068–72; Kramer, *supra* note 272, at 319–38. *Erie* carried the duty over to federal courts. *See* Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487, 496 (1941) (holding that the law providing the cause of action should provide the choice of law rules in ordinary diversity cases); Griffin v. McCoach, 313 U.S. 497, 502–04 (1941).

343. Compare Enter. Irr. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 163–64 (1917) (holding the Court lacked jurisdiction to review appropriators' dispute arising wholly under state law and not presenting an independent, substantial federal question), *with* Williams v. North Carolina, 325 U.S. 226, 230–34, 231 n.7 (1948) (recognizing the Full Faith and Credit Clause as a basis for a federal common law rule of reconciling judgments interstate). This patterning has been explicit in some original jurisdiction opinions. *See, e.g.*, Colorado v. New Mexico, 459 U.S. 176, 182–83, 182 n.9 (1982) (noting Colorado's interest in interstate stream and how that interest countered downstream state's interest in its appropriators' senior rights). But there remain state interests that cannot be vindicated at all. *See* State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) ("A State cannot punish a defendant for the conduct that may have been lawful where it occurred.") (citing BMW of No. Amer., Inc. v. Gore, 517 U.S. 559, 572 (1996)).

344. 185 U.S. 125 (1902).

345. *See, e.g.*, Conant v. Deep Creek & Curlew Valley Irr. Co., 66 P. 188 (Utah 1901); Howell v. Johnson, 89 F. 556, 559–60 (D. Mont. 1898); Union Mill & Mining Co. v. Dangberg, 81 F. 73 (D. Nev. 1897).

346. 221 U.S. 485 (1911). *Bean* was exalted as a "leading case involving the doctrine of prior appropriation" in *Arizona v. California*, 373 U.S. 546, 581 n.82 (1963), and noted several times as the emphatic rejection of the so-called "Harmon doctrine" in *Wyoming v. Colorado*, 259 U.S. 419, 466–68 (1922).

347. *See* Tyler, *supra* note 157, at 15.

348. *See* Morris v. Bean, 146 F. 423, 425–28 (Cir. Ct. Mont. 1906).

349. *See Id.* at 426–29. The amount-in-controversy requirement could not be fulfilled without this underlying entitlement's jeopardy. The court ultimately concluded its jurisdictional inquiry that "complainant is an appropriator [under Wyoming law], fully invested with all the rights attaching to that interest in property." *Id.* at 429.

350. *See Morris*, 146 F. at 429–31 (holding that the Wyoming appropriator had a property right at stake and that the jurisdictional amount in controversy requirement was met).

be presumed to allow "the same rights to be acquired from outside the state that could be acquired from within."[351] To Justice Holmes for the Court, thus, a litigant's water right could be asserted as far upstream as it may reach: state boundaries should not erase a *liability* stemming from that right if each state's laws governing the water made it a liability.[352]

*Bean*'s choice-of-law approach[353] anticipated the synthesis to be had from *Erie*, the equitable apportionment tradition, and the Court's late doctrines on extraterritoriality.[354] *Bean* was an attempt to accommodate rival sovereign interests through the adjudication of legal entitlements to a common resource. If the concerned states shared a common rule, a federal court sitting in diversity was obliged to apply that rule.[355] Several inferior courts, some of them state courts, had settled on a similar approach.[356] Again in *Rickey Land v. Miller & Lux*[357] and again a decade later in *Weiland v. Pioneer Irrigation Co.* (the day *Wyoming v. Colorado* was decided),[358] the Court reiterated that inferior courts with jurisdiction were obliged to assess

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351. *Bean*, 221 U.S. at 487 (emphasis added); *see also* Bean v. Morris, 159 F. 651, 654–55 (9th Cir. 1908). Holmes' nod to the potential difference legislation could make may have been an acknowledgement that states could, with the right show of positive jurisdictional effort, at least *assert* unique state interests. The facts in *Bean* presented no such effort, however.

352. 221 U.S. at 487. The Court prefaced its holding by acknowledging that the private rights of appropriators in the upstream states were "subject to such rights as the lower state might be decided by this court to have, *and to vested private rights, if any, protected by the Constitution. . . .*" *Id.* at 486 (emphasis added). This of course suggests a difference of right. But, as we have seen, while it may be a difference of claim/relief and eligible forums, it is not necessarily a divergence of the underlying interest(s) at issue.

353. *Bean* is, essentially, a conflicts case. *See* Grant & Birdsong, *supra* note 285, at § 44.05(a)(2). As Grant and Birdsong astutely note, it echoed a decision Holmes authored while serving on the Massachusetts Supreme Judicial Court. *See* Mannville Co. v. City of Worcester, 138 Mass. 89 (1884).

354. Holmes's opinion in *Bean* surely illustrated a territorialist, "vested rights" view of choices of law—a theory later conflicts work rejected. *See* Currie, *supra* note 339; Spillenger, *supra* note 336, at 1274–91. As the Court would later make clear, statutes' extraterritorial effects are limited by due process and full faith and credit curbs as well. *See* Florey, *supra* note 338, at 1084–92 (discussing Edgar v. MITE Corp., 457 U.S. 624 (1982); CTS Corp. v. Dynamics Corp. of Amer., 481 U.S. 69 (1987)).

355. *Cf. Rickey Land*, 218 U.S. at 262 (noting that "[f]ull justice cannot be done and anomalous results avoided unless all the rights of the parties before the court in virtue of the jurisdiction . . . acquired are taken in hand"); *Union Mill*, 81 F. at 87–89, 95–96 (noting equity jurisdiction to determine rights of parties to interstate stream and afford relief as appropriate to court's jurisdiction over the parties and citing "general principles" of "universal application" throughout the western states).

356. *See* Taylor v. Hulett, 97 P. 37 (Idaho 1908); Anderson v. Bassman, 140 F. 14, 28–29 (N.D. Cal. 1905); Howell v. Johnson, 89 F. 556, 559–60 (D. Mont. 1898). In one of the cases, *Hoge v. Eaton*, 135 F. 411 (D. Colo. 1905), the court found jurisdiction and enjoined the out-of-priority appropriators but was reversed on appeal for an insufficient amount in controversy, defeating diversity jurisdiction. *See* Eaton v. Hoge, 141 F. 64, 66 (8th Cir. 1905). In *Willey v. Decker*, the Wyoming Supreme Court in a lengthy, at times rambling opinion, concluded that Montana and Wyoming's doctrines allowed an appropriator to "secure a valid water right" that would operate across state boundaries. 73 P. 210, 222 (Wyo. 1903). It declined finally to resolve what type of action was being adjudicated—contenting itself to find a valid underlying right and jurisdiction sufficient to enforce that right. *See id.* at 224.

357. 218 U.S. 258 (1910).

358. 259 U.S. 498 (1922).

the laws governing the quality and quantity of interstate waters and that with conflict came a kind of federal interstice tasking that adjudicator with identifying the specific rule(s) of decision.[359] With jurisdiction over defendant(s),[360] a court should enjoin violations of any shared rule.[361] This decoupled the legal *situs* of the entitlements being pressed—or any property thereby advantaged—from territorial authority as such.[362] No irreconcilable conflict emerged in those three cases.[363] This was the approach conflicts scholars like Cook, Cavers, Currie, and others elevated over the naïve territorialism

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359. *Cf.* Grant & Birdsong, *supra* note 285, at § 44.01 (concluding that "the law governing private suits" was "settled" to this effect). In *Pioneer*, the Court noted that both lower courts had agreed "the state line did not affect the superiority of right," 259 U.S. at 502, adding that any claim that Colorado *owned* the river's flow rising within its territory had been "fully disposed of on principle and authority." 259 U.S. at 502–03. The Court declared that the decree below "necessarily rested not upon Colorado laws or decisions which attempted to deny the asserted right to the use of the water in Nebraska nor upon Nebraska laws or decisions which could not be effective in Colorado, but upon rights secured to the appellee by the Constitution of the United States." Id. at 502 (citing *Wyoming v. Colorado*, 259 U.S. 419 (1922)). This element supported the Court's jurisdiction to hear the appeal *regardless* of diversity (which had been challenged). The relevant 'arising under' jurisdictional statute then, as now, required that a motion to dismiss succeed unless the claim included some *substantial* federal law element. *See, e.g.*, Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921); Grable & Sons Metal Prods., Inc. v. Darue Eng'g and Mfg., 545 U.S. 308 (2005).

360. *See* Conant v. Deep Creek & Curlew Valley Irr. Co., 66 P. 188, 190 (Utah 1901) (noting that upstream state court had no jurisdiction to determine downstream state's users' rights to stream "as between themselves"). The rise of long-arm jurisdictional statutes eventually prompted the clarification that forum states' reach over claims involving absent defendants depends at least in part on that state's *interests* in the dispute. *See* Worldwide Volkswagen Corp. v. Woodson, 444 US. 286, 292 (1980). Of course, as pre-*Erie* diversity suits, neither *Bean*, *Rickey*, nor *Pioneer* dwelled on the federal court's territorial relationship to the forum state as such.

361. This was, in fact, extended to cases where a defendant's water diversion was *outside* the jurisdiction. *See, e.g.*, The Salton Sea Cases, 172 F. 820, 811–13 (9th Cir. 1909) (upholding assertion of jurisdiction over defendant's canal in Mexico); Taylor v. Hulett, 97 P. 37, 40 (Idaho 1908); *cf.* Union Mill & Mining Co. v. Dangberg, 81 F. 73, 88–90 (D. Nev. 1897) (declaring that federal equitable principles must decide whether upstream users in California should be joined as necessary and indispensable defendants in suit between Nevada users); *but cf.* Howell v. Johnson, 89 F. 556, 559–60 (D. Mont. 1898) (rejecting claim that junior downstream-state appropriator could assert downstream state's interests against first-in-time upstream state appropriator to defeat senior rights to non-navigable stream).

362. *Bean*'s holding necessarily rested on *some* entitlement(s) in the affected parties—as in the equitable apportionments—fulfilling Article III's prerequisites. *Cf.* Frothingham v. Mellon, 262 U.S. 447, 480 (1923) (companion case to *Massachusetts v. Mellon*, dismissed for a lack of capacity to make claim); Fairchild v. Hughes, 258 U.S. 126, 128–29 (1922). The "standing" precedents construing Article III were, however, still decades in the future. *See* Wright & Kane, *supra* note 229, at 69 & n.9 (noting that the notion of "standing" first materialized in discussions of Article III only mid-way through the Twentieth century). But *Bean* departed not at all from the territorialist jurisdictional tradition. *See* Albion-Idaho Land Co. v. Naf Irr. Co., 97 F.2d 439, 443 & n.3 (1938).

363. Indeed, its jurisdiction and the lack of an irreconcilable conflict in the cases kept the Court from having to confront hard questions arising where the states' laws conflict and the forum's remedial reach becomes decisive. *See* Brooks v. United States, 119 F.2d 636, 638–41 (9th Cir. 1941); *cf. Albion-Idaho*, 97 F.2d at 444 (fashioning a futile call doctrine from the law of the opposing states).

that had dominated conflicts of law to then.[364] A shared resource involving rivalrous claims from within different legal systems posed competing sovereign *interests* and therefore implied a federal interest in their adjudication.[365] Presumptions favoring forum law would not do.[366] In the event some conflict emerged among the applicable laws, the federal interest—derived from states' interests in the maximum possible scope and priority for their own laws consistent with duties to the Union—could only be served by a proper checking of a forum's (perhaps biased) application of forum-state law.[367]

Litigating such a claim here is beyond our scope, but some implications are plain. First, assertions of jurisdiction *in rem* aiming to 'clear title' to water rights can easily deny the rights of other states' users and thereby deny that state's equal sovereignty as it has been interpreted by the Supreme Court.[368] Denying out-of-

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364. Cook's seminal 1924 article emphasized the forum's autonomy in identifying foreign law that it may choose to *adopt* even while purporting simply to *apply* that law. *See* Cook, *supra* note 296, at 469. Cavers did much the same in 1933. *See* Cavers, *supra* note 297, at 192–93. Currie observed in 1958 that a forum's choice of law would generally be upset by due process or full faith and credit obligations only where the state whose law was applied had *no* legitimate interest therein. *See Currie*, *supra* note 339, at 75. And although he recognized that the Court had occasionally *weighed* the competing state interests, he argued that this was essentially a "political function of a high order," not to be undertaken lightly in ordinary adjudication. *See id.* at 77–78 (urging Congress to utilize its full faith credit powers to distinguish between sources of foreign law and judgments to be credited specially).

365. *Cf. Pioneer*, 259 U.S. at 502 (noting that "essential and substantial issue in the case" arose from a "federal constitutional right to transport water" in accordance with law of the place of use); *Rickey Land & Cattle*, 218 U.S. at 259–60 (observing that the claims "in respect of each may require a consideration of the other if they are to be dealt with completely" because "each may be regulated by the state where the land lies according to its sovereign will"). Notably, in the Ninth Circuit's famed *Brooks* case following the *Bean*, *Rickey*, and *Pioneer* trilogy, even after noting the two states' quasi-sovereign interests, the court held that neither was an indispensable party. *See Brooks*, 119 F.2d at 643.

366. The conflicts revolution surrounding *Erie* ultimately drew into question any forum state's careless application of its own laws to interstate parties or circumstances. *Cf.* Green, *supra* note 199, at 1266–71 (reviewing the history of presumptions in favor of forum law and to the effect that foreign law is identical to forum law). Although the Court eventually settled on permissive due process standards for choices of law generally, *see* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981), and for assertions of jurisdiction to adjudicate, *see* Weinstein, *supra* note 285, at 211–13, it has long since made clear that, for interstate waters, out-of-state actions affecting forum state interests in the shared waters can suffice for both inquiries. *See* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 504 (1971); *cf.* Phillips Petro. Co. Shutts, 472 U.S. 797, 821–22 & n.8 (1985) (holding that a state must have sufficient "interest" in a claim to apply its own law to it).

367. Although "it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards . . . than in trying to determine what choice of law is required by the Constitution," Franchise Tax Bd. Hyatt, 538 U.S. 488, 496 (2003) (quoting Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 16 (1945)), the Court has insisted that states' *interests* in their shared waters necessarily require accommodation when rivalrous claims arise. *See, e.g.*, Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 956–57 (1982) (noting that "the legal expectation that under certain circumstances each State may restrict water within its borders" had been "fostered" by equitable apportionments and the "enforcement of interstate compacts" but that these state interests were surely limited by the State's membership in the Union); *see supra* notes 70–71, 206 and accompanying text.

368. *See supra* notes 209–16 and accompanying text. Generally, courts may assert jurisdiction over absent defendants only with appropriate interests, contacts, and notice to the defendant(s). *See, e.g.*,

state claimants a forum to challenge in-state rights is likewise unconstitutional.[369] Second, no accommodation of quasi-sovereign interests comes from simply crediting an intrastate adjudication with conclusive (claim– or issue-preclusive) effects interstate where those rights deny or diminish the resource contrary to other users' entitlements to it.[370] To do so would either deny them their due process[371] or deny the subordinated state *its* due as the correct source of law under the Full Faith and Credit Clause, the faith and credit statute, or both.[372] Valid

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Shaffer v. Heitner, 433 U.S. 186, 196–207 (1977); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 311–17 (1950). Furthermore, a state's interest in allowing its own users of interstate waters the fullest benefits due therefrom consistent with other valid claims preempts any aggregate cancellation of such rights. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106–08 (1938); *see also* Hill, *supra* note 211, at 1076.

369. *See, e.g.*, Howlett v. Rose, 496 U.S. 356, 367–71 (1990); First Nat'l Bank of Chicago v. United Air Lines, Inc., 342 U.S. 396, 399–401 (1952); Testa v. Katt, 330 U.S. 386, 391–94 (1947); Broderick v. Rosner, 294 U.S. 629, 639–45 (1935); Kenney v. Supreme Lodge, Loyal Order of Moose, 252 U.S. 411, 414–15 (1920).

370. Unlike the Court's several escheat cases, where it held that one and only one state could claim intangible property by escheat, *see* Texas v. New Jersey, 379 U.S. 674, 677 (1965); W. Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 75 (1961); Standard Oil Co. v. New Jersey, 341 U.S. 428, 443 (1951), shared waters and the (intangible) entitlements to them are "by nature" *shared interstate*. *See* Kansas v. Colorado, 185 U.S. 125, 144 (1902). Jurisdiction to adjudicate conflicts among such entitlements, even assuming they are property rights of some kind, is therefore not necessarily the exclusive province of some host state where they may be said to "vest."

371. *See* Taylor v. Sturgell, 553 U.S. 880, 885 (2008) (holding that there should be no "public law" "virtual representation" form of non-party preclusion in federal common law); Richards v. Jefferson County, 517 U.S. 793, 797–98 (1996) (holding that "extreme applications" of issue- and claim-preclusion doctrine like those depriving one who lacked notice of a proceeding from their own adjudication violate the Fourteenth Amendment's Due Process Clause); *cf.* Restatement (2d), Judgments § 86 (1982) (valid, final judgment of a state court has same preclusive effect in a subsequent action in federal court as by the law of rendering state except where subsequent action involving related federal claim or issue arises under a scheme of federal remedies contemplating assertion notwithstanding adjudication in state court).

372. This conclusion follows from the Court's faith and credit doctrines and the bundle of state interests in interstate waters it has repeatedly held are owed to all states equally. *Cf.* Green, *supra* note 199 (arguing that state courts interpreting the law of a sibling state are under an obligation similar to that levied on federal courts to decide the issue as would the courts of that state); Florey, *supra* note 338, at 1115 ("[A] state that ignores due process guarantees through the heedless application of forum law is generally violating the rights not only of the defendants in question but of *another state*."); Weinstein, *supra* note 285, at 232–43 (tracing the Supreme Court's several forays since the advent of the Federal Rules into due process limitations on jurisdiction to adjudicate). The faith and credit statute was amended in 1948 to require "the same full faith and credit in every court within the United States" for "Acts, records and judicial proceedings" as they receive "by law or usage" in the rendering state. *See* 28 U.S.C. § 1738 (2016). And although the Court's extraterritorial doctrines as to "Acts," "records," and "judicial proceedings" may have fluctuated, *see* Florey, *supra* note 338, at 1068–1111, two bedrock principles have remained fixed. First, state courts adjudicating cases within their jurisdiction are obliged to adjudicate federal claims and defenses as if they were (superior) forum law. *See* Testa v. Katt, 330 U.S. 386, 390–94 (1947). Second, parties to be burdened by prior proceedings should not be so burdened if the "forum in the second action affords [it] procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined." Restatement (2d) Judgments § 29(2) (1982); *see* Montana v. United States, 440 U.S. 147, 164 n.11 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330–31 & n.16 (1979).

water rights may extend upstream or down, but only if they are consistent with the governing law at the point of operation. Thus, although the era of general stream adjudications is closing,[373] if the conclusions here are correct, the proper recognition of those adjudicated rights could easily prompt challenges to the scope and/or priority of the laws intersecting on interstate waters.[374] The Court's holdings on interstate judgment recognition suggest that finality and predictability must occasionally yield to States' equal sovereignty and that cross-jurisdictional claims like water rights on shared waters are one of those instances.[375]

## CONCLUSION

The Court came into protecting states' interests in interstate waters to protect their equal sovereignty. A long century later and after dozens of such adjudications, the Court's reasoning case-by-case has revealed that these quasi-sovereign interests are an amalgam of benefits and burdens to be shared with sibling states that must be reconciled as they arise in courts of competent jurisdiction. Assuming these interests arise under the Constitution—and the bulk of the Court's relevant holdings suggest that they do—it would deny the Supreme Court's finality on questions of constitutional interpretation for any inferior court simply to *ignore* those interests in civil litigation adjudicating claims to interstate waters.

Still, the Court's precedents in both its original and appellate jurisdictions leave much to other institutions—especially to Congress and to the states themselves. Ordinary water rights litigation often raises the interests the Court has been adjudicating on these dockets. Thus, the path forward on interstate waters with the fewest snags in the record may be a choice-of-law rubric that acknowledges and fits together Congress's authority to *make* federal laws, the states'

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373. *See* Colburn, *supra* note 210, at 63.

374. As is true in general, an F1 judgment rendered in violation of the Constitution is not necessarily entitled to any "faith and credit," even in F1. *See* Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 303 (1993). Adjudicated water rights should be no different. The Court has, however, suggested that the law governing any *federal* court judgment's preclusive effects will vary as between federal question cases, *see, e.g.*, University of Tenn. v. Elliott, 478, U.S. 788, 794–95 (1986) (federal common law), and diversity cases. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507–09 (2001) (either state law or federal common law). But it has never suggested deviations from the bedrock *exception* in preclusion of claims where claimants were "unable to rely on a certain theory of the case or to seek a certain remedy or form of relief [in F1] because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority . . . ." Restatement (2d), Judgments § 26(c) (1982). States' general stream adjudications have rarely (if ever) taken up foreign law claims to the water(s). Reliance on the Court's equitable apportionment adjudications to this effect, however, would be erroneous.

375. *Cf. Richards*, 517 U.S. at 798 (noting that the limits on a state court's power to develop estoppel rules reflect a "general consensus that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process"); *Taylor*, 553 U.S. 901 (noting that a "diffuse balancing approach to nonparty preclusion would likely create more headaches than it relieves" and reaffirming that, with few exceptions, non-parties are generally not to face claim- or issue-preclusion from prior proceedings).

sovereign interests in the broadest possible scope and priority for their own laws consistent with membership in the Union as interpreted by the Supreme Court, and all inferior courts' careful attention to the limits of legal authorities, starting with their own.