# TIME TO RETHINK THE SUPREME COURT'S INTERSTATE WATERS JURISPRUDENCE

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**SUMMARY**

**This October Term, the U.S. Supreme Court will be asked to weigh in on three and possibly all four of its pending original jurisdiction controversies over interstate waters. The Court's past judgments and opinions have established little in the way of "federal common law" governing the states' interests in shared waters. But they have established this much: these interests vest in states-as-states directly under the U.S. Constitution, even if the Court itself is reluctant to specify the interests with much precision or to enjoin violations thereof. Ultimately, and perhaps ironically, if it is states' "equal dignity" that animates their interests in shared waters, it may be time for the Court to help other courts to adjudicate these interests through more ordinary channels than the extraordinary precincts of the Supreme Court's original jurisdiction.**

A court that can refuse to hear cannot credibly say that it had to decide.[1] That, in a nutshell, is the U.S. Supreme Court's quandary in its original jurisdiction interstate waters matters—one that promises to expand and intensify demands on the Court in the coming decades. Two of the Court's four pending interstate matters, *Florida v. Georgia*[2] and *Texas v. New Mexico*,[3] have presented dispositive motions.[4] A third will do so next term if not this one.[5] And the other cannot be far behind.[6] Together, they offer a rare opportunity to refresh and perhaps reorient a field of law—or at least a field of practice—that is now straining at its seams.[7]

These "controversies"[8] will confront the Court with the following questions (among others). First, how (if at all) are private users bound by apportionment opinions, judgments, decrees, or the denials thereof by the Supreme Court? Second, is the United States bound by an apportionment—even if it was never party to the proceeding? Third, may Congress rearrange or reorder state interests in interstate waters even if those interests were previously adjudicated? And finally, what force do state-law rights to a certain quality or quantity of resource possess upstream or downstream on the same (or related) interstate waters?

This Article first describes what has become the challenging jurisdictional and legal landscape of interstate waters—waters that are increasingly beset by devilishly hard environmental problems.[9] It then questions the conventional wisdom surrounding the pending cases' motions with the Court's own patterning (uneven as it has been). For 120 years, the Supreme Court has entertained equitable actions regarding shared waters in "controversies involving two or more States,"[10] functioning as their forum of last resort. A major question that has arisen continually

1. *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643, 1717 (2000).
2. *See* No. 142 Orig., 574 U.S. 972 (2014) (granting Florida leave to file).
3. Texas and New Mexico's Pecos River dispute has been on low boil since a 2014 tropical storm added *too much* water to the system and their storage projects were forced to spill it without use. *See infra* notes 82-110 and accompanying text.
4. *See* Florida v. Georgia, 138 S. Ct. 2502, 2508-12, 48 ELR 20107 (2018) (reviewing procedural history); Florida v. Georgia, 140 S. Ct. 951 (2019) (ordering the submission of motions following special master's report); *cf.* Report of the Special Master, Florida v. Georgia, No. 142 Orig. (Dec. 11, 2019), *available at* https://www.ca10.uscourts.gov/sites/default/files/SM142/670.pdf (recommending rejection of Florida's claims).
5. In *Mississippi v. Tennessee*, No. 143 Orig., the special master's evidentiary proceedings were drawing to a close in Spring 2020—after the master had rejected Mississippi's argument that the Court's typical approach, equitable apportionment, should not apply to aquifers. *See* Cecil Howell, *Mississippi v. Tennessee: Water as Cake*, June 16, 2020, Burnaway, https://burnaway.org/mississippi-v-tennessee-water-as-cake/.
6. *See* Texas v. New Mexico, No. 141 Orig., 134 S. Ct. 1050 (2014) (granting Texas leave to file in dispute over Río Grande Compact).
7. In 1931, the Court issued important decisions in four different matters. *See* Connecticut v. Massachusetts, 282 U.S. 660 (1931); New Jersey v. New York, 283 U.S. 336 (1931); Arizona v. California, 283 U.S. 423 (1931); New Jersey v. City of New York, 283 U.S. 473 (1931).
8. Article III distinguishes "cases" within its scope where federal law governs from "controversies" among its menu of party-alignments where federal law does not necessarily govern. Although the modern Court has given them a unitary interpretation, we might do best to keep them distinct. *See* Robert J. Pushaw, *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447 (1994).
9. *See* Jamison E. Colburn, *Don't Go in the Water: On Pathological Jurisdiction Splitting*, 39 Stan. Envtl. L.J. 3, 5-6 (2019); Reed D. Benson, *Can a State's Water Rights Be Dammed? Environmental Flows and Federal Dams in the Supreme Court*, 8 Mich. J. Envtl. & Admin. L. 371 (2019).
10. *Cf.* Hans v. Louisiana, 134 U.S. 1, 15 (1890) (discussing U.S. Constitution Article III, Section 2, Clause 2 and what became 28 U.S.C. §1251(a), and concluding that Article III rendered such controversies justiciable and that

from that tradition is whether the Court has fashioned any sort of "common law" pertaining to states as states in that 120 years. For continued progress in the sharing of these assets may require the Court to privatize: privatization that would impel the real parties in interest to resolve their differences in the inferior courts, the U.S. Congress, and the statehouses instead of submerging them within endless proxy wars in a forum that is, at best, reluctant to rule.

## I. The Rise and Rise of State Sovereignty

Much of the conventional wisdom on the Court's interstate waters jurisprudence proceeds from its apparent inclination to take jurisdiction over the disputes but then, often after protracted litigation, to deny relief.[11] As judicial patterns go, this one is curious. The Court's evident distaste for issuing equitable judgments against states is almost certainly at work, and it has probably spurred state negotiations in some instances.[12] But negotiating interstate agreements is notoriously tricky work.[13] Judicial efforts to increase the stakes may do no more than amplify the frustrations.

Yet, as one leading treatise entry explains, the Court has established multiple significant hurdles to the granting of relief against states.[14] Chief among these is the need to prove an injury of "serious magnitude" by "clear and convincing" evidence.[15] In *Florida v. Georgia*,[16] this hurdle has been the focus for six years as Florida has struggled to prove that Georgia's consumptive uses of the Apalachicola River's flows have been a significant cause of Apalachicola Bay's ecological decline.[17] This struggle illustrates a paradox tucked within the equitable apportionment tradition, which the Roberts Court's renovations in the law of our equal sovereignty and judicial federalism are bringing to center stage.

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.[18] Complaining states had alleged injuries being caused in upstream states,[19] and the Court declared its readiness to compel upstream state action as warranted.[20] Since then, the Court has entered four decrees: apportioning flows of the Laramie, Delaware, and North Platte Rivers[21] and constraining Illinois' diversions from Lake Michigan.[22] A fifth decree interpreting and further specifying allocations made by an interrelated compact, federal statute, and reservations, still controls the lower Colorado River.[23] And 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.[24] Each decree addressed what, to the complainant(s), was a threat insulated from liability by "foreign" law.[25] Each supplied relief that was, in a word, "symbiotic" with the injury(s) asserted.[26]

But these controversies have proven unparalleled in their potential for (often arcane) subsidiary disputes and mutual frustration.[27] For throughout that same long century, the Court progressively broadened states' immunities from suit, right up to—*but not including*—this original jurisdiction docket.[28] Today, only the Court can grant the kind

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the U.S. Congress could and did vest exclusive original jurisdiction over them in the Supreme Court).

11. *See*, *e.g.*, Kristen A. Linsley, *Original Intent: Understanding the Supreme Court's Original Jurisdiction in Controversies Between the States*, 18 J. App. Prac. & Process 21, 48-49 (2017).
12. The Court's notorious reluctance to grant relief has reportedly spurred compact negotiations in several instances. *See* G. Emlen Hall, High and Dry: The Texas-New Mexico Struggle for the Pecos 4-5 (2002); Norris Hundley Jr., Dividing the Waters: A Century of Controversy Between the United States and Mexico (1966). But some commentary has argued that the Court's tendencies have prejudiced states' interests. *See* Jonathan Horne, *On Not Resolving Interstate Disputes*, 6 N.Y.U. J. L. & Liberty 95 (2011).
13. Many attempted agreements have failed and many completed agreements have failed to work. *See*, *e.g.*, Hall, *supra* note 12, at 64-78; Florida v. Georgia, 138 S. Ct. 2502, 2509-10, 48 ELR 20107 (2018); Texas v. New Mexico, 138 S. Ct. 954, 956-58, 48 ELR 20035 (2018); Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. Colo. L. Rev. 105 (2003); *see also* Donald J. Pisani, *The Strange Death of the California-Nevada Compact: A Study in Interstate Water Negotiations*, 47 Pac. Hist. Rev. 637 (1978).
14. *See* Douglas L. Grant & Bret C. Birdsong, *Equitable Apportionment Suits Between States*, *in* Waters and Water Rights §45.04 (Amy K. Kelley ed., Matthew Bender 3d ed. 2019).
15. *See*, *e.g.*, Colorado v. New Mexico, 459 U.S. 176, 187-88 (1982).
16. 138 S. Ct. 2502 (2018).
17. *Id.* at 2517-18. Special Master Paul Kelly determined in December 2019 that Florida had failed to carry its burden, detailing at length his comparisons of Georgia's evidence to Florida's. *See* Report of the Special Master, *supra* note 4.
18. *See* Missouri v. Illinois, 180 U.S. 208 (1901); Kansas v. Colorado, 185 U.S. 125 (1902).
19. 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.
20. *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 within the original jurisdiction of th[e] court"). Chief Justice Melville 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., and Harlan & White, JJ., dissenting).
21. *See* 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).
22. *See* Wisconsin v. Illinois, 278 U.S. 367, 420 (1929). The Court's decree grew out of the complaining states' interests in the navigability of the Great Lakes, *see id.* at 420-21, but was finally expressed like any other cap on consumptive use. *See* Wisconsin v. Illinois, 281 U.S. 179, 201-02 (1930).
23. *See* Arizona v. California, 376 U.S. 340 (1964); *see also* Arizona v. California, 547 U.S. 150 (2006) (amending 1964 decree).
24. *See* New Jersey v. City of New York, 283 U.S. 473, 483 (1931).
25. 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 v. Colorado, 260 U.S. 1, 1-2 (1922); New Jersey v. New York, 293 U.S. 805, 805-07 (1931); *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.
26. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 914 (1999).
27. *See infra* notes 40-60 and accompanying text.
28. The immunities from suit have mostly stemmed from the Eleventh Amendment. It 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*, 134 U.S. 1 (1890), the Court declared that the amendment's bare text

of equitable relief against U.S. states that these decrees embody.[29] Remedial choice has become a focal element of Article III scholarship generally.[30] And the Roberts Court has continued immunizing states from federal legal liabilities of all kinds on the grounds that their sovereign dignity demands it.[31] States' "equal sovereignty," in short, is flourishing in the Roberts Court,[32] although it remains to be seen how that doctrine actually serves "We the People."[33] Precision in describing the grounds of any relief—the legal basis (or bases) in the Court's decisions to order (or refuse to order) state action—is therefore imperative. Precision has been hard to find, though.[34]

The U.S. 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.[35] Yet, as the *Erie* doctrine[36] and other developments have long made clear, Article III's vesting of jurisdiction does not necessarily imply the authority to *make* federal law.[37] Indeed, the Supremacy Clause[38] implies otherwise: judicial jurisdiction by itself is no authority to make the law.[39]

The conventional wisdom is that interstate waters constitute a special "enclave" of federal common law grounded in the Court's many opinions on interstate waters disputes.[40] Federal courts specialists say so.[41] Even the Court has said

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. *Id*. at 19-21. In *Ex parte State of New York*, 256 U.S. 490 (1921), it extended this immunity to federal courts' admiralty jurisdiction. *Id*. at 500. In *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), it extended the immunity to suits brought by foreign states. *Id*. at 330. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), it held that Congress' Article I powers could not abrogate state immunity from suit in federal courts. *Id*. at 58-73. In *Alden v. Maine*, 527 U.S. 706 (1999), it held that Congress' Article I powers were insufficient to abrogate the immunity from suit in states' own courts. *Id*. at 754-55. Still, the Court has refused to immunize states from suits by one another or by the United States in its own original jurisdiction. *See* 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," thus, 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). Yet, that purposivism has never reached the Court's own original jurisdiction. *See* Kansas v. Colorado, 533 U.S. 1, 7, 31 ELR 20744 (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.").

29. In *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019), the Court held that states are immune from private suits in the courts of sibling states, overruling *Nevada v. Hall*, 440 U.S. 410 (1979). It found within the Constitution's silence on the issue a latent assumption that "took as given that States could not be haled involuntarily before each other's courts." 139 S. Ct. at 1494.
30. *See*, *e.g.*, Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. Rev. 217 (2018); Samuel L. Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997 (2015); Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 Duke L.J. 249 (2010); Richard H. Fallon Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 Va. L. Rev. 633 (2006).
31. *See*, *e.g.*, Murphy v. National Collegiate Athletic Ass'n, 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."); Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 498-99 (2003) (refusing to balance state interests in the application of California's and Nevada's competing statutory policies for full faith and credit purposes out of a perceived futility in doing so); National Fed'n of Indep. Bus. v. Sebelius, 567 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); Printz v. United States, 521 U.S. 898, 907 (1997) (invalidating provisions of federal statute requiring state and local officials to perform background checks on prospective firearms purchasers); New York v. United States, 505 U.S. 144, 175, 22 ELR 21082 (1992) (invalidating provision of Low-Level Radioactive Waste Policy Amendments for having "crossed the line distinguishing encouragement from coercion" of states).
32. *See generally* Leah M. Litman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207 (2016). Interstate waters, coincidentally, featured in several of the Court's 19th century "equal footing" doctrine landmarks, including *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 Railroad Co. v. Illinois*, 146 U.S. 387, 451-59 (1892), and *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473-76, 18 ELR 20483 (1988) (reviewing cases); *see also* Litman, *supra*, at 1210 (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").
33. The literature critical of the Court's dignitarian conception of federalism is vast. For an introduction, see Litman, *supra* note 32.
34. For example, in the Court's noted denial of leave to sue in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 1 ELR 20124 (1971), one of the reasons given for its denial was deference to other courts' jurisdiction to apply "the same common law of nuisance upon which [the Supreme Court's] determination would have to rest." *Id*. at 500. This, combined with what the Court viewed as the prevalence of "long-arm" jurisdictional statutes to hail alleged tortfeasors into a forum state's courts and the enforceability in foreign state courts of any forum-state judgment(s) obtained, *see id*. at 497-501, convinced the majority that hearing Ohio's claims would commit the Court to "trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies [we]re already grappling with on a more practical basis." *Id*. at 503.
35. *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, §13. Congress trimmed the exclusivity to its present scope—controversies between "two or more states"—in 1948. *See* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569, 1573-602 (1990).
36. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("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.").
37. *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1255-64 (1996). To be sure, because many of the Court's formative opinions in the equitable apportionment tradition predated *Erie*, *Erie* opened something of a rift. *Cf.* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. Pa. L. Rev. 1847, 1852 (2017) ("When the Court 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." (quoting *Erie*, 304 U.S. at 78)).
38. The text of the Supremacy Clause deems "Laws of the United States which shall be made in Pursuance" of the Constitution "supreme Law of the Land," while commanding "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, arguably distinguishes between law *within* and law *outside* of court, and directs even state judges to apply valid federal law. Just as importantly, though, the first clause permits—but does not necessarily entail—that so-called federal common law does *not* preempt inconsistent state law and is not binding on state judges. *See* Henry P. Monaghan, *Supremacy Clause Textualism*, 110 Colum. L. Rev. 731, 767-68 (2010).
39. *See* Monaghan, *supra* note 38, at 769-81.
40. *See*, *e.g.*, Linsley, *supra* note 11, at 37-41; 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, 514-17 (2014). Federal courts and water rights specialists alike usually invoke Justice Louis Brandeis' opinion in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). For there, the same Justice who authored *Erie* (and on the same day) first stated that "whether 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." *Id*. at 110.
41. *See* Wolff, *supra* note 37, at 1871-78; Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 Va. L. Rev. 1, 2-3 (2015); Clark, *supra* note 37, at 1322-31; Martha A. Field, *Sources of Law: The Scope of Federal*

so occasionally.[42] Yet, this conventional wisdom ignores more than it reveals. The supposed basis of this reconciliation, Justice Louis Brandeis' opinion in *Hinderlider v. La Plata*, did not arise in the Court's original jurisdiction,[43] did not involve a merits question about the water's interstate allocation,[44] and need not have resolved anything about collective rights to the La Plata River.[45]

*Hinderlider* was quintessentially about jurisdiction to adjudicate.[46] *Hinderlider*, logically, could not have resolved much at all about the legal basis of equitable relief against a sibling state for interstate waters wrongs—nor about the force of the Court's past opinions thereon. And that leaves the hardest questions essentially unanswered—by *Hinderlider* or any simple notion of law making by the Court from within its equitable original jurisdiction.[47]

From its appellate docket, the Court made clear no later than the *Willamette Iron Bridge* case that, at least as to the obstruction of interstate waters for navigational purposes, there was *no* federal common law binding inferior courts.[48] Indeed, it was that signal that prompted Congress into action through §10 of the 1890 Rivers and Harbors Act.[49] In *Arizona v. California*,[50] furthermore, the Court stated unequivocally that it could not allocate waters contrary to the Boulder Canyon Project Act or the authority delegated to the Interior Secretary thereby.[51]

Jurisdictionally, then, only the Court may hear state-state "controversies" involving state interests in interstate waters. But when it decides to hear—sitting in equity, weighing the claims of opposing dignitaries—the Court invariably provokes one of the Constitution's hardest questions: how may the Court itself be *making* federal law? The more complex and interrelated these controversies become with the governance of important natural resources, the more uncomfortable this question grows.

In the very first *Kansas v. Colorado* case,[52] the Court famously declared that its task was to "apply Federal law, state law, and international law, as the exigencies of the particular case may demand."[53] Seemingly anticipating its landmark decision in *Erie* decades later,[54] though, the Court adopted a stance it still invokes today: the authority to decide stems *directly* from the states' equal sovereignty and, in sitting as that tribunal, it merely provides or withholds *relief* as appropriate.[55] But can the Court really skip around the core focus of all Article III court litigation—a decision on the merits?[56] This has remained a continentally scaled equivocation. For, as remedies scholars have converged to agree lately, the Court's precedents on the granting or withholding of equitable relief confer no independent authority to change the law.[57]

In the last analysis, then, unless the interests that have animated this jurisdiction are in some real sense *constitutional*, the Constitution suggests in too many ways to count that the Court's practices cannot be squared with its broader understanding of Article III.[58] Yet, the Court's

*Common Law*, 99 Harv. L. Rev. 881, 908 (1986). "When the Court 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*, at 1852 (quoting *Erie*, 304 U.S. at 78). In *Illinois v. City of Milwaukee*, 406 U.S. 91, 2 ELR 20201 (1972), where the Court characterized its original jurisdiction precedents as "leading" cases in the federal common law of interstate waters, it took the same tack toward Justice Brandeis' opinion in *Hinderlider*.

42. *See*, *e.g.*, *Illinois*, 406 U.S. at 106-07 & n.7; 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.").
43. *See Hinderlider*, 304 U.S. at 101-03.
44. *See id*. at 109-11 & n.12. *Hinderlider* involved only Colorado parties, although the opinion does suggest that the adjudication of rights to an interstate water necessarily raises a jurisdictional federal question. *See id*. at 110.
45. *See id*. at 104-06. *Hinderlider* did, of course, unequivocally hold that interstate compacts may bind intrastate water claimants fully and completely—as the Court's rejection of several private claimants' requests to intervene in the Río Grande controversy underscored most recently in *Texas v. New Mexico*, 140 S. Ct. 815 (2020). *See also* Texas v. New Mexico, 138 S. Ct. 349 (2017).
46. *See Hinderlider*, 304 U.S. at 101-03. An earlier appeal in the case had to be dismissed for lack of (statutory) appellate jurisdiction. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 291 U.S. 650 (1934). Justice Brandeis' explanation so famed for its description of interstate waters as an enclave of federal common law was given as the basis of jurisdiction to hear the petition. *See* 304 U.S. at 103. Later in his 1938 opinion, Justice Brandeis came to the application of the La Plata River Compact within the lower court's judgment—acknowledging that it might by itself supply a jurisdictional federal question. *See id*. at 109-11 & n.12.
47. *Hinderlider* surely did contribute to the major change of legal complexion interstate compacts underwent in the 20th century. *See* David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 Va. L. Rev. 987, 1030-38 (1965).
48. *See* Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8 (1888). The *Willamette Iron Bridge* Court was unequivocal where earlier holdings to this effect had been much less direct. *See*, *e.g.*, South Carolina v. Georgia, 93 U.S. 4, 13-14 (1876); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 430-31 (1856); Georgetown v. Alexandria Canal Co., 37 U.S. (12 Pet.) 91, 97-98 (1838).
49. *See* Rivers and Harbors Act of 1890, 26 Stat. 426, 454. Congress enacted §10 prohibiting the obstruction of any navigable water without a federal permit or congressional permission. That statute, and its delegation of permitting authority to the U.S. Army Corps of Engineers, was upheld repeatedly in subsequent cases. *See* 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).
50. 373 U.S. 546 (1963).
51. *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 implied in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 429 (1856).
52. 185 U.S. 125 (1902).
53. *Id*. at 147.
54. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). To be sure, the *Kansas v. Colorado* opinion famously characterized the accumulation of opinions deciding state-state disputes as "interstate common law," distinguishing it from the common law of either of the contending states. *See* Kansas v. Colorado, 206 U.S. 46, 98 (1907).
55. *See Kansas*, 206 U.S. at 95; *see also* Colorado v. New Mexico, 459 U.S. 176, 190-91 (1982) (Burger, C.J., and Stevens, J., concurring); Kansas v. Nebraska, 135 S. Ct. 1042, 1051, 44 ELR 20040 (2015) (noting that the proceedings are "basically equitable in nature" (quoting Ohio v. Kentucky, 410 U.S. 641, 648 (1973)).
56. *Cf*. Fallon, *supra* note 30, at 639 (observing that every suit in federal court where a plaintiff prevails must pass through three phases: jurisdiction, a decision on the merits, and remedies).
57. *See* Bray, *supra* note 30, at 1036-44.
58. *See*, *e.g.*, Clark, *supra* note 37, at 1269 (observing that "[o]pen-ended federal common lawmaking by courts enables the judiciary to evade the safeguards inherent" in our federalism and separation of powers). The list of "enclaves" of federal judge-made law that avoid *Erie*'s sting beneath such cover is uncertain—but almost certainly short. *Cf*. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426-27 (1964) (noting the existence of "enclaves of federal judge-made law which bind the States" while refusing to list them); Alfred L. Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1030-68 (1967) (arguing that enclaves of federal common law after *Erie* include interstate

opinions are still alternatively cast as binding precedent[59] or as mere record of the Court's unfettered remedial discretion.[60] The states' equal sovereignty, thus, has become the fulcrum between the two distinct functions Article III confers on its courts: dispute resolution and the authoritative exposition of federal law. Looking ahead, though, this functional divide itself could better organize the Court's interstate waters jurisprudence, especially if the goal is to replace equivocations with tractable, forum-independent principles of law. Parts II and III argue that there is a path to that end, albeit one with significant obstacles.

## II. Decoding the Court: State Interests, Federal Law, and Equitable Balancing

The Court's dignitarian conception of state sovereignty has lately acted as a formidable sword.[61] This complicates any conclusion that the Court's original jurisdiction decisions in interstate waters disputes lack precedential force beyond the Court-as-forum itself.[62] But what is this force, exactly? Whom does it bind? Must the United States be party to a suit for a decision prioritizing rival state interests to bind the executive branch on that water? May Congress reallocate benefits or burdens on interstate waters regardless of the Court's judgments? Their reasoning? How may others be bound by the Court's apportionment of benefits and burdens?

Inferior courts may lack jurisdiction over controversies between two or more states by statute.[63] But they often confront issues on interstate waters that implicate the very same state and federal interests that have been fashioned and adjudicated by the Supreme Court.[64] After all, these are what the Court has labeled "quasi-sovereign" interests[65]—seemingly acknowledging their unique origins and scope.[66] Their measure and actuation come in the form of real users, the Court's legal fictions notwithstanding.[67] Indeed, the Court itself has lately wavered on whether the private users standing behind these quasi-sovereign interests may ever be parties to its original jurisdiction suits.[68] But this uncertainty surrounding the legal character of the state interests is growing deeper and more consequential as interstate waters face an increasingly grim future with climate change, increased demands, and augmented threats.

The Court has held that the states' interests are c*ollective* interests that may be bargained away—whether by compact, federal statute, or both.[69] Neither completely sovereign nor merely proprietary, quasi-sovereign interests were once explained as the "set of interests that the State

controversies, admiralty, the proprietary transactions of the United States, and international relations).

59. *See*, *e.g.*, Florida v. Georgia, 138 S. Ct. 2502, 2516, 48 ELR 20107 (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)).
60. *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*, 135 S. Ct. at 1052 (observing the "essentially equitable character of our charge"); Idaho ex rel. Evans v. Oregon, 462 U.S. 1017, 1025, 13 ELR 20658 (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 the 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.").
61. *See*, *e.g.*, Murphy v. National Collegiate Athletic Ass'n, 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, 570 U.S. 529 (2013) (invalidating provision of Voting Rights Act of 1965 as infringement on states' equal sovereignty); National Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575-85 (2012) (invalidating Patient Protection and Affordable Care Act's penalization of nonparticipating 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, 22 ELR 21082 (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").
62. No one could reasonably maintain that special masters are not "bound" by the Court's past opinions. Yet, a special master could rightly decide, in deference to the *present* Court's prerogatives over any ultimate decisions prioritizing rivalrous uses, that past entries in the *United States Reports* must be construed pragmatically. *Cf*. *Florida*, 138 S. Ct. at 2513 (noting that the ultimate act of apportionment involves an "untechnical spirit proper for dealing with a quasi-international controversy").
63. *See supra* note 35 and accompanying text.
64. Two of the Court's four pending controversies, *Mississippi v. Tennessee* and *Florida v. Georgia*, began as cases in a lower federal court 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 Litig., 644 F.3d 1160, 41 ELR 20217 (11th Cir. 2011); Hood ex rel. Mississippi v. City of Memphis, 570 F.3d 625 (5th Cir. 2009). Another that has thus far remained in the lower courts, where the Court has repeatedly refused leave to file in the original jurisdiction, involved invasive fish species reaching the Great Lakes by way of the Chicago Area Waterway System. Finally, litigation over states' interests in the Missouri River, as impacted by the Corps' flood control projects, has periodically arisen. *See* South Dakota v. Ubbelohde, 330 F.3d 1014 (8th Cir. 2003); In re Operation of the Missouri River Sys. Litig., 421 F.3d 618 (8th Cir. 2005).
65. *See*, *e.g.*, North Dakota v. Minnesota, 263 U.S. 365, 374 (1923).
66. *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, provide the state no interest as *parens patriae* by which to sue the United States).
67. Although party status is guarded assiduously before the Court, states' litigable *claims* have nevertheless been synonymous with their particular users' demands. *See*, *e.g.*, Colorado v. New Mexico, 467 U.S. 310, 317-24 (1984). Ironically, the Court's very first equitable apportionment decree, *Wyoming v. Colorado*, 260 U.S. 1 (1922), ordered that the costs of the action be divided three ways: a third to each state and a third to the "corporate defendants." *See id*. at 2-3.
68. In *South Carolina v. North Carolina*, 558 U.S. 256, 40 ELR 20019 (2010), a 5-4 majority voted to allow Duke Energy and the Catawba River Water Supply Project to intervene as parties while denying the same to the city of Charlotte. *See id*. at 265-76. Only the former satisfied what the majority referred to as a "high threshold" involving "compelling circumstances." *Id*. at 267-68.
69. *See*, *e.g.*, Arizona v. California, 373 U.S. 546, 567-90 (1963); Kansas v. Nebraska, 135 S. Ct. 1042, 1052 (1982); Texas v. New Mexico, 462 U.S. 554, 569 (1983). This, at least in theory, distinguishes the quasi-sovereign interests in interstate waters from the states' public trust doctrine rights and duties. *See* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1891).

has in the well-being of its populace."[70] Such interests in waters are a permanently open class as waters' benefits and burdens evolve with society, culture, technology, climate, and so on. No final tabulation of their number or extent is feasible, and Congress' remit over matters interstate must be kept in mind.[71] After 120 years, though, we should have a better sense than we do of their legal grounds and sweep given how many times these interests have been adjudicated. This alone suggests a mismatch between the jurisdiction and the controversies it takes in.

Are these interests functionally equivalent to the preemptive *federal* interests the Court has held survived *Erie*'s dismissal of federal general common law?[72] A state's assertion of its equal sovereignty over an interstate water—legal claims that have withstood the Court's own Eleventh Amendment jurisprudence—arguably *should* be appropriately preemptive. But what do they appropriately preempt?[73] If not valid positive federal law, should they nonetheless preempt executive branch interpretations of the law? The only inference to be drawn from the Court's admission of two private parties in the late *South Carolina v. North Carolina*[74] dispute over the Catawba River was that those parties' claims on the river were to be adjudicated—and would thereafter bind the states, the United States, and other users.[75] Could these state interests be any *less* powerful than that?

To be sure, *Hinderlider*, *Erie*, and several other cases jointly confirm that state law in a multi-sovereign system can be rendered inoperable by little or no federal law just for being among a plurality of potentially conflicting state laws.[76] This can offer no warrant to ignore the balance of the Constitution: the separation of powers, due process, and full faith and credit requirements, for example, all remain intact.[77] And the judicial *discovery* of preemptive federal interests has been problematic at times.[78] But the Court has for too long and in too many ways held that states' interests in interstate waters are "real and substantial," and "must be reconciled as best they may,"[79] to turn back wholesale or to hold that these interests have *no* preemptive scope. Part III pursues the question further in one context: allocation compact disputes.

## III. (Not So) Compact Disputes: Interests Out of Equity?

In his book about the Pecos litigation, Prof. G. Emlen Hall closed by observing that the "1948 Pecos River Compact was based on science that promised more than it could deliver and on a legal system that exacerbated, rather than corrected, those scientific limitations."[80] Hall's book was an extended meditation on the several mistaken factual premises animating the compact, chief among them the notion that the river uses as of 1947 (the so-called 1947 condition) could be a basinwide armistice. From April 1975 to March 1988, a "profoundly boring" suit[81] between the two states obliterated that notion.[82] Despite the evident truth that the compact had engendered more dispute than the river, the Court held fast: "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms."[83] Congress'

70. *Snapp*, 458 U.S. at 602; *id*. at 602-07 (discussing Georgia v. Pennsylvania R.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 Byron 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 id*. 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 Pennsylvania R.R. Co.*, 324 U.S. at 468 (Stone, C.J., and Roberts, Frankfurter, Jackson, JJ., dissenting); Massachusetts v. Missouri, 308 U.S. 1, 17-20 (1939); *Pennsylvania*, 262 U.S. at 591-98.
71. References to the Court's statement in *Kansas v. Colorado*, 206 U.S. 46, 98 (1907), that these disputes, "[i]f the two States were absolutely independent nations," "would be settled by treaty or by force," thus must be tempered by our contemporary sensibilities on the scope of federal power.
72. 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. Center 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, 6 ELR 20540 (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 also occasionally preempted "hostile" or "aberrant" state laws that target sibling states and/or the Union. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 595-603 (1973).
73. *Cf.* Maine v. Taylor, 477 U.S. 131, 136, 150-52 (1986) (upholding state's standing to appeal lower court's invalidation of its law and reversing that judgment in deference to state's local public welfare interests). Ironically, it may be a precedent from the Court's appellate docket that most directly confirms these preemptive effects. When the Court set aside the secretary of war's permit for Chicago's Lake Michigan diversions, it tacitly confirmed that the Court's precedents are protective of state sovereign *interests* regardless of then-extant positive federal law. *See* Sanitary Dist. of Chi. v. United States, 266 U.S. 405, 425-26 (1925). Congressional displacement of past Supreme Court decisions on states' quasi-sovereign interests, thus, must at least be explicit and definitive—or the 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 decree, no Article II actor would be free to interfere with or frustrate the Court's judgment. *See* William Baude, *The Judgment Power*, 96 Geo. L.J. 1807, 1840-41, 1853-61 (2008). A (much) harder question is the extent to which the reasoning within the Court's decision would bind Article II actors and/or Congress.
74. 558 U.S. 256, 266, 40 ELR 20019 (2010).
75. *Cf. id*. at 279-83 (Roberts, C.J., concurring in part and dissenting in part) (describing the potential legal consequences of private-party intervention in state-state controversy).
76. *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). Kermit Roosevelt argued quite persuasively that *Erie*'s multiple rationales require courts to engage in a two-step choice-of-law analysis: (1) decide which sovereigns may attach legal consequences to the events in question; and (2) if more than one may do so, assign priorities thereto with federal courts using state law to do so unless preempted therefrom by federal law or wherever uniquely federal interests exist. *Id*.
77. *See id*. at 6-15; Wolff, *supra* note 37, at 1851-78.
78. *See* Clark, *supra* note 37, at 1368-75 (discussing Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988)).
79. New Jersey v. New York, 283 U.S. 336, 342 (1931).
80. Hall, *supra* note 12, at 224.
81. *Id*. at 131.
82. *See* Texas v. New Mexico, 485 U.S. 388 (1988) (final amended decree); Texas v. New Mexico, 482 U.S. 124 (1987) (final judgment in No. 65 Orig.).
83. Texas v. New Mexico, 462 U.S. 554, 564 (1983). The Court rejected the special master's proposal to give the United States' representative to the compact's "commission" a tie-breaking third vote—something the compact itself had not done. *See id*. at 565 ("The Pecos River Compact clearly lacks [this feature] and we are not free to rewrite it."). But the Court's frustrations with the parties boiled over. *See id*. at 576 ("[I]t is difficult to believe that the bona fide differences in the two States' views of how much water Texas is

consent, in the Court's considered judgment, invested an interstate compact with the same force as a "law of the United States."[84] The Court's equitable discretion could not stretch so far as to *change* it.[85]

Shortly after it rejected the solution of appointing a "river master" to interpret the compact under the Court's own continuing jurisdiction,[86] however, it relented and did precisely that.[87] Indeed, the Pecos controversy moved the Court to an equitable apportionment quantum leap—fashioning a first-ever damages remedy for past violations (the compact itself was silent on remedies)[88] and appointing a Colorado State University professor to apply the Court's rehabilitation of the compact annually in light of varied local conditions.[89] Since 1988, the states have paid more than $228,000 in fees to River Master Neil Grigg to apply the Court's jiggered framework for keeping the peace.[90] In work published in his individual capacity, Grigg explained the manual created to this end as a crosswalk from the primitive hydrology behind the 1948 compact to the more complex methods of water balancing today.[91]

Decades later in *Alabama v. North Carolina*,[92] this same struggle to prove a compact's fundamental flaws and the need for the Court's rehabilitative services ended in four opinions and conflicting signals on the legal character of compacts and the states' rights to remedies.[93] A critical dispute was whether the states party to the compact had a judicially enforceable duty to act in good faith—what some of the Justices regarded as ordinary contract law and others as the Court being asked to rewrite the compact.[94] Here again, the Court struggled with the legal grounds of a bargain struck by states and ratified by Congress—questions the water allocation compacts seem fated to present regularly.[95]

Nowhere mentioned in the Supremacy Clause,[96] only the Court's precedents settle the "law of the Union" understanding of interstate compacts—a legal and jurisdictional fudge holding that they constitute positive federal "law."[97] The Court again cited this doctrine in its 2018 opinion on No. 141.[98] But whether they are federal law or not, compacts rarely resolve the sources of conflict impelling states to bring suit. They simply shift the terms.[99] The Pecos River and Río Grande have illustrated that for decades. The states' fight over the Pecos shows what can go wrong when a compact aims to regulate *causes* instead of consequences.[100] And the Court's judgment in *Texas v. New Mexico* (No. 65) may have been the only time it awarded water to a downstream state's relatively minor irrigation economy out of upstream seniors' totals.[101] But this latest chapter—involving New Mexico's "delivery credits" for water Texas had no means of using and that literally just evaporated—invites the Court to *adapt* (but not to change!) a flawed compact to still more unanticipated challenges after the administrative surrogate it first stood up three decades ago did so to one party's delight and the other's chagrin.[102]

Though distinct, the Río Grande dispute in No. 141 is eerily similar. A federal storage project meant to develop

entitled to receive justify the expense and time necessary to obtain a judicial resolution to this controversy.").

84. *Texas*, 462 U.S. at 564 (quoting Cuyler v. Adams, 449 U.S. 433, 438 (1981)).
85. As has been detailed by Professor Hall and others, groundwater pumping in the Pecos basin (like others) confounded most of the estimative analyses of inflows and outflows and made stabilization of the states' agreement difficult. *See generally* Hall, *supra* note 12; *see also* Burke W. Griggs, *Interstate Water Litigation in the West: A Fifty-Year Retrospective*, 20 U. Denv. Water L. Rev. 153, 167 (2016).
86. *See Texas*, 462 U.S. at 566.
87. *See Texas*, 482 U.S. at 137.
88. Against its special master's recommendation, the Court gave New Mexico the option of paying for the past noncompliance with either water or money. *See id*. at 129-33. Money damages would again be ordered in *Kansas v. Nebraska*, 135 S. Ct. 1255, 1255 (2015)—another compact dispute.
89. The method was devised by the special master and approved by the Court. *See Texas*, 482 U.S. at 127, 135.
90. The Court publishes every motion for the collection of the fees and its grant thereof. My analysis of that compendium of orders from April 1988 (when Grigg took his oath) to October 2019 (when briefing in the latest controversy began) averages to about $9,300 per year.
91. *See* Neil S. Grigg, *Royce Tipton and the Inflow-Outflow Method of Compact Accounting*, 145 J. Irrigation & Drainage Engineering 02519001-1, 02519001-2 (2019).
92. 560 U.S. 330, 40 ELR 20148 (2010).
93. The original jurisdiction has shifted noticeably toward disputes over the meaning and/or scope of interstate compacts. Of the 11 full opinion decisions since the Colorado River Compact structured the Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), six have been compact disputes. *See* Texas v. New Mexico, 462 U.S. 554 (1983); Oklahoma v. New Mexico, 501 U.S. 221 (1991); Virginia v. Maryland, 540 U.S. 56, 34 ELR 20005 (2003); Montana v. Wyoming, 563 U.S. 368 (2011); Kansas v. Nebraska, 135 S. Ct. 1042, 44 ELR 20040 (2015); Texas v. New Mexico, 138 S. Ct. 954, 48 ELR 20035 (2018). By comparison to the five (arguably six) basins where a decree has ever been entered, there are 22 basins with an interstate allocation compact approved by Congress and at least a dozen more with compacts for managing pollution, navigation, impoundment, and so on. *See* George William Sherk, Dividing the Waters: The Resolution of Interstate Water Conflicts in the United States (2000).
94. *Compare Alabama*, 560 U.S. at 351 ("We have never held that an interstate compact approved by Congress includes an implied duty of good faith and fair dealing . . . We do not and cannot add provisions to a federal statute."), *with id*. at 364-69 (Breyer, J., joined by Roberts, C.J., concurring and dissenting in part) (using the compact's structure to infer the meaning of a pledge to "take appropriate steps").
95. *See*, *e.g.*, *Kansas*, 135 S. Ct. at 1065-71 (Scalia, J., dissenting) (criticizing the majority for rehabilitation of a compact through its equitable discretion that amounted to adding features to the compact); *cf*. Grant, *supra* note 13, at 153-55 (noting (in 2003) that the Court had not fully resolved the "law of the Union" doctrine's applicability to water allocation compacts and that states' "reserved powers" might well protect added flexibility to states).
96. *See* U.S. Const. art. VI; Engdahl, *supra* note 47, at 1010-11.
97. *See* Cuyler v. Adams, 449 U.S. 433, 438-39 & n.7 (1981) (discussing Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852); Delaware River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419 (1940); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959)). According to the dissenters in *Cuyler*, it was a "remarkable feat of judicial alchemy" by which the Court had "transform[ed] state law into federal law." *Id*. at 450 (Rehnquist, J., dissenting). The compact at issue in *Cuyler* did not require congressional consent and had only received a generic nod from Congress in the form of an open-ended invitation enacted 20 years prior. *See id*.
98. *See Texas*, 138 S. Ct. at 958.
99. *See* Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 Fla. L. Rev. 1 (1997).
100. By regulating New Mexico's *uses* of the river rather than water balances therein, the 1948 compact entrenched an evidentiary nightmare at the center of the parties' bargain. *See* Hall, *supra* note 12, at 130-63.
101. Professor Hall detailed the state of the basin as of the first litigation of No. 65. *See* Hall, *supra* note 12, at 1-23. This was, to be sure, a compact dispute and not a pure equitable apportionment. By comparison, similar circumstances in the Vermejo River Basin (without a compact) ended in a refusal of relief in *Colorado v. New Mexico*, 467 U.S. 310, 323-24 (1984).
102. The 2014 storm that challenged the principal Pecos storage projects first pushed Texas to request that water be held in the federal project in New Mexico (Brantley) until Texas could utilize the water. When New Mexico and the Bureau of Reclamation obliged, the resultant evaporative losses then became the subject of dispute. *See* Brief for the United States as Amicus Curiae at 7-8, Texas v. New Mexico, No. 65 Orig. (Dec. 9, 2019).

supply had its full legal significance—as against the host-state's sovereignty—left undecided in the compact.[103] The United States joined No. 141 because its customers could be affected quite directly by a decision permitting New Mexico residents to pump water out of the basin below the storage project but above the Texas state line.[104] Although Justice Neil Gorsuch's opinion was curiously emphatic that the admission of the United States' claims reflected special circumstances in the Río Grande,[105] it is hard to see how judicial economy could possibly have been served *without* the United States in such a litigation.[106] It is also hard to see how the Court can fully resolve the disputes of the real parties in interest without adjudicating the users' disputes.

The latest chapters on the Pecos and Río Grande entangle the Court in legal arcana without even allowing that one river's troubles are tributary to the other's—and feature the same parties and similar issues![107] Obscure questions of positive versus judge-made law and state versus federal interests are spilling out of each. Indeed, they may eventually amount to aggregate litigation without much aggregation at all. But is the Court's adjudication of the allocations at stake truly state autonomy-enhancing? This question should bedevil any Justice (or special master) striving to safeguard the states' equal sovereignty even as their peoples' needs intensify the controversies over shared waters. Are the people of Alamosa, Monte Vista, Del Norte, Alamogordo, Albuquerque, Las Cruces, Roswell, Santa Fe, Santa Rosa, Taos, White Rock, El Paso, Laredo, or Pecos at all served by having their demands on the rivers filtered through the Court's own reticence toward equitable relief against states?

As champions of the compact form may be loath to admit, most compacts were "negotiated with too limited a scope, focusing primarily on near-term water supply matters without giving sufficient attention to possible future contingencies."[108] As climate change quickens the obsolescence of these compacts, the Court's reserving to itself the hardest work—specifying and ordering the states' real interests—may just sow greater uncertainty about the scope and priority of these interests in a fast-changing environment.

As has happened in *Florida v. Georgia*[109] and no doubt will happen in *Mississippi v. Tennessee*, the interposition of the states' equal dignity and the remedial haze it brings has obscured the more practical questions of distributing benefits and burdens.[110] Neither does it encourage clear distinctions between dispute resolution and law exposition—something vital to the Court's communication to others. As Part I argued, it barely allows us to conclude that the Court has been interpreting the Constitution in these controversies. Of course, the large majority of its denials of relief have been without prejudice[111] (i.e., nonfinal).[112] In fact, the Court has at least once expressly rejected the claim that a prior denial of relief amounted to a judgment in favor of the defending state.[113]

And yet, such nonjudgment-judgments have just as often involved balancing the states' relative utilities.[114] This is curious because the Court's account of states' sovereign dignity is at least nominally a *rejection* of utilitarian balancing.[115] Indeed, from the battery of instances in which the states' equal sovereignty has been heralded by this Court

103. *See* United States v. City of Las Cruces, 289 F.3d 1170, 1185-89, 32 ELR 20698 (10th Cir. 2002).

104. The first special master in No. 141 fully inventoried the United States' interests in the Elephant Butte Project, the supplies from upstream of Elephant Butte in fulfilling its obligations to Mexico, and in the preemption of state law governing the delivery of project water from Elephant Butte. *See* First Interim Report of the Special Master at 210-17, 231-37, Texas v. New Mexico, No. 141 Orig. (Feb. 9, 2017).

105. *See* Texas v. New Mexico, 138 S. Ct. 954, 959-60, 48 ELR 20035 (2018) (noting four distinct considerations in favor of allowing the United States to pursue its own claims but that "the question whether the United States could initiate litigation [in the Court's original jurisdiction] to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States" had not been presented).

106. *See* Sandra B. Zellmer, *Waiving Federal Sovereign Immunity in Original Actions Between States*, 53 U. Mich. J.L. Reform 447, 472-74 (2019). The indispensability of the United States defeated the Court's jurisdiction over the first Río Grande controversy between the two. *See* Texas v. New Mexico, 352 U.S. 991 (1957).

107. Compact disputes over shared waters with federal (Reclamation Act) storage projects will invariably raise difficult questions of preemption implicating the forum's authority to elaborate the bargain, the competing sovereign interests, and the injury(s) at issue.

108. Jerome C. Muys Jr. & George William Sherk, *The Dogmas of the Quiet Past: Potential Climate Change Impacts on Interstate Compact Water Allocation*, 34 Va. Envtl. L.J. 297, 312 (2016). Jerome Muys and George Sherk's recommendation on compacts was that "[m]andatory, prescriptive provisions [sh]ould be kept to a minimum," and should be accompanied by broadly empowered administrators for the compact's execution. *Id*. at 315.

109. *See* Benson, *supra* note 9, at 393-401.

110. *See* Zellmer, *supra* note 106, at 473; *cf*. Hasday, *supra* note 99, at 46 (arguing that the Court's "law of the Union" doctrine has created a "permanency problem" for interstate compacts). As Prof. Andrezj Rapaczynski noted after the Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), "[t]he complexity of the concept of the people, as spelled out in the Constitution, makes the idea of popular sovereignty very difficult to work with and, in any case, useless for a defense of the *a priori* notion of state sovereignty." Andrezj Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 Sup. Ct. Rev. 341, 358 (1985).

111. An explicit declaration that the denial of relief (or of leave) was without prejudice can be found in *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 Chemicals Corp*., 401 U.S. 493, 505, 1 ELR 20124 (1971), *United States v. Nevada*, 412 U.S. 534, 540, 3 ELR 20666 (1973), and *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1029, 13 ELR 20658 (1983). Justice Benjamin Cardozo's meticulous opinion in *Washington v. Oregon*, 297 U.S. 517 (1936), remains the only instance where the Court conclusively denied relief in a decree affirming a special master to the effect that the complaining state could not make out a case. *See id*. at 530.

112. A dismissal without prejudice will generally not bar future litigation of the same claim 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*, 538 U.S. 720, 720 (2003) (No. 126 Orig.).

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

114. *See*, *e.g.*, Colorado v. New Mexico, 467 U.S. 310, 321 (1984) (noting that the Court had "asked the Master to help [it] balance the benefits and harms that might result from the proposed [decree]"); *Connecticut*, 282 U.S. at 666-67 (noting that Connecticut had failed to prove that Massachusetts' proposed diversion would materially interfere with its own uses); *see also* Grant & Birdsong, *supra* note 14; Bernadett, *supra* note 40, at 523.

115. *See* Litman, *supra* note 32, 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).

and the Rehnquist Court before it, it bears recalling that states' interests in shared waters should be protected to them generally—and not just when those states sue in the Supreme Court![116]

Such an approach is possible, but probably not if it remains confined to the Court's equitable original jurisdiction practice. But consider that the Court's predominant mode of decision there has been to *reconcile* the law of the contending parties ("local law"), not to *apply* it.[117] The Court's declared intentions have been to reveal equities from what the state-parties themselves have established should favor some claims to the resource over others.[118] This has settled few if any broadly applicable rules or principles of decision independent of the Court as forum. Indeed, a rival explanation of this mode of decision has never been completely foreclosed: that the Court is actually elevating shared local law into a common *federal* rule of decision.[119]

The best interpretation, thus, may be that the states' interests in interstate waters consist at least in having the widest possible scope and highest possible priority assigned to their own laws on the shared resource consistent with their duties to the Union. This would be an approach not unlike basic choice-of-law methods today, especially given *Erie*'s demand that substantive legal interests be recognized regardless of forum.[120] It would start from the premise that the states' equal sovereignty entails at least the empowerment of their rights holders with claims to interstate waters, however far or wide such rights may naturally reach. If, as seems logical to infer from the Court's jurisprudence, these state interests in interstate waters are constitutional in origin, then inferior courts and at least arguably the executive branch are bound to recognize that interest all states share as it has been interpreted and adjudicated by the Court.[121]

This, of course, would leave Congress a prominent role in specifying positive federal law sorting out interstate assertions of priority, immunity, or duty. Sorting out boundaries between these structural constitutional spheres is beyond our scope here,[122] but it is obviously work that the Court, in tandem with both state and federal inferior courts, has significant experience in doing. That the scope and priority of competing state interests may necessarily be a question of federal law, as *Hinderlider* and the original jurisdiction precedents suggest, is no reason to assume that the Supreme Court (or even an Article III court) must decide such questions in the first instance. Other courts hearing ordinary civil litigation between the affected private parties regarding interstate waters could serve important sorting and queuing functions that the Supreme Court cannot, acting alone, serve.

* * *

Ultimately, making the best sense of the Court's work on original jurisdiction interstate waters controversies demands careful attention to the distinction between law exposition and dispute resolution.[123] The Court has on occasion confessed as much.[124] Federal judge-made law, like interstate compacts, has uncertain and even conflicted foundations in our Constitution. This has compounded our troubles on interstate waters for more than a century.

Moving forward, the key to better dispute resolution may be the broader empowerment of forums other than the Supreme Court to engage in the right kinds of law exposition and their own forms of dispute resolution. If inferior courts, the executive branch, and Congress were all better able to *understand* the states' interests in interstate waters while working to resolve various kinds of disputes therein, the federal law of reconciling those interests would almost surely become clearer over time than it has been to date.

116. *Compare Kansas*, 206 U.S. at 97 ("One cardinal rule, underlying all the relations of the States to each other, is that of equality of right."), *with* Shelby County v. Holder, 570 U.S. 529, 544 (2013) ("Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the States.").

117. *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*, 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."); 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*, 320 U.S. at 399-400; 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").

118. *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.").

119. *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*, 259 U.S. at 464 (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 Great Plains Res. 7, 20-21 (1992). Similarly, in the majority opinion in *Florida v. Georgia*, 138 S. Ct. 2502 (2018), the Court 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 Joseph Story's riparianism chestnut, *Tyler v. Wilkinson*! *See id.* at 2513 (citing Tyler v. Wilkinson, 24 F. Cas. 472 (D.R.I. 1827)).

120. *Cf.* Wolff, *supra* note 37, at 1883-88 (noting that resolution of the content of state law and policy is a function of that state's law and policy but that resolving conflicts between two or more states is a matter of interstate relations); Roosevelt, *supra* note 76, at 10-15 (dividing substantive law creating interests that can be asserted in any forum from procedural law creating interests tied to a particular forum that cannot be asserted elsewhere).

121. *See* Baude, *supra* note 73; Hill, *supra* note 58, at 1068-79.

122. I tackle these structural questions in a larger, forthcoming study. *See* Jamison E. Colburn, *Rethinking the Supreme Court's Interstate Waters Jurisprudence,* 33 Geo. Envtl. L. Rev. (forthcoming 2021).

123. *See* Pushaw, *supra* note 8, at 531.

124. *Wyandotte* remains the prime example. *See supra* note 34.