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DOUGLAS L. GRANT*

Limiting Liability for Long-Continued Breach of Interstate Water Allocation Compacts

ABSTRACT

Recent Supreme Court decisions in Texas v. New Mexico *and* Kansas v. Colorado, *involving assessment of damages for long-term breaches of interstate water compacts, have raised the specter of huge liability for breaching states. Thus far the Supreme Court has not dealt with the possibility that time may bar some claims of long-continued breach. The ancient principle of* nullum tempus*—no time runs against the sovereign—might enable a sovereign plaintiff state to recover damages no matter how old. The* nullum tempus *principle should not apply in water compact enforcement suits, however, because it would produce little or no public benefit in that situation and because its application would violate the constitutional plan of equal footing for litigating states. With the removal of the principle of* nullum tempus, *the defenses of either laches or a borrowed statute of limitations may reduce a defendant state's liability for breach of an interstate water compact.*

INTRODUCTION

Interstate compacts are the major means of defining the rights of states to divert and use the flow of rivers that cross or form their borders. Various combinations of states have negotiated 26 water allocation compacts.[1] In contrast, Congress has legislated interstate allocations only

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1. *See* Douglas L. Grant, *Water Apportionment Compacts Between States*, *in* 4 WATERS AND WATER RIGHTS § 46.01 (Robert E. Beck, ed., 1991 ed. 1996 Repl. Vol. & Supp. 2002) [hereinafter *Water Compacts*]. Twenty-two of the compacts are solely between states; the other four include the United States as a signatory party in addition to the states. *Id.*

twice,[2] and the Supreme Court has decreed interstate allocations for only three rivers.[3]

Historically, states realized that they could not attract federal funding and private capital needed for water development projects on interstate rivers if their shares of the flows were uncertain.[4] They negotiated water allocation compacts in an effort to provide desired certainty.[5] They were optimistic that compacting would promote certainty not only by defining individual state shares but by "eliminat[ing] all future litigation of the matters treated."[6]

Compacting avoided litigation for a time. Most water allocation compacts are more than four decades old,[7] and some of them go back to the 1920s.[8] The first suit between states to interpret and enforce a water allocation compact was not brought until 1974.[9] Since then, however, three more such suits have been filed.[10] These are unlikely to be the last ones. The 1974 suit arose because compact negotiators relied on data and assumptions that later proved erroneous, and the compacting states could not agree on how the new information should affect their rights and duties.[11] At least one more water allocation compact is based on data and assumptions now known to be erroneous,[12] and litigation-producing

2. Douglas L. Grant, *Apportionment by Congress, in* 4 WATERS AND WATER RIGHTS § 47.01(b) (Robert E. Beck ed., 1991 ed., 1996 Repl. Vol.).

3. Douglas L. Grant, *Equitable Apportionment Suits Between States, in* 4 WATERS AND WATER RIGHTS § 45.07(a) (Robert E. Beck ed., 1991 ed., 1996 Repl. Vol.) [hereinafter *Apportionment Suits*].

4. *See* M.C. Hinderlider & R.I. Meeker, *Interstate Water Problems and Their Solutions*, 90 TRANSACTIONS OF THE AM. SOC'Y CIV. ENG'RS 1035, 1038 (1927) [hereinafter *Interstate Water Problems*]; *see also* A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT 913-14 (5th ed. 2002).

5. *Interstate Water Problems, supra* note 4, at 1048-49.

6. *Id.* at 1049.

7. *See Water Compacts, supra* note 1, § 46.01, Table of Water Apportionment Compacts.

8. *Interstate Water Problems, supra* note 4, at 1045-47.

9. *See infra* note 46 and accompanying text. In 1952, Texas tried to sue New Mexico over the Rio Grande Compact, Texas v. New Mexico, 343 U.S. 932 (1952), but the Court dismissed the case because of the absence of the United States as an indispensable party, Texas v. New Mexico, 353 U.S. 991 (1957).

10. Kansas v. Nebraska, 525 U.S. 1101 (1999) (Republican River Compact) (motion for leave to file complaint granted); Oklahoma v. New Mexico, 484 U.S. 808 (1987) (Canadian River Compact) (motion for leave to file complaint granted); Kansas v. Colorado, 475 U.S. 1079 (1986) (Arkansas River Compact) (motion for leave to file complaint granted).

11. Texas v. New Mexico, 462 U.S. 554, 560-62 (1983) (Pecos River Compact).

12. The Colorado River Compact allocates more water than exists in the river system because compact negotiators relied on water supply data now known to be inaccurate on the high side. *See* DAVID H. GETCHES, *Competing Demands for the Colorado River*, 56 U. COLO. L. REV. 413, 419 & n.13 (1985).

controversy might well occur as water uses in the basin grow.[13] Another reason to expect more litigation is that compacts typically allocate water for the long term,[14] and limits of human foresight can result in unintended drafting omissions and ambiguities. Still another reason is deliberate omission or ambiguity. Most water allocation compacts were concluded in order to get federal water project funding that depended on the states reaching agreement about their shares of the water source.[15] Compact negotiators had an incentive to omit contentious points or plaster them over with ambiguity.[16]

One of the water compact cases brought to date was settled before the Court made any findings,[17] but in each of the other three, the Court found that the defendant state had breached its water delivery obligation.[18] The breach extended for decades in two of the cases,[19] and the Court had to address the defendant states' liability for long-continued breach.[20] Prior to these cases, the issue of state liability for long-continued breach of compact was essentially unexplored, not just for water allocation compacts but for interstate compacts generally.

The Court has issued three opinions in the two water compact cases addressing long-continued breach.[21] These opinions have started the Court down the path of awarding damages measured by the plaintiff state's losses for the entire period of breach,[22] however long, plus

13. For discussion of growing tensions under the Colorado River Compact, see generally Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 114-20 (2003).

14. *E.g.*, Colorado River Compact, art. III(a), 70 Cong. Rec. 324, 325 (1928) (apportionment "in perpetuity"); Red River Compact, Pub. L. No. 96-564, art. XII, 94 Stat. 3305, 3318 (1980) (compact terminable upon agreement of all four signatory states, with rights established under it continuing in the event of termination).

15. Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 48 (1966).

16. *See* TARLOCK ET AL., *supra* note 4, at 949.

17. Kansas v. Colorado, 123 S. Ct. 1898 (2003) (decree based on settlement stipulation); *Tri-state Settlement Reached in Republican River Battle*, IX NATIONAL WATER RIGHTS DIGEST, Jan. 2003, at 9.

18. Kansas v. Colorado, 533 U.S. 1, 5-6 (2001) (Arkansas River Compact); Oklahoma v. New Mexico, 510 U.S. 126, 126 (1993) (Canadian River Compact); Texas v. New Mexico, 482 U.S. 124, 127-28 (1987) (Pecos River Compact).

19. *See Kansas v. Colorado*, 533 U.S. at 6 (recommendation of special master, not challenged by Colorado, that damages be calculated from 1950); *Texas v. New Mexico*, 482 U.S. at 127-28.

20. *Kansas v. Colorado*, 533 U.S. at 24 (O'Connor, J., dissenting); *Texas v. New Mexico*, 482 U.S. at 128, 135.

21. Texas v. New Mexico, 482 U.S. 124 (1987) (Pecos River Compact); Kansas v. Colorado, 514 U.S. 675 (1995) (Arkansas River Compact); Kansas v. Colorado, 533 U.S. 1 (2001) (Arkansas River Compact).

22. *See infra* text accompanying notes 74-78 and 83-84 (*Kansas v. Colorado*) and notes 54-64 (*Texas v. New Mexico*).

compound prejudgment interest for possibly an extended period.[23] This path could lead to huge liability for future defendant states found to be in breach for decades. The risk is heightened by the Court's ruling that a state is liable even if it acted in good faith and breached only because it interpreted ambiguous compact language concerning its water delivery obligation in a way that the Court later rejects.[24]

The Court provided a single glimmer of hope for future defendant states facing liability for long-continued breach. It noted in one of the opinions that it "has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact."[25] Laches would bar or reduce a defendant state's liability if the plaintiff state delayed inexcusably in pressing its claim and the delay prejudiced the defendant.[26]

After raising hope about a laches defense, however, the Court immediately noted a potential obstacle: "The common law has long accepted the principle '*nullum tempus occurrit regi*'—neither laches nor statutes of limitations will bar the sovereign."[27] The Court did not go on to decide whether the *nullum tempus* principle should operate in a compact enforcement case. Instead, it ended its brief discussion of laches by saying, "We need not...foreclose the applicability of laches in [compact] cases, because we conclude that Colorado has failed to prove an element necessary to the recognition of that defense [*i.e.*, inexcusable delay by the plaintiff state]."[28]

This article brightens the prospects of states sued for long-continued breach of water allocation compacts by arguing that *nullum tempus* has no place in such litigation. With *nullum tempus* gone, the Court should apply laches as readily as in suits brought by non-sovereign plaintiffs. In addition, the Court might possibly borrow and apply an analogous statute of limitations as a matter of federal common law.

Part I below examines the Court's few compact enforcement cases involving retrospective relief for long-continued breach. Part II addresses the *nullum tempus* principle—exploring its genesis, modern

23. *See infra* notes 80-100 and accompanying text.

24. *Texas v. New Mexico*, 482 U.S. at 129.

25. *Kansas v. Colorado*, 514 U.S. at 687.

26. *See id.* Colorado asserted that laches by Kansas barred all relief. Sometimes, however, laches only reduces the relief awarded. 27A AM. JUR. 2D *Equity* § 142 (1996).

27. *Kansas v. Colorado*, 514 U.S. at 687 (quoting O'Connor, J., dissenting, in Block v. North Dakota *ex rel* Board of Univ. & School Lands, 461 U.S. 273, 294 (1983)). In addition, the Court quoted passages from other cases saying that laches is generally inapplicable in interstate boundary suits and that delay in suing might well preclude relief or increase the plaintiff state's burden in equitable apportionment litigation. *Kansas v. Colorado*, 514 U.S. at 687-88.

28. *Id.* at 688.

rationale, and current status in state courts and the Supreme Court. Part III argues that *nullum tempus* does not fit cases between states because its supporting policy rationale breaks down in the interstate setting and because its application would be inconsistent with the constitutional plan for states as members of the Union. Part IV challenges the conventional wisdom that no statute of limitations is available for the Court to apply in suits between states. It explores the idea of borrowing one in water compact enforcement suits, based on extension of the federal-court practice of borrowing an analogous statute of limitations when a federal cause of action lacks one that applies by its terms. Although the extension would not be free from difficulties, part IV develops arguments to overcome them.

I. THE CASES ON LONG-CONTINUED BREACH OF COMPACT

The Supreme Court does not function in its familiar appellate role in compact enforcement cases. The Court has original and exclusive jurisdiction of suits between states.[29] The Court is poorly suited to sit as a trial tribunal. So the Court appoints a special master to handle pre-trial and evidentiary proceedings and to submit reports recommending how the Court should dispose of the issues.[30]

A. Compacts Other Than Water Allocation Compacts

States have formed compacts to address many interstate issues besides water allocation.[31] These other compacts have seldom been litigated.[32] Many of them were fully performed upon state ratification or shortly thereafter.[33] Others require continuing performance, but states

29. U.S. CONST., art. III, § 2, cl. 2 (judicial power of United States extends "to Controversies between two or more States); *id.*, cl. 1 (Supreme Court has original jurisdiction of "all Cases...in which a State shall be a Party"); 28 U.S.C. § 1251(a) (2000) (Supreme Court's jurisdiction is exclusive if a suit is between two or more states).

30. *See generally* 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 (2002).

31. *See* Brevard Crihfield, *Interstate Compacts, 1783–1977: An Overview, in* 22 THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES: 1978–1979, at 580-81 (1978).

32. *E.g.*, New Jersey v. New York, 523 U.S. 767 (1998) (boundary compact); Nebraska v. Iowa, 406 U.S. 117 (1972) (boundary compact); Tennessee v. Virginia, 177 U.S. 501 (1900) (boundary compact). A 1951 study reported that only two compact enforcement cases had come before the Court as of that time. FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE INTERSTATE COMPACT SINCE 1925, at 48 n.193 (1951).

33. ZIMMERMAN & WENDELL, *supra* note 32, at 49.

generally behave responsibly and meet their compact obligations unless the compact language is ambiguous.[34]

As unusual as compact enforcement litigation is, rarer still is compact enforcement litigation that involves liability for long-continued breach. Outside the context of water allocation compacts, a single case has presented that issue.[35] There, the Court assumed without discussion that no statute of limitations applied.[36] It also declined to apply laches[37] but did not explain whether that was because the doctrine never operates against a sovereign state or because an essential element of the doctrine was missing on the facts. In sum, the Court treated the issue of a statute of limitations so casually and the issue of laches so ambiguously that the case is not useful precedent on these issues.

B. Water Allocation Compacts

The Supreme Court water allocation compact cases on liability for long-continued breach involved the Pecos River Compact and the Arkansas River Compact.[38] The Court's opinions in these cases illustrate how long-continued breach can arise and suggest the potential magnitude of a breaching state's liability. More importantly, the opinions state the presently operative legal principles on long-continued breach and reveal some remaining uncertainties.

1. *The Pecos River Compact:* Texas v. New Mexico

The Pecos River flows from north-central New Mexico south into Texas, where it continues until emptying into the Rio Grande. The two states negotiated the Pecos River Compact in 1948,[39] and it became effective a year later upon state ratification and congressional approval.[40] New Mexico agreed in the compact not to "deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that

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34. FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 13 (1976).

35. Virginia v. West Virginia, 206 U.S. 290 (1907), 209 U.S. 514 (1908), 220 U.S. 1 (1911), 222 U.S. 17 (1911), 231 U.S. 89 (1913), 234 U.S. 117 (1914), 238 U.S. 202 (1915), 241 U.S. 531 (1916), 246 U.S. 565 (1918).

36. *Virginia v. West Virginia*, 220 U.S. at 35-36.

37. The defendant state argued laches at length in its brief. Defendant's Brief at 125-36, Virginia v. West Virginia, 238 U.S. 202 (1915) (Orig. No. 2). The Court dismissed this argument, without using the word "laches," by saying that "[t]he lapse of time has not changed the substance of the agreement," and "[i]t is urged that there are equities to be considered, but we can find none which go so far as to destroy them." *Id.* at 236.

38. *Supra* note 21 and accompanying text.

39. Texas v. New Mexico, 462 U.S. 554, 559 (1983).

40. *Id.*

available to Texas under the 1947 condition."[41] To quantify that amount for future years, an engineering advisory committee that assisted the compact negotiators prepared an inflow-outflow manual. The manual set out a formula for calculating how much water Texas should receive at the state line under varying conditions given the 1947 level of water consumption in New Mexico.[42]

Soon after the compact went into effect, the inflow-outflow formula proved to be based on seriously erroneous data and assumptions. Flows at the state line were far below the inflow-outflow projections with no significant changes in natural conditions or in man's activities in New Mexico.[43] The two states struggled to adjust for the errors and seemingly reached agreement in 1962, but thereafter cooperation between them ceased.[44] They became deadlocked regarding what changes, if any, should be made in the formula to address the errors.[45] Finally, in 1974, Texas asked the Supreme Court to interpret and enforce the compact.[46] The litigation proceeded slowly as the special master and the Court addressed various issues.[47] A breakthrough occurred in 1984, when the Court approved a revised inflow-outflow formula recommended by the special master.[48] Thereafter, using the new formula, the special master calculated that New Mexico had shorted Texas by 340,100 acre-feet from 1950 through 1983.[49]

To remedy the breach, the special master recommended that the Court order New Mexico to deliver one-tenth of the accumulated shortfall to Texas annually for ten years, in addition to the shortfall due in any future year.[50] The special master opined that both parties might be

41. Pecos River Compact, art. III(a), 63 Stat. 159, 161 (1949).

42. *Texas v. New Mexico*, 462 U.S. at 558-59.

43. *Id.* at 560.

44. *See* G. EMLEN HALL, HIGH AND DRY: THE TEXAS-NEW MEXICO STRUGGLE FOR THE PECOS RIVER 122-23 (2002).

45. *Texas v. New Mexico*, 462 U.S. at 561-62. The compact created a commission empowered to administer its terms and gave each state one vote on the commission. *Id.* at 560.

46. Paul Elliott, *Texas' Interstate Water Compacts*, 17 ST. MARY'S L.J. 1241, 1256 (1986). The Court granted the Texas motion for leave to file a bill of complaint in *Texas v. New Mexico*, 421 U.S. 927 (1975).

47. *See* Texas v. New Mexico, 446 U.S. 540 (1980) (holding that the term "1947 condition" in the compact referred to actual water use conditions then rather than an artificial condition defined by the inflow-outflow manual's data and assumptions); Texas v. New Mexico, 462 U.S. 554 (1983) (defining the Court's role when states are deadlocked about compact interpretation).

48. *See* Texas v. New Mexico, 482 U.S. 124, 127 (1987) ("On June 11, 1984, we summarily approved the Special Master's report specifying the inflow-outflow methodology to be used in calculating Texas' entitlement.").

49. *See id.*

50. *Id.* at 127-28; Special Master's Report (July 1986) at 32-33, 36-37, Texas v. New Mexico, 482 U.S. 124 (1987) (No. 65, Orig.). The special master also recommended that the

better off with money damages, rather than payment in kind, but he thought money relief was unavailable because the compact did not specifically provide for it.[51]

In the Supreme Court, New Mexico opposed the special master's recommendation on three grounds. First, it argued that the Court could order only prospective relief, not retrospective relief compensating for past breaches. The Court disagreed, saying that although congressional consent makes an interstate compact a law of the United States, a compact is also a contract,[52] and "nothing in the nature of compacts generally or of this Compact in particular...counsels against rectifying a failure to perform in the past...."[53] Second, New Mexico argued retrospective relief was inappropriate because its breach was due to a good-faith misunderstanding of its water delivery obligation under the compact. The Court did not dispute New Mexico's good faith.[54] Instead, it invoked the contract rule that "good-faith differences about the scope of contractual undertakings do not relieve either party from performance."[55] Finally, New Mexico argued that if it were held liable to Texas for the shortfall, it should have the choice of paying in money rather than in water. The Court rejected the special master's view that money damages were foreclosed,[56] and it remanded the case to him for a recommendation on whether New Mexico should be allowed to elect a monetary remedy and, if so, the amount payable.[57] The recovery period spanned the entire 34 years of breach.[58] Also, the Court said

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Court impose a penalty of "water interest" should New Mexico fail in bad faith to meet the ten-year repayment schedule. Special Master's Report (July 1986) at 36-37, Texas v. New Mexico, 482 U.S. 124 (1987) (No. 65, Orig.). This was not prejudgment interest because it did nothing to compensate for prejudgment breach. It was a limited kind of postjudgment interest. New Mexico would owe no interest if it complied with the ten-year schedule of the recommended decree.

51. *See Texas v. New Mexico*, 482 U.S. at 130. The special master believed that money relief was foreclosed by the Court's statement, in an earlier phase of the case, that congressional consent to a compact makes it a law of the United States, and consequently no court could order relief inconsistent with its terms. Special Master's Report (July 1986) at 32, Texas v. New Mexico, 482 U.S. 124 (1987) (No. 65, Orig.).

52. Texas v. New Mexico, 482 U.S. at 128.

53. Texas v. New Mexico, 482 U.S. 124, 128 (1987).

54. *Id.* at 129.

55. *Id.*

56. *Id.* at 130.

57. *Id.* at 132. The Court said payment in kind "has all the earmarks of specific performance, an equitable remedy that requires some attention to the relative benefits and burdens that the parties may enjoy or suffer as compared with a legal remedy in damages" and noted the established principle that specific performance is a discretionary remedy that will not be awarded if doing so would be inequitable. *Id.* at 131.

58. The special master calculated the shortfall back to 1950, and the Court did not indicate any problem with that. *Id.* at 127-28.

postjudgment interest should be awarded until payment of whatever judgment might be entered.[59]

After further proceedings, the parties settled the case for $14 million.[60] Texas did not seek prejudgment interest. If it had done so successfully, New Mexico's liability might have been far larger, depending on the proper period for assessing such interest.

2. *The Arkansas River Compact:* Kansas v. Colorado

The Arkansas River flows from the mountains of Colorado into and through Kansas and two other states before it empties into the Mississippi River. Colorado and Kansas entered into the Arkansas River Compact after two unsuccessful attempts by Kansas to get the Supreme Court to equitably apportion the river.[61] The compact became effective with congressional approval in 1949.[62] It obligates Colorado not to engage in or allow future water development within its borders that will materially deplete the stateline flow in usable quantity or availability.[63] In 1985, Kansas sued Colorado for breaching that obligation.[64] Initially, Kansas sought only to compel Colorado's future compliance with the compact.[65] After the Court's opinion in *Texas v. New Mexico* allowing retrospective relief, however, Kansas amended its complaint to seek damages for breach.[66]

The special master bifurcated the litigation, considering breach first and saving remedial issues.[67] He concluded that Colorado breached the compact by allowing substantial increases in groundwater pumping commencing in 1950, but he left calculation of the total shortfall for the remedial phase of the case.[68] Colorado asserted the affirmative defense of laches[69] because Kansas did not formally complain to the compact

59. *Id.* at 132-33 & n.8.

60. Texas v. New Mexico, 494 U.S. 111 (1990) (stipulated judgment).

61. Colorado v. Kansas, 320 U.S. 383 (1943); Kansas v. Colorado, 185 U.S. 125 (1902), 206 U.S. 46 (1907).

62. Arkansas River Compact, ch. 155, 63 Stat. 145 (1949); Kansas v. Colorado, 514 U.S. 673, 678 (1995).

63. Arkansas River Compact, ch. 155, art. IV-D, 63 Stat. 145, 147 (1949).

64. *Kansas v. Colorado*, 514 U.S. at 679.

65. Motion for Leave to File Complaint, Complaint, and Brief in Support at 5-6, Kansas v. Colorado, 514 U.S. 673 (1995), 533 U.S. 1, 24 (2001) (No. 105, Orig.). Justice O'Connor noted this point in her dissenting opinion. *Kansas v. Colorado*, 533 U.S. at 24 (citing the special master's third report in the case).

66. First Amended Complaint at 6, Kansas v. Colorado, 514 U.S. 673 (1995), 533 U.S. 1, 24 (2001) (No. 105, Orig.).

67. *Kansas v. Colorado*, 514 U.S. at 680.

68. Special Master's Report (July 1995) at 263, 290, Kansas v. Colorado, 514 U.S. 673 (1995), 533 U.S. 1 (2001) (No. 105, Orig.).

69. Kansas v. Colorado, 514 U.S. 673, 687 (1995).

administration agency about excessive Colorado groundwater pumping until 1984.[70] Colorado argued that Kansas delayed inexcusably because it knew or should have known by 1956, or at least by 1968, that post-compact groundwater pumping in Colorado had increased substantially.[71] The special master concluded that Colorado proved neither inexcusable delay by Kansas nor prejudice to Colorado from the delay, both elements of laches.[72]

The Court accepted the master's recommended finding that post-compact groundwater pumping in Colorado breached the compact.[73] It disposed of Colorado's laches defense by accepting the master's view that Kansas had not delayed inexcusably in pressing its claim.[74] The Court said Colorado's conduct undermined its laches defense because Colorado refused, as late as 1985, to let the compact administration agency investigate groundwater use within its borders by asserting Kansas lacked evidence that the pumping had an impact on usable stateline flows.[75] Because Kansas did not delay inexcusably, the Court saw no reason to address the undecided legal issue of whether laches can apply in a compact enforcement suit.[76]

In the remedial phase of the case, the special master recommended awarding damages to Kansas for losses from compact violations by Colorado since 1950 plus prejudgment interest running from 1969, when Colorado knew or should have known of the overpumping.[77] Having lost previously on its laches argument, Colorado did not oppose the master's recommendation that the Court award damages from the commencement of breach. Instead, Colorado only contested the master's recommended period for prejudgment interest, arguing that it should run not from 1969 but from 1985 when Kansas filed suit.[78] Kansas also objected to the master's recommended period for prejudgment interest, asserting that it should run from 1950.[79] Kansas claimed damages of $62 million, consisting of $9 million for direct and

70. *Id.* at 688.

71. *Id.*

72. *See id.* at 680-81.

73. *Id.* at 693-94.

74. *Id.* at 688-89.

75. Kansas v. Colorado, 514 U.S. 673, 689 (1995).

76. *Id.* at 687-88.

77. Kansas v. Colorado, 533 U.S. 1, 6 (2001). The attorney for Kansas stated during oral argument on objections to the special master's report that the concluded Colorado underdelivery of water from 1950 through 1994 was approximately 420,000 acre-feet. *See* Transcript of Oral Argument of John B. Draper (Mar. 19, 2001), Kansas v. Colorado, 514 U.S. 673 (1995), 533 U.S. 1 (2001) (No. 105, Orig.), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/105orig.pdf.

78. *Kansas v. Colorado*, 533 U.S. at 12.

79. *Id.* at 6.

indirect losses, $12 million to adjust for inflation, and $41 million of prejudgment interest based on compounding from the time of breach.[80]

The Court divided three ways on the proper period for prejudgment interest. Justice Stevens, writing for a plurality of four Justices, favored awarding prejudgment interest from 1969. He recognized that the common law traditionally denied prejudgment interest on unliquidated claims.[81] But he said that by 1949, when the parties negotiated and ratified the compact, the Court had "consistently acknowledged that a monetary award does not fully compensate for an injury unless it includes an interest component"[82] and therefore had been awarding prejudgment interest when "'considerations of fairness' demand it."[83] He concluded that when Colorado entered into the compact, it should have expected the Court to balance the equities under the fairness standard.[84]

Stevens accepted the special master's assessment of the equities.[85] Weighing in favor of prejudgment interest was the need to fully compensate Kansas for the economic consequences of Colorado's breach.[86] Weighing against it were the reality that no one "had any thought" the compact was being violated in its early years,[87] "the long interval [that] passed between the original injuries and these proceedings,"[88] and "the dramatic impact of compounding interest over many years."[89] These factors led to the conclusion that prejudgment interest should run only from 1969, when Colorado knew or should have known of the overpumping.[90]

Justice O'Connor, joined by two other Justices, opposed any prejudgment interest.[91] She said that when the states negotiated and ratified the compact, the Court had not yet abandoned the venerable common law rule against prejudgment interest on unliquidated and

80. *Id.* at 10 n.2 (Stevens, J.), 25 (O'Connor, J., dissenting in part). For further information regarding the inflation adjustment, see *infra* note 103.

81. *Id.* at 9-10.

82. *Id.* at 10.

83. Kansas v. Colorado, 533 U.S. 1, 11 n. 4 (2001) (quoting Board of Comm'rs of Jackson County v. United States, 308 U.S. 343, 352 (1939)). He also noted that the Court's case law had not sufficiently developed by 1949 to give Colorado notice it would automatically be liable for prejudgment interest beginning at the time of injury. *Kansas v. Colorado*, 533 U.S. at 13-14.

84. *Id.* at 14.

85. *Id.* at 15 n.5.

86. *Id.* at 10-11.

87. *Id.* at 14.

88. *Id.*

89. Kansas v. Colorado, 533 U.S. 1, 14 (2001).

90. *Id.* at 6.

91. *Id.* at 20 (O'Connor, J., dissenting in part, joined by Scalia, J., and Thomas, J.).

unascertainable claims.[92] Therefore, she saw no basis to say the two states intended or expected any award of prejudgment interest for breach of the compact.[93] Moreover, she thought the Court's cases awarded prejudgment interest only upon considerations of fairness, rather than any rigid theory of compensation.[94] She saw nothing fair about awarding prejudgment interest when the parties "neither intended nor contemplated such an unconventional remedy."[95]

Two Justices, neither of whom wrote an opinion, thought prejudgment interest should run from the time Kansas filed suit in 1985.[96] To enable the Court to enter a judgment, the four Justices who favored prejudgment interest from 1969 joined the two who favored 1985 to produce a six-to-three majority for awarding prejudgment interest from 1985.[97] The Court remanded the case to the special master for calculation of final damages.[98]

The Court's opinions in *Kansas v. Colorado* leave uncertain the law on retrospective relief for breach of a water allocation compact. The Court left undecided whether the defense of laches would operate in a compact enforcement case. In addition, the Court's result on prejudgment interest represented a compromise that raises presently unanswerable questions. One can only guess about why two Justices thought prejudgment interest should not begin to run until Kansas filed suit in 1985. Was their conclusion based on particular facts in the case, or was it based on some broad rule applicable generally to breach of compact cases?

Justice Stevens' opinion adds another uncertainty. Although he said Supreme Court caselaw had not developed sufficiently by 1949 to put Colorado on notice that prejudgment interest would be awarded automatically from the time of breach, rather than under considerations of fairness, he also said there was "some merit" to Kansas's position that the Court's more recent cases had disapproved a balancing-of-the-equities limitation on awarding prejudgment interest.[99] Would he award prejudgment interest automatically, under the rubric of full compensation, for breach of compacts negotiated and ratified after the

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92. *Id.* at 21-24.
93. *Id.* at 21.
94. *Id.* at 25.
95. Kansas v. Colorado, 533 U.S. 1, 25 (2001).
96. *Id.* at 15 n.5.
97. *Id.* Justice Stevens also seemed to be influenced by the facts that the damages were unquantified; their quantification would require complex and protracted litigation, "it was uniquely in Kansas' power to begin the process [sooner] by which those damages would be quantified." *Id.* at 16.
98. *Id.* at 10 n.2, 20.
99. *Id.* at 13-14.

Court's more recent cases that rejected the balancing approach? If so, would he also award prejudgment interest automatically for earlier compacts as to breaches commencing or occurring after those recent cases? In other words, would the relevant time for ascertaining what the compacting states should have expected under governing caselaw be when the breach commences or occurs rather than when the states ratified the compact? In *Kansas v. Colorado*, ratification and commencement of breach were so close together that this issue did not arise.

O'Connor's position is also unclear. She opposed any prejudgment interest on the ground that the Court's caselaw as of 1949 did not allow it upon unliquidated and unascertainable claims. She acknowledged, however, that, at least by 1962, the Court was awarding prejudgment interest on considerations of fairness.[100] Would she treat compacts negotiated and ratified after 1962 differently than the 1949 Arkansas River Compact?

3. Summary and Observations

Texas v. New Mexico and *Kansas v. Colorado* illustrate two ways that litigation can arise regarding long-continued breach of a water allocation compact. *Texas v. New Mexico* arose because the formula in the Pecos River Compact for allocating water between the two states was based on flawed data. The two states sought to work through the difficulties with the formula, but cooperation between them ceased after about 15 years. A dozen more years passed before one of them sought judicial resolution of the disagreement. In *Kansas v. Colorado*, neither state "had any thought" during the early years of the compact that increased groundwater pumping in Colorado would materially reduce the streamflow into Kansas.[101] Perhaps the reason for their lack of awareness was that ground water moves very slowly, and years or decades may pass before the pumping of ground water tributary to a stream reduces its flow.[102]

Texas v. New Mexico established that retrospective compensatory relief is available for breach of a water allocation compact and that (depending on unelucidated factors) compensation might be in water or in money. *Kansas v. Colorado* established that the award of compensatory damages can include prejudgment interest though the claim was unliquidated until judgment. Uncertainty remains about the period for which prejudgment interest can be recovered. Until the uncertainty is

100. *Id.* at 25 (citing Blau v. Hehman, 368 U.S. 402 (1962)).

101. Kansas v. Colorado, 533 U.S. 1, 14 (2001).

102. *See, e.g.*, Dist. 10 Water Users Ass'n v. Barnett, 599 P.2d 894 (Colo. 1979) (expert testimony of 40-year lag between pumping tributary ground water and depletion of streamflow).

clarified, future plaintiff states can be expected to seek interest back at least to the time the defendant state knew or should have known of the breach. They might even seek it all the way back to the commencement of breach on either of two theories. One would be that a balancing of the equities in a particular fact situation justifies that. The other would be based on Justice Stevens' remark that there is "some merit" to the view that the Court's more recent cases treat the compensation principle as important enough to justify the automatic award of prejudgment interest back to the commencement of breach. Future plaintiff states might argue this supports automatic prejudgment interest for breach of the more recently approved compacts and perhaps also for more recent breaches of older compacts.

Under *Texas v. New Mexico* and *Kansas v. Colorado*, a state that is sued for long-continued breach of an interstate water allocation compact faces potentially huge liability even though it might have acted in good faith in interpreting its compact obligation differently than the Court ultimately does. While such a state will surely argue for a narrow interpretation of *Kansas v. Colorado* regarding prejudgment interest, there is no knowing whether that argument will succeed. Even if the period for prejudgment interest is limited significantly, the damages for direct and indirect losses due to decades of water delivery shortfalls can reach considerable magnitude, especially if adjusted for inflation.[103] Furthermore, many citizens of the defendant state who benefited from the extra water due to the breach of the compact may be gone and be replaced by a new generation of taxpayers who will think it especially unfair that they should bear the burden of the judgment.[104] Future defendant states surely will want to limit the period for which they are liable. They cannot

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103. *See supra* note 80 and accompanying text. During oral argument in *Kansas v. Colorado*, the following exchange occurred:

> QUESTION: Did you—was there an inflationary factor added so that the damages, say for the early sixties were computed in 1995 or year 2000 dollars?
>
> MR. DRAPER: For the years that were denied prejudgment interest treatment, 1950 through 1968, the Special Master did adjust those, at the suggestion of Colorado, not on the basis of principal [sic], but simply because Colorado was not objecting to that. Those are adjusted, which is only a fraction of the time value of money that occurred from that period to the present.

Transcript of Oral Argument, 2001 WL 300643, *9-10 (Mar. 19, 2001), Kansas v. Colorado, 514 U.S. 673 (1995), 533 U.S. 1 (2001) (No. 105, Orig.).

104. *Cf.* Transcript of Oral Argument, 2001 WL 300643, *10 (Mar. 19, 2001), Kansas v. Colorado, 514 U.S. 673 (1995), 533 U.S. 1 (2001) (No. 105, Orig.).

> QUESTION: But the people who are paying are really the present taxpayers, and they're paying for something that older generations of taxpayers maybe didn't do, and it could be horrendous amounts, if you have a violation that's 200 years old, as you could in a different case.

succeed without overcoming the principle that neither laches nor statutes of limitations bar the sovereign.

II. THE *NULLUM TEMPUS* PRINCIPLE

The principle that laches and statutes of limitations do not bar the sovereign traces back to the ancient English maxim *quod nullum tempus occurrit regi,*[105] which translates literally as "no time runs against the king."[106] The principle is broader than literal translation would indicate. It encompasses laches as well as statutes of limitations[107] even though laches requires more than the passage of time, namely, delay by the plaintiff that is inexcusable and that prejudices the defendant.[108] Proper application of the *nullum tempus* principle depends on understanding the reasons why courts have said laches and statutes of limitations do not bar the sovereign.

A. The Historical and Modern Rationales for the Principle

In England, *nullum tempus* was grounded in royal prerogative.[109] Statutes of limitations generally did not bar the king because no act of parliament bound the king unless the act expressly named him or necessarily implied that he was included.[110] Laches did not bar the king because he was too busy looking after the public welfare to be expected to bring timely suit, and he should not have to suffer from the neglect of his officers in failing to do so.[111]

The American Revolution undercut the royal-prerogative foundation for *nullum tempus* in the United States. Nonetheless, early American courts uniformly accepted the *nullum tempus* principle.[112] They discovered an appealing new function for it that Joseph Story, writing as a circuit judge, set forth as follows:

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105. United States v. Hoar, 26 F. Cas. 329, 329-30 (C.C.D. Mass. 1821).

106. BLACK'S LAW DICTIONARY, app. A (7th ed. 1999).

107. *E.g.*, Block v. North Dakota *ex rel.* Board of Univ. & School Lands, 461 U.S. 273, 294 (1983) ("neither laches nor statutes of limitations will bar the sovereign") (O'Connor, J., dissenting); Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938) ("the sovereign is exempt from the consequences of its laches, and from the operations of statutes of limitations"); United States v. Thompson, 98 U.S. 486, 489 (1878).

108. *E.g.*, Kansas v. Colorado, 514 U.S. 673, 687 (1995) (quoting Costello v. United States, 365 U.S. 265, 282 (1961) and also relying on BLACK'S LAW DICTIONARY); Gardner v. Panama R.R. Co., 342 U.S. 29, 30-31 (1951).

109. X WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 354-55 (1956).

110. *Id.* The king was implicitly included if the act was for the public good and it would have been absurd to exempt him. *Id.*

111. *Id.* at 355.

112. Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938).

> The true reason [for *nullum tempus*] is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments.[113]

The public will benefit, of course, if the neglect of public officers to pursue claims punctually does not bar the sovereign from later obtaining injunctive relief that preserves public rights or monetary relief that augments public assets.

Although early American courts uniformly accepted the *nullum tempus* principle, not all modern state courts and legislatures embrace it. Some state courts have limited the principle to higher levels of government and excluded political subdivisions of the state from its benefit.[114] Some state legislatures have enacted statutes of limitations for certain causes of action that expressly include the sovereign.[115] And some state courts[116] or legislatures[117] have abrogated the *nullum tempus* principle either completely or nearly so.

In addition, state courts have disagreed about whether *nullum tempus* survives the modern demise of another attribute of traditional sovereignty, namely, immunity from suit without consent. Some courts say that even though *nullum tempus* and immunity from suit have a common ancestry in royal prerogative, *nullum tempus* is sufficiently different to survive.[118] They point out that historically immunity from

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113. United States v. Hoar, 26 F.Cas. 329, 330 (C.C.D. Mass. 1821) (Story, J.).

114. City of Colorado Springs v. Timberlane Assoc., 824 P.2d 776, 778-79 & nn.4-5 (Colo. 1992) (collecting cases taking different views).

115. *E.g.*, MD. CODE ANN., STATE GOV'T § 12-201 (1999) (suits based on written contacts); UTAH CODE ANN. § 78-12-2 (2002) (suits in respect to real property or the issues or profits thereof). The public benefit function articulated by Story does not immunize an American sovereign from a statute of limitations that expressly includes it any more than royal prerogative insulated the king from acts of parliament that expressly included him. *E.g.*, State v. City of Columbia, 528 S.E.2d 408, 412 (S.C. 2000): "Under the nullum tempus doctrine, statutes of limitation do not run against the sovereign unless the legislature specifically provides otherwise."

116. *E.g.*, Shootman v. Dep't of Transp., 926 P.2d 1200, 1204-06 (Colo. 1996); New Jersey Educ. Facilities Auth. v. Gruzen P'ship, 592 A.2d 559, 563-64 (N.J. 1991).

117. *E.g.*, MO. REV. STAT. § 516.360 (2002) ("The limitations prescribed in sections 516.010 to 516.370 shall apply to actions brought in the name of this state, or for its benefit, in the same manner as to actions by private parties."); W. VA. CODE ANN. § 55-2-19 (2000) ("Every statute of limitation, unless otherwise expressly provided, shall apply to the State.").

118. City of Shelbyville v. Shelbyville Restorium, Inc., 451 N.E.2d 874 (Ill. 1983); Ohio Dep't of Transp. v. Sullivan, 527 N.E.2d 798 (Oh. 1988); Oklahoma City Mun. Improvement

suit was grounded in the idea that the king can do no wrong rather than the ideas supporting *nullum tempus, i.e.,* that acts of parliament generally do not apply to the king, and the king is too busy to sue punctually and should not suffer from the neglect of his officers to do so.[119]

More importantly, these courts stress that the two immunity doctrines provide different protections to American sovereigns. Immunity from suit protects the sovereign as a *defendant* in litigation, enabling it to shield public finances from depletion due to the neglect or malfeasance of public officers.[120] In contrast, *nullum tempus* protects the sovereign as *plaintiff* in litigation, enabling it to preserve public rights and public property despite the neglect of public officers to sue more promptly.[121] Thus, say these courts, immunity from suit does not protect a sovereign's citizens against violation of their public rights while *nullum tempus* does.[122] This added function of *nullum tempus,* they say, justifies its continued survival despite abrogation of the state's immunity from suit without consent.[123]

Other courts, however, have concluded that abrogation of immunity from suit leads also to the demise of *nullum tempus.*[124] They stress that both immunity from suit and immunity from time bars are aspects of sovereign immunity.[125] They reason that once the sovereign has "yielded the greatest aspect of sovereign immunity, immunity from any suit at all, it would be anomalous in the extreme not to conclude that the sovereign who can now be sued should not have to bring its own suit in a timely manner."[126] They are unimpressed by the asserted distinction between a sovereign as defendant and a sovereign as plaintiff: "Both liability avoidance [immunity from suit] and public rights preservation [immunity from time bars]...provide protection for the public fisc. We are not persuaded that the distinction supplies an adequate basis in

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Auth. v. HTB Inc., 769 P.2d 131 (Okla. 1988); Commonwealth v. J.W. Bishop & Co., 439 A.2d 101 (Pa. 1981).

119. *E.g., Commonwealth v. J.W. Bishop,* 439 A.2d at 103-04.

120. *E.g., id.* at 104.

121. *E.g., id.*

122. *Id.*

123. *See City of Shelbyville,* 451 N.E.2d at 877:

> Inasmuch as citizens who share a public right which has been violated may be unable in certain cases to bring suit on their own behalf while the government has a representative interest in the controversy [citations omitted], abolition of the government's immunity from limitations defenses would expose these citizens to the harsh consequences of neglect by officials over whose actions they had no control.

124. Shootman v. Dep't of Transp., 926 P.2d 1200 (Colo. 1996); New Jersey Educ. Facilities Auth. v. Gruzen P'ship, 592 A.2d 559 (N.J. 1991); State *ex. rel.* Condon v. City of Columbia, 528 S.E.2d 408 (S.C. 2000).

125. *E.g., New Jersey Educ. Facilities Auth. v. Gruzen,* 592 A.2d at 561.

126. *Id.*

policy to justify retaining *nullum tempus* while rejecting sovereign immunity."[127] This statement links protection of the public fisc and protection of public rights, apparently because public rights usually can be protected through use of the public fisc, *i.e.*, by eminent domain or other expenditures.

In sum, these latter courts reason that once a state concludes that the public fisc benefits cease to justify sovereign immunity from suit, the public fisc justification for *nullum tempus* also loses its force. Then the only remaining policy justification for *nullum tempus* is its role in enabling stale suits to protect public rights; and since public rights can often be protected by public expenditures, this role is minor enough to be outweighed by the standard policies behind laches and statutes of limitation.[128]

B. *Nullum Tempus* in the Supreme Court

Only three years after Story's circuit court opinion setting out the public-benefit rationale for *nullum tempus* in America, the Supreme Court embraced it—not surprisingly, in an opinion by Story.[129] The Court has continued since then to treat public benefit as the basis for *nullum tempus*.[130]

In most of the Supreme Court's *nullum tempus* cases, a sovereign was suing one of its citizens.[131] These cases establish beyond doubt that

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127. *Shootman*, 926 P.2d at 1206 n.8.

128. *City of Columbia*, 528 S.E.2d at 413-14, describes the policies behind statutes of limitations as follows:

> Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose...is to protect potential defendants from protracted fear of litigation.

Citing Moates v. Bobb, 470 S.E.2d 402, 404 (S.C. Ct. App. 1996). These principles ring true regardless of whether the party is a private individual, a corporation, or a governmental entity.

129. United States v. Kirkpatrick, 22 U.S. (9 Wheat.) 720, 735 (1824).

130. *E.g.*, Costello v. United States, 365 U.S. 265, 281 (1961); Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 132 (1938); United States v. Thompson, 98 U.S. (8 Otto) 486, 488-89 (1878); United States v. Knight, 39 U.S. (14 Pet.) 301, 315 (1840). Accordingly, the Court applies *nullum tempus* only when a sovereign is asserting a public right or the public interest, not when it is merely the nominal plaintiff suing solely to benefit a private person. United States v. Beebe, 127 U.S. 338, 344, 347 (1888).

131. That is true, for example, of the cases cited *supra* notes 129-130.

nullum tempus operates in that situation. Whether *nullum tempus* also operates when both parties are sovereign states is not settled.

In *Kansas v. Colorado,* the Court made the statement reported in the introduction of this article: "This Court has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact."[132] This statement appears to have been accurate when the Court made it in 1995,[133] and the laches issue has remained undecided since then.[134]

In contrast to the lack of Supreme Court authority on laches in compact enforcement suits, the Court squarely addressed the issue of applying a statute of limitations in *Rhode Island v. Massachusetts.*[135] Although that was not a compact enforcement suit, it presented a similar situation in that one state sued another to enforce the boundary between them as established by their colonial charters.[136] The Court gave the following reasons why no statute of limitations should apply:

> [H]ere two political communities are concerned, who cannot act with the same promptness as individuals; the boundary in question was in a wild unsettled country, and the error [made in locating the boundary on the ground] not likely to be discovered, until the lands were granted by the respective colonies, and the settlements approached the disputed line; and the only tribunal that could relieve, after the mistake was discovered, was on the other side of the Atlantic, and not bound to hear the case and proceed to judgment, except when it suited its own convenience.[137]

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132. Kansas v. Colorado, 514 U.S. 673, 687 (1995).

133. *See* Illinois v. Kentucky, 500 U.S. 380, 388 (1991) (stating in dictum that laches "is generally inapplicable against a State," but citing as authority only cases that were not suits between states); Virginia v. West Virginia, 206 U.S. 290 (1907), 209 U.S. 514 (1908), 220 U.S. 1 (1911), 222 U.S. 17 (1911), 231 U.S. 89 (1913), 234 U.S. 117 (1914), 238 U.S. 202 (1915), 241 U.S. 531 (1916), 246 U.S. 565 (1918) (initially expressing interest in applying laches, 220 U.S. at 35-36, but later disregarding it without explaining whether that was because *nullum tempus* precluded laches or because an essential element of laches was missing, 238 U.S. at 234-35); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838), 39 U.S. (14 Pet.) 210 (1840), 40 U.S. (15 Pet.) 233 (1841), 45 U.S. 591 (1846) (initially indicating laches might apply, 40 U.S. (15 Pet.) at 714, but not developing this possibility later).

134. In *New Jersey v. New York,* 523 U.S. 767, 806 (1998), a boundary case, the Court noted that *Kansas v. Colorado* had recognized "the possibility...that a laches defense may be available in some cases founded upon interstate compacts." The Court saw no reason to explore that possibility, however, because New York was not really asserting the defense of laches. *Id.*

135. 37 U.S. (12 Pet.) 657 (1838), 39 U.S. (14 Pet.) 210 (1840), 40 U.S. (15 Pet.) 233 (1841), 45 U.S. (4 How.) 591 (1846).

136. 37 U.S. (12 Pet.) at 714.

137. 40 U.S. (15 Pet.) at 273.

This statement reflects a variation of the English busy-king rationale for *nullum tempus*, embellished by the difficulty in discovering the factual basis for a cause of action and in accessing a judicial forum.

In evaluating the present force of the statement, it should be noted that Rhode Island discovered the boundary mistake in 1740,[138] long before there was a U.S. Supreme Court with jurisdiction to hear interstate controversies. Unlike litigation between colonies, suits between states no longer are delayed by the need for trans-Atlantic filing of papers carried by ship. More importantly, *Rhode Island v. Massachusetts* arose before the judiciary tempered statutes of limitation with a discovery rule that defers when they commence running, first in medical malpractice cases and later in other cases.[139] To whatever extent it appears that a state cannot act with the same promptness as individuals, the discovery rule can accommodate that. Similarly, to whatever extent the relevant hydrologic facts in a water compact enforcement suit might not have been immediately apparent to the plaintiff state, the discovery rule can adequately account for that. Therefore, *Rhode Island v. Massachusetts* is dubious precedent today against applying a statute of limitations in compact enforcement suits.[140]

III. THE UNSUITABILITY OF *NULLUM TEMPUS* IN COMPACT ENFORCEMENT SUITS

For two independent reasons, *nullum tempus* should not operate in suits between states for breach of compact. The first is that the public-benefit rationale for it breaks down in such suits. The second is that *nullum tempus* does not fit the constitutional plan for states as equal members of the Union.

A. Break Down of the Public-Benefit Rationale

The public-benefit rationale for *nullum tempus* is apt when a sovereign brings a stale suit against one of its citizens to protect public revenue, property, or rights. In this situation, the U.S. Supreme Court has said application of *nullum tempus* "is supportable...because its

138. 40 U.S. (15 Pet.) at 270.

139. "[L]ower federal courts 'generally apply a discovery accrual rule when a statute is silent on the issue.'" TRW Inc. v. Andrews, 534 U.S. 19, 27 (2001) (quoting from Rotella v. Wood, 528 U.S. 549, 555 (2000), but noting the Court has never decided whether to adopt the same approach). The discovery rule traces back to medical malpractice cases in the 1950s and early 1960s. 2 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 11.1.2 (1991).

140. Nor is the language quoted above from *Illinois v. Kentucky*—regarding use of prescription and acquiescence rather than laches and statutes of limitations in boundary suits between states—an insurmountable problem. *See infra* note 236.

benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes."[141]

In contrast, when a state brings a stale suit to protect public revenue, property, or rights and the defendant is another state, rather than one of the plaintiff state's citizens, the public consequences of applying *nullum tempus* differ significantly. The plaintiff state's recovery will benefit its citizens, but another body of citizens—those of the defendant state—will be harmed by their state's need to comply with the judgment imposing retrospective relief. In this situation, *nullum tempus* has double-edged public consequences. At the same time that it protects the plaintiff state's citizens from the neglect of their public officials to pursue a claim reasonably promptly, it undercuts the protection that laches and limitations statutes would otherwise provide to the defendant state's citizens against stale claims arising from the neglect (or good faith mistake) of their public officers to perform an obligation owed to the plaintiff state.

The significance of the double-edged public consequences of *nullum tempus* in a suit between states emerges from analysis of the Court's treatment of *nullum tempus* in *Guaranty Trust Co. v. United States*.[142] There, Russia sued a New York bank in a New York federal district court to recover a deposit it made with the bank many years earlier.[143] The Supreme Court held that the New York statute of limitations barred Russia's claim notwithstanding the sovereign's assertion of *nullum tempus*.[144] To explain why, the Court set out what it called "the guiding principle" on the applicability of *nullum tempus*:

> By voluntarily appearing in the role of suitor [a sovereign] subjects itself to the procedure and rules of decision governing the forum....[T]hose rules, which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts.[145]

The Court distilled this guiding principle from cases in which the plaintiff was a domestic sovereign, but it said the principle should apply also when the plaintiff is a foreign sovereign.[146]

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141. Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938).
142. 304 U.S. 126 (1938).
143. *Id.* at 129-30.
144. *Id.* at 132-36.
145. *Id.* at 134-35.
146. *Id.*

In *Guaranty Trust*, the forum rule of decision at issue was the New York statute of limitations. The question was whether some public policy demanded that this limitations period be "relaxed," *i.e.*, rendered inoperative, against the sovereign suitor, Russia. To decide the question, the Court engaged in a weighing process. It weighed the principles of justice underlying the statute of limitations against the public benefit that would accrue from applying *nullum tempus* to avoid the limitations period:

> The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest. Denial of its protection against the demand of the domestic sovereign in the interest of the domestic community of which the debtor is a part could hardly be thought to argue for a like surrender of the local interest in favor of a foreign sovereign and the community which it represents. We cannot say that the public interest of the forum goes so far.[147]

Because application of *nullum tempus* would not benefit citizens of the forum community, the statute of limitations operated against Russia's claim and barred it.

Regarding the weighing process, several fact patterns can be differentiated. One is where a foreign sovereign sues a private defendant from the forum state. This was *Guaranty Trust*: Russia sued a New York bank in a New York federal district court. The case was an easy one for not relaxing the New York statute of limitations. The Court regarded the public policies behind the limitations period as "meritorious," and it treated the public benefit from applying *nullum tempus* as inconsequential because there would be no benefit to forum citizens.

A second fact pattern is where a sovereign sues one of its citizens. The Court was referring to this situation when it said application of *nullum tempus* "is supportable because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes."[148] The courts that apply *nullum tempus* in this fact pattern have made the judgment, at least implicitly, that the public benefit of protecting the sovereign's citizens against neglect by its officers outweighs the policies behind laches and limitations statutes.

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147. Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938).
148. *Id.* at 132.

A third fact pattern is where a state sues another state, *e.g.*, for breach of compact. As noted earlier, the public consequences of applying *nullum tempus* here are double-edged: the plaintiff state's recovery on a stale claim benefits its citizens but harms the defendant state's citizens. If the calculation of public consequences is not to be myopic, it must consider not only the benefit to the plaintiff state's citizens but also the harm to the defendant state's citizens. The harm to the defendant state's citizens will weigh against applying the *nullum tempus* principle. The crucial question is whether that harm outweighs the benefit of *nullum tempus* to the plaintiff state's citizens. Which is greater: the public harm or the public benefit?

Cases applying *nullum tempus* in the second fact pattern are of little relevance to this question because no harmful public consequences occur when the defendant is a private party from the plaintiff state. It is one thing to conclude, as many courts have done implicitly in the second fact pattern, that the public consequences of *nullum tempus* outweigh the public policies behind laches and limitations when the public consequences of *nullum tempus* are solely beneficial. It is quite a different matter when the public consequences include harm as well as benefit.

When the double-edged public consequences in the third fact pattern are considered, the public harm to the defendant's citizens will counterbalance either partially or fully the public benefit to the plaintiff's citizens. Even if the counterbalancing is only partial, the *net* public benefit of *nullum tempus* (that is, the benefit to citizens of the plaintiff state minus the harm to citizens of the defendant state) might well fail to outweigh the public interests served by laches and limitations. More likely, however, the public harm to the defendant's citizens will fully counterbalance the public benefit to the plaintiff's citizens. A judgment awarding retrospective relief, in money or in water, for breach of a water compact generally will deprive the defendant state's citizens of as much in dollars or water as the plaintiff state's citizens would gain in dollars or water. Then the public harm and public benefit will be equal, and the harm will fully counterbalance the gain. A net public benefit of zero from applying *nullum tempus* could hardly outweigh the meritorious public policies behind laches and limitations periods.[149]

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149. A possible complexity might be noted. The forum for a compact enforcement suit between states is the Supreme Court. *See supra* note 29 and accompanying text. Therefore, the relevant domestic community for calculating the public harm and benefit arguably should not be just a single state's citizens, as in *Guaranty Trust*, but the national, or at least regional, community of citizens. Moreover, the harm-benefit calculation for applying *nullum tempus* arguably should look beyond the case before the Court and should account for the possibility that although the defendant state's citizens will not benefit from *nullum tempus* in that particular case, they might benefit in the future if their state were to bring a stale suit against some other state. If these arguments are accepted, the public benefit from

B. The Constitutional Plan for States as Members of the Union

The discussion below argues that the constitutional plan for states entails abrogation of sovereign immunity from time bars in suits between states. The argument relies on elements of two constitutional provisions governing the relationship of states to each other: first, the surrender of a state's immunity from suit by another state that is implicit in Article III, Section 2, and, second, the concept of a Union of states in Article IV, Section 3.

To focus the discussion, it may be useful to distinguish a superficially similar topic discussed earlier, namely, whether a state's abrogation of its sovereign immunity from suit entails ending its sovereign immunity from laches and limitations statutes.[150] There, the question was whether a state that surrenders its immunity from becoming a defendant can still assert immunity from time bars when it is a plaintiff. That situation concerned one state and two lawsuits in which the state has different postures—defendant in one, plaintiff in the other. In contrast, the topic discussed below is whether a state suing another state retains its immunity from time bars when the defendant state has surrendered its immunity from suit. This situation involves two states and one lawsuit. At issue is the relationship between different states in a single suit. More specifically, at issue is the constitutional plan regarding their relationship in the suit.

Article III, Section 2 of the Constitution extends the judicial power of the United States to certain suits against states.[151] It says nothing about whether states retain a sovereign's traditional immunity

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applying *nullum tempus* would include not only the benefit to the plaintiff state's citizens in the particular case but also the potential benefit to the defendant state's citizens in future litigation. But the public harm from *nullum tempus* would also have to include deferred harm to the citizen of other states associated with future litigation. As with the narrower approach to public harm and benefit discussed in the text, the broader calculation of public harm often will fully counterbalance the broader calculation of public benefit. Thus, the complexity of broadening the harm-benefit calculation should not change the outcome suggested in the text.

150. *See supra* notes 118-128 and accompanying text.

151. U.S. CONST. art. III, § 2, cl. 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

from suit without consent. The omission does not mean the states broadly lost immunity from suit in the federal courts upon entering the Union. According to the Supreme Court, state immunity from suit does not depend on the "mere literal...words of [section] 2 of article 3"[152] because "[b]ehind the words of the constitutional provisions are postulates which limit and control."[153] One tacit postulate is "that States of the Union, still possessing attributes of sovereignty, shall be immune from suits without their consent, save where there has been a surrender of this immunity in the plan of the [constitutional] convention."[154] Thus, state immunity from suit remains except so far as it is surrendered in the constitutional plan.

The constitutional plan, in Article III, Section 2, gives the Supreme Court jurisdiction over "Controversies between two or more States."[155] The Court has noted that in such cases, one of the states necessarily must be the defendant.[156] Consequently, the Court has concluded that when the original states ratified the Constitution, they surrendered their immunity from suit by another state.[157] Similarly, the Court has said that newer states consented to give up this immunity when they entered the Union.[158]

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152. Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

153. *Id. Cf.* Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting):

> [W]hen the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, for without them the Constitution is denied force and often meaning.

154. *Monaco*, 292 U.S. at 322-23 (quotation marks and citation omitted); *accord* Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) ("the States entered the federal system with their sovereignty intact [and] the judicial authority in Article III is limited by this sovereignty").

155. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend...to Controversies between two or more States."). *See also id.* at cl. 2 ("In all Cases...in which a State shall be party, the Supreme Court shall have original Jurisdiction.")

156. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 450-51 (1793) (opinion of Blair, J.), *id.* at 466-67 (opinion of Cushing, J.), *id.* at 473 (opinion of Jay, C.J.).

157. *Monaco*, 292 U.S. at 328; Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 720 (1838); *see also Blatchford v. Village of Noatak*, 501 U.S. at 782 (acknowledging the waiver); *cf.* Cohens v. Virginia, 19 U.S. 264, 380-84 (1821) (waiver of state sovereign immunity is contained in art. III provisions extending judicial power to all cases arising under the Constitution or laws of the United States and giving the Supreme Court original jurisdiction if a state is a party).

158. Virginia v. West Virginia, 206 U.S. 290, 319 (1907).

The constitutional plan, in Article IV, Section 3, makes the states members of "this Union."[159] The Court has interpreted this phrase to mean "a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution."[160] Moreover, the Court has specifically recognized that the postulate of equal sovereign power, dignity, and authority extends to the relationship of states when they are opposing litigants. They "come to the Court on an equal footing."[161]

The equal footing of states in litigation means that neither state's law applies to the other state.[162] Instead, the Court creates and applies federal interstate common law.[163] This body of law seeks to resolve litigation between states "in such a way as will recognize the equal rights of both and at the same time establish justice between them."[164] Perhaps the most well-developed part of federal interstate common law concerns the rights of states on an interstate river to use its waters when they have not negotiated a compact. The Court applies a doctrine of equitable apportionment of benefits,[165] under which "[n]either [state] is entitled to any special priority over the other with respect to the use of water."[166]

A logical extension of the equal power, dignity, and authority of states in litigation would be that the defendant state's surrender of its immunity from suit implies reciprocal surrender by the plaintiff state of its immunity from laches and limitations statutes. Under Article III, Section 2, the defendant impliedly consented to the suit and cannot raise the defense of sovereign immunity. The defendant comes before the Court as a sovereign stripped of power and authority to protect its citizens from depletion of the public fisc to satisfy liability arising from the neglect (or good faith mistake) of their public officials. If the plaintiff were allowed to come before the Court retaining power and authority to

159. U.S. CONST. art. IV, § 3, cl. 1: "New States may be admitted by the Congress into this Union...."

160. Coyle v. Smith, 221 U.S 559, 567 (1911). *See also* California *ex rel.* State Lands Comm'n v. United States, 457 U.S. 273, 281 n.9 (1982) ("all States...possess the same rights and sovereignty").

161. Colorado v. New Mexico, 467 U.S. 310, 327 (1984) (quoting Colorado v. New Mexico, 459 U.S. 176, 191 (1982)) (Burger, C.J., concurring).

162. Kansas v. Colorado, 206 U.S. 46, 97 (1907).

163. *Id.* at 97-98.

164. *Id.* at 98; *accord* Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1024 n.8 (1983) (quoting *Kansas v. Colorado*, 206 U.S. 46).

165. Kansas v. Colorado, 206 U.S. at 118 ("the equitable apportionment of benefits between the two states resulting from the flow of the river").

166. Colorado v. New Mexico, 459 U.S. 176, 191 (1982) (Burger, C.J., concurring). In a later phase of the case, the Court applied Chief Justice Burger's statement to the facts of the case: "Colorado is not entitled to any priority simply because the river originates in Colorado, and New Mexico is not entitled to an undiminished flow simply because of its first use." *Colorado v. New Mexico*, 467 U.S. at 327.

protect its citizens from the neglect of their public officials to assert the claim reasonably promptly, the two states would hardly be on an equal footing regarding protection of their citizens from the neglect of their public officials. The asymmetry of the state's positions would be at odds with equal power and authority of states to exert their sovereignty for the benefit of their citizens. Neither state should be entitled to any special status not enjoyed by the other regarding protection of its citizens from the neglect of their public officials. Since surrender of the defendant state's immunity from suit is a given under Article III, Section 2, equality between states under Article IV, Section 3, should entail that the plaintiff state surrenders its immunity from time bars.

IV. A BORROWED LIMITATIONS PERIOD

The preceding section argued that *nullum tempus* has no place in water compact enforcement suits because the public-benefit rationale for it breaks down and because applying it would conflict with the equal power and authority of litigating states as members of the Union. Without *nullum tempus* operating, laches would be available in water compact enforcement suits as readily as in suits by nonsovereign plaintiffs. Whether a statute of limitations would also be available is more complicated. The discussion below explains the complications and seeks to resolve them.

A. Borrowing a Statute of Limitations

Congress has not enacted a statute of limitations that by its terms includes breach of compact actions. It has enacted a residual four-year statute of limitations for any civil action that arises under an act of Congress passed after December 1, 1990.[167] The date excludes all but the two most recent water allocation compacts.[168] Those two are excluded as well unless "act of Congress" is read broadly,[169] for Congress consented to them by joint resolution rather than by formal act of Congress.[170] Thus,

167. Title III, § 313(a) of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, codified as amended at 28 U.S.C. § 1658(a) (2000), and further amended by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

168. *See Water Compacts, supra* note 1, at § 46.01 (table showing dates of congressional consent to the water allocation compacts).

169. *Cf.* Browsher v. Synar, 478 U.S. 714, 768 n.7 (1986) (White, J., dissenting) ("a joint resolution passed by both Houses of Congress and signed by the President (or repassed over the President's veto) is legislation having the same force as any other Act of Congress").

170. *See* Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997); Alabama-Coosa-Tallapoosa River Basin Compact, Pub. L. No. 105-105, 111 Stat. 2233 (1997). Neither of these compacts is yet operative. *See Water Compacts, supra*

for all of the water allocation compacts, or at least all but two of them, neither a specific nor residual statute of limitations would apply of its own force to a suit for long-continued breach.

This does not mean, however, that no statute of limitations can apply. When Congress has not provided a statute of limitations for a federal cause of action, the Supreme Court and lower federal courts regularly borrow an analogous one if Congress would likely have intended them to do so.[171] This borrowing practice has two requisites: the cause of action must be federal and it must be likely Congress would have intended borrowing. The discussion below argues that suits for breach of an interstate water allocation compact meet both requirements.

1. Breach of Compact as a Federal Cause of Action

The borrowing practice applies whether the federal cause of action derives from federal statute [172] or federal common law.[173] A suit for breach of a water allocation compact should fit within one of these two categories, even if the exact one might be debatable.

Arguably, the suit would be based on a federal statute or the equivalent thereof. The Compact Clause of the Constitution[174] requires the consent of Congress for states to form water allocation compacts.[175] Congressional consent, says the Court, "transforms an interstate compact...into a law of the United States."[176] The Court has specifically

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note 1, § 46.03 (Supp. 2002). Congress usually gives its consent to water allocation compacts by formal act. *See, e.g.*, Canadian River Compact, ch. 135, 64 Stat. 93 (1952); Kansas-Nebraska Big Blue River Compact, Pub. L. No. 92-308, 86 Stat. 193 (1972); Snake River Compact, ch. 73, 64 Stat. 29 (1950).

171. *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 355 (1991) (plurality opinion) and cases cited therein.

172. *Id.* (private cause of action implied under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2000)); Reed v. Transp. Union, 488 U.S. 319 (1989) (express cause of action under §§ 101(a)(2) and 102 of Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411(a)(2), 412 (2000)); Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143 (1987) (express cause of action under § 901(a) of Title IX of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962, 1964(c) (2000)).

173. County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State, 470 U.S. 226 (1985) (federal common law cause of action to recover damages from wrongful possession of tribal land).

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

175. Contrary to the literal language of this clause, not all agreements between states require congressional consent. Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175-76 (1985). Interstate water allocation compacts do require consent, though. *See* Texas v. New Mexico, 462 U.S. 554, 559 (1983); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 105 (1938).

176. New Jersey v. New York, 523 U.S. 767, 811 (1898); Reed v. Farley, 512 U.S. 339, 347 (1994); Cuyler v. Adams, 449 U.S. 433, 438 (1981).

recognized that congressional consent transforms a water allocation compact into a law of the United States.[177] To the extent that transformation occurs, a compact enforcement suit is based on a congressionally created law of the United States.

Alternatively, the suit might be regarded as based on federal common law. The Court has said that although a compact "approved by Congress becomes a law of the United States,...a Compact is after all, a contract."[178] Thus, in *Texas v. New Mexico,* the Court treated the Pecos River Compact as a contract in deciding the remedial issue of whether retrospective relief was available for breach. Analogously, the Court might treat a compact as a contract in deciding the remedial issue of whether retrospective relief is available for the whole period of long-continued breach or is limited by a borrowed statute of limitations. If the Court opts for contract treatment regarding this remedial issue, the common law governing it would have to be federal rather than state because the equal footing of states in litigation prevents either state from applying its common law to the other state.[179] That is why the Court relied on federal common law in *Kansas v. Colorado*[180] to decide the remedial issue of Kansas's right to prejudgment interest for Colorado's breach of the Arkansas River Compact.[181]

2. *Likely Congressional Intent*

Congressional intent has always been the basis for federal court borrowing practice, but the source and nature of the intent have evolved. Originally, the federal courts interpreted the Rules of Decision Act of 1789 to require borrowing of a statute of limitations from state law when Congress had not provided a statute of limitations for a federal cause of action.[182] After decades of borrowing on this basis, the Court came to doubt that interpretation of the Rules of Decision Act.[183] But the Court did not end borrowing. Instead, it characterized borrowing as merely the

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177. *Texas v. New Mexico,* 462 U.S. at 564 (quoting *Cuyler,* 449 U.S. at 438).

178. Texas v. New Mexico, 482 U.S. 124, 128 (1987).

179. *See supra* notes 162-166 and accompanying text.

180. 533 U.S. 1 (2001).

181. *See id.* at 13-14 (relying principally on *Board of Comm'rs of Jackson County v. United States,* 308 U.S. 343 (1939), and *Miller v. Robertson,* 266 U.S. 243 (1924), the former of which was quite explicit that federal common law governed). For a more detailed discussion of the Court's use of federal common law, see Grant, *Interstate Water Allocation Compacts, supra* note 13, at 164-66.

182. DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 160 n.13 (1983). Section 34 of the Rules of Decision Act, ch. 646, 62 Stat. 944 (1948), codified, as amended, at 28 U.S.C. § 1652 (2000), requires federal courts to apply "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide."

183. *DelCostello,* 462 U.S. at 160 n.13.

"interstitial fashioning of remedial details," and it reasoned that "[g]iven our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law."[184]

The Court's most illuminating discussion of this general assumption about congressional silence came in *DelCostello v. International Brotherhood of Teamsters.*[185] There, the Court noted that when Congress has not enacted a statute of limitations for a federal cause of action, there usually is no legislative history showing Congress even considered the limitations issue.[186] The Court then said,

> In such cases, the general preference for borrowing state limitations periods could more aptly be called a sort of fallback rule of thumb than a matter of ascertaining legislative intent; it rests on the assumption that, absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions.[187]

This statement dispels any pretense of requiring evidence in legislative history about what Congress intended regarding a limitations period for the cause of action. The lack of such evidence is no problem because a fallback rule of thumb fills the void: Congress would likely intend by its silence that the courts borrow a state limitations period unless it would have a sound reason to prefer otherwise.

DelCostello also illustrates operation of the "sound reason" exception to the general practice of borrowing a state statute of limitations. The Court borrowed a federal rather than state statute of limitations in *DelCostello* because it "better reflected the balance that Congress would have preferred between the substantive policies under the federal claim and the policies of repose."[188] In other words, a sound reason existed to borrow the federal limitations period, so Congress likely would have preferred that.

While the "sound reason" exception to state-law borrowing led the Court to borrow a federal limitations period in *DelCostello,* the exception has also led the Court to decline to borrow any statute of limitations, state or federal, on "rare occasions."[189] These occasions

184. Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 147 (1987).
185. 462 U.S. at 169.
186. *Id.* at 160 n.12.
187. *Id.*
188. Wilson v. Garcia, 471 U.S. 261, 270 (1985) (describing *DelCostello*).
189. Lampf Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 356 n.3 (1991).

apparently total two. On both occasions, evidence existed showing that Congress likely intended no statute of limitations should be borrowed.

The first occasion was *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission.*[190] The suit arose under an amendment to the Civil Rights Act of 1964, which authorized the Equal Employment Opportunity Commission (EEOC) to sue employers in federal court for sexually discriminatory practices against their employees. The amendment provided no limitations period for such suits. An employer argued for borrowing a state limitations period. In rejecting this argument, the Court noted that during congressional debates on the amendment, "many Members of both Houses demonstrated an acute awareness of the enormous backlog of cases before the EEOC."[191] And yet, in passing the amendment, "Congress substantially increased the workload of the EEOC" in various ways, including the authority to bring civil actions in federal court.[192] The Court decided it would not "be reasonable to suppose that a Congress aware of the severe time problems already facing the EEOC would grant that agency substantial additional enforcement responsibilities and at the same time consign its federal lawsuits to the vagaries of diverse state limitations statutes, some as short as one year."[193]

Occidental Life predated *DelCostello*, where the Court for the first time borrowed a federal statute of limitations,[194] so there might be some question about how that new borrowing possibility would affect *Occidental Life*. In any event, the evidence in *Occidental Life* from which the Court inferred Congress would likely oppose borrowing a state limitations statute has no counterpart regarding water allocation compacts.[195] Unlike the *Occidental Life* situation, states were attracted to allocation by compact because they thought compacting would decrease, not increase, the likelihood of litigation over their shares of interstate streams.[196]

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190. 432 U.S. 355, 375-76 (1977) (Rehnquist, J., dissenting) (emphasizing that this was the first case in which a federal cause of action not expressly subject to a federal limitations period was held not to be subject to any limitations period at all).

191. *Id.* at 369.

192. *Id.* at 370.

193. *Id.* at 370-71.

194. Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 158 (1987) (Scalia, J., concurring) (stating, "Until *DelCostello*, we never responded to legislative silence by applying a limitations period drawn from a different federal statute").

195. A study of congressional debates preceding consent to the various water compacts surely would fail to turn up a single instance in which members of Congress expressed concern about an enormous backlog of work in the signatory states' water agencies that would be worsened by compact enforcement, and yet Congress approved the compact.

196. *See supra* notes 4-6 and accompanying text.

The second rare occasion was *County of Oneida v. Oneida Indian Nation,*[197] a federal common law action brought by three Indian tribes in New York seeking damages for unlawful possession of their lands during the preceding two years. The plaintiffs' ancestors conveyed the land 175 years earlier, but the plaintiffs alleged the conveyance was invalid for failure to comply with an Indian Nonintercourse Act.[198] No federal statute of limitations governed such suits.[199] The Court decided that borrowing a New York limitations period would violate congressional Indian policy as manifested by numerous statutes and their legislative history.[200]

Interstate water allocation compacts present an entirely different situation than *Oneida*. No federal trust responsibilities to the states are involved. Nor is there any mosaic of statutes and legislative history evidencing a general congressional policy against borrowing a limitations period for interstate water compact suits. There is just congressional silence.

Of course, one can speculate about the silence. But rather than do that, it is more important to note the inutility of speculation. The Court did not rely on mere speculation in *Occidental Life* and *Oneida* when it rejected the general preference for borrowing state limitations periods and concluded that Congress would likely intend no statute of limitations should apply. In *Occidental Life*, legislative debates evidenced congressional concern about the backlog of cases before the EEOC that indicated Congress would not have wanted the Court to borrow a state limitations period. In *Oneida*, evidence of general Indian policy existed indicating Congress likely did not want the Court to borrow any limitations period.

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197. 470 U.S. 226 (1985).

198. *Id.* at 229.

199. *Id.* at 240.

200. *Id.* at 241. Specifically, the Court noted that when Congress gave New York state courts jurisdiction over civil actions involving Indian lands, it provided that the New York statute of limitations would not apply to Indian land claims predating 1952. *Id.* Later, in 1966, Congress enacted a special limitations period for suits by the United States on behalf of Indians but expressly excluded actions regarding title to or possession of property. *Id.* at 241-42. Still later, Congress extended the limitations period several times for pre-1966 claims. *Id.* at 242. The Court concluded that the legislative history of the 1966 act and its amendments revealed that Congress always regarded the statutory time bar as limited to suits by the United States and inapplicable to suits by tribes or individual Indians. *Id.* Finally, in 1982, Congress amended the statute of limitations to cover certain contract and tort claims by tribes and individual Indians but included various protective measures. *Id.* at 242-43. Overall, said the Court, the limitations history was "replete with evidence of Congress' concern that the United States had failed to live up to its responsibilities as trustee for the Indians." *Id.* at 244. Therefore, the Court inferred that borrowing of a state statute of limitations likely would violate Congress's intent.

The *DelCostello* analytical framework, as illuminated by *Occidental Life* and *Oneida*, has three elements:

> 1. The Court assumes congressional awareness of the longstanding federal court practice of borrowing a state statute of limitations when Congress has not provided one for a federal cause of action.
>
> 2. When Congress is silent about a limitations period for a particular federal cause of action, the Court infers from the silence that Congress accepts federal court borrowing practice for that cause of action.
>
> 3. But the Court will not infer congressional acceptance of the borrowing practice for a particular cause of action if affirmative evidence exists of some sound reason for Congress to intend otherwise.

The inference of congressional acceptance in element 2 does not require specific supporting evidence in legislative history. Instead, it arises from the combination of congressional awareness of borrowing practice and congressional silence about a limitations period for the cause of action in question. These combined factors provide sufficient support for the inference to be drawn unless there is evidence of some sound reason for Congress to intend otherwise. But the inference is sufficiently well grounded that evidence, not merely speculation, is required to negate it. For this reason, more than mere speculation should be required in water compact enforcement suits for the Court to conclude that Congress would likely intend no limitations period should be borrowed.

At least that is true if compact suits between states fit within the *DelCostello* framework. A critic can point out that it is not immediately apparent they do. According to *DelCostello*, the Court infers from congressional silence about a particular cause of action that "Congress would likely intend that the courts follow their *previous practice* of borrowing state provisions."[201] The cases that created congressional awareness of federal court borrowing practice include no suits between states. Because no established borrowing practice exists for suits between states, the critic could object that congressional silence about a limitations period does not imply Congress would likely want the Court to borrow a statute of limitations in compact enforcement suits.

This is a serious objection, but it is not necessarily insurmountable. Although *DelCostello* did link borrowing to congressional

201. DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 160 n.12 (1983) (emphasis added).

awareness of longstanding judicial borrowing practice, there is more to *DelCostello* than that. The fallback borrowing rule "assum[es] that, *absent some sound reason to do otherwise,* Congress would likely intend that courts follow their previous practice of borrowing state provisions."[202] The "sound reason" exception overcomes the general assumption (or inference) about what Congress would likely intend. Thus, sound reason is the ultimate guide to what Congress would likely intend.

Arguably, sound reason supports borrowing the most analogous limitations period in water compact enforcement cases despite the lack of a longstanding judicial practice of doing so. The argument is built on the Court's view, which goes back nearly two centuries to *Adams v. Woods,*[203] that "[a] federal cause of action brought at any distance of time would be utterly repugnant to the genius of our laws."[204] The Court has repeated this axiom over the years,[205] sometimes elaborating as follows: "Just determinations of fact cannot be made when, because of the passage of time, the memories of witness have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten."[206]

The "utter repugnance" case of greatest present interest is *Campbell v. City of Haverhill,*[207] where the Court held that Congress intended judicial borrowing of a state limitations statute in an infringement case under federal patent law. One reason the Court gave for the result was that unless a state limitations period were borrowed,

> we have the anomaly of a distinct class of actions subject to no limitation whatever,—a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions....This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams v. Woods*...of a similar statute: "This would be utterly repugnant to the genius of our laws...."[208]

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202. *Id.*
203. 6 U.S. (2 Cranch) 336, 342 (1805).
204. Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 156 (1987) (quoting from but slightly reordering the *Adams* statement to read as it does in the text); Wilson v. Garcia, 471 U.S. 261, 271 (1985) (doing the same with *Adams* as *Agency Holding Corp.*).
205. *See, e.g.,* Gompers v. United States, 233 U.S. 604, 612-13 (1914); Campbell v. City of Haverhill, 155 U.S. 610, 616-17 (1895).
206. *Wilson,* 471 U.S. at 271.
207. 155 U.S. 610 (1895).
208. *Id.* at 616-17.

The Court treated the "utter repugnance" axiom as shaping what Congress contemplated.

Campbell supplements the *DelCostello* framework for borrowing. In *Campbell,* the Court assumed that Congress was aware of the "utter repugnance" axiom. In effect, the Court inferred that Congress, being guided by sound reason, accepted the axiom by silence and would likely intend the federal courts to borrow a statute of limitations. *Campbell* shows that congressional awareness and acceptance of longstanding judicial borrowing practice is not the only basis for concluding Congress would likely intend by its silence for the Court to borrow a statute of limitations. Another basis is congressional awareness and acceptance of the venerable judicial "utter repugnance" axiom.

Under the *DelCostello* framework, as supplemented by *Campbell,* Congress is guided ultimately by sound reason, is aware of the "utter repugnance" axiom, and likely accepts it when silent about a limitations period for a federal cause of action. If sound reason indicates *nullum tempus* is ill fitted for suits between states (as argued in section III), the Court should infer that had Congress considered the limitations issue, it would likely have intended the Court to borrow the most analogous statute of limitations in water allocation compact enforcement suits.

B. The Most Analogous Statute of Limitations to Borrow

Although the Court borrowed a federal statute of limitations in *DelCostello,* it stressed that "resort to state law remains the norm for borrowing."[209] The Court later called state limitations law the lender of first resort and federal limitations law the secondary lender.[210] Therefore, in deciding which statute to borrow, the Court first identifies the "most closely analogous" state statute of limitations.[211] Then it inquires whether borrowing this statute "would frustrate or interfere with the implementation of national policies or be at odds with the purpose or operation of federal substantive law."[212] If so, the Court seeks a federal statute of limitations that better reflects what Congress would likely have preferred.[213] Consistent with this approach, the following discussion of borrowing in water compact enforcement suits begins by considering state limitations statutes.

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209. DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 171 (1983).

210. N. Star Steel Co. v. Thomas, 515 U.S. 29, 33-34 (1995).

211. *Id.* at 34 (quoting Reed v. Transp. Union, 488 U.S. 319, 323 (1989), in turn quoting DelCostello, 426 U.S. at 158).

212. *N. Star Steel,* 515 U.S. at 34 (internal quotation marks and citations omitted).

213. *See id.;* Wilson v. Garcia, 471 U.S. 261, 270 (1985).

1. State Limitations Law

Finding the most closely analogous state statute of limitations for a federal cause of action requires characterizing the cause of action.[214] The proper characterization of a suit for breach of a water allocation compact should be straightforward. As noted earlier, the Court has said that although congressional consent to a compact transforms it into a law of the United States, "a compact is, after all, a contract."[215] Thus, the most closely analogous statute of limitations in state law should be the one for written contracts.

A complication arises, however, because each state in a compact enforcement suit will have its own statute of limitations for written contracts. If their statutes specify the same period for bringing suit, would Congress likely intend the Court to borrow both of them (or, what amounts to the same thing, either of them)? If their statutes specify different periods, would Congress likely intend the Court to borrow the longer one? The shorter one? The defendant state's? The plaintiff state's? Or none of the above because a federal statute of limitations provides a better fit?

DelCostello suggests an approach to answering these questions. There, the Court assumed that absent sound reason to do otherwise, Congress would likely intend it to follow its previous borrowing practice.[216] By analogy, the Court might assume that absent sound reason to do otherwise, Congress would likely intend it to follow the same general precepts it has used in other cases between states so far as they bear on issues in compact enforcement suits. Congress presumably is aware of these other cases and their precepts, just as it is presumed to be aware of the cases that established the borrowing practice. The Court could infer that when Congress consents to a water allocation compact without considering a limitations period, Congress would likely intend by its silence for the Court to follow those general precepts in its interstitial fashioning of remedial details for breach of compact.

The important cases between states under this approach to inferring likely congressional intent are those dealing with the equitable apportionment of interstate rivers. In the first case,[217] decided in 1907, the Court ruled that federal interstate common law necessarily governs because "[o]ne cardinal rule underlying all the relations of the States to

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214. *See Wilson*, 471 U.S. at 268. Generally, characterization of a federal cause of action is itself a matter of federal law. *See* Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 147 (1987); Wilson, 471 U.S. at 270-71.

215. Texas v. New Mexico, 482 U.S. 124, 128 (1987) (quoting Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)).

216. *See supra* note 187 and accompanying text.

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

each other, is that of equality of right....[and thus a State] can impose its own legislation on no one of the others, and is bound to yield its own view to none."[218] In the second case,[219] decided in 1922, the two litigating states both used the appropriation doctrine for purposes of internal water allocation. Applying federal interstate common law, the Court made an apportionment based on the priority-in-time rule of the appropriation doctrine. It reasoned that "[b]oth States pronounce the rule just and reasonable as applied to the natural conditions in that region [so] its application to such a controversy as is here presented cannot be other than eminently just and equitable."[220]

In the next apportionment case, decided in 1931, the two litigating states both applied the riparian doctrine internally.[221] One might have expected the Court to base its interstate apportionment on riparian principles, but it did not do so. It said that internal state law should "be taken into account" but does not "have controlling weight."[222] The same year, in another case between riparian states, the Court again declined to use riparian principles to apportion an interstate river because "the effort always is to secure an equitable apportionment without quibbling over formulas."[223]

Since then, the Court has continued to adhere to the view that it will not simply adopt, as federal interstate common law, the water law principles that competing states use for internal allocation even when the states follow identical principles.[224] Instead, the Court seeks to make a "delicate adjustment of interests"[225] between the states that considers numerous factors.[226]

Based on these apportionment cases, and presumed congressional awareness of them, the consent of Congress to water compacts formed between 1922 and 1931 might be interpreted as indicating Congress would likely intend for the Court to borrow state limitations periods when the litigating states have identical periods for written contracts. But most water allocation compacts postdate 1931.[227] With these compacts, and with compacts of any vintage between states not having identical statutes of limitations, it is doubtful that Congress

218. *Id.* at 97.

219. Wyoming v. Colorado, 259 U.S. 419 (1922).

220. *Id.* at 470.

221. Connecticut v. Massachusetts, 282 U.S. 660 (1931).

222. *Id.* at 670.

223. New Jersey v. New York, 283 U.S. 336, 343 (1931).

224. *See* Colorado v. New Mexico, 459 U.S. 176 (1982) (two appropriation doctrine states); Nebraska v. Wyoming, 325 U.S. 589 (1945) (three appropriation doctrine states).

225. *Nebraska*, 325 U.S. at 618.

226. For discussion of the various factors the Court has considered, see generally *Apportionment Suits, supra* note 3, at § 45.06.

227. *See Water Compacts, supra* note 1, § 46.01, Table of Water Apportionment Compacts.

would likely intend the Court to borrow either state's statute of limitations.

2. Federal Limitations Law

Two federal statutes of limitations are candidates for borrowing. The first one, section 2415(a) of title 28, is a six-year statute of limitations for "every action for money damages brought by the United States...which is founded upon any contract."[228] This statute is a good fit so far as compacts are contracts between states.[229] The statute's reference to "money damages" is problematic, however, because a state suing for breach of a water allocation compact might seek either money damages or payment in water. In *Texas v. New Mexico*, the Court characterized payment in water as having "all the earmarks of specific performance, an equitable remedy."[230]

The issue of whether the statutory phrase "money damages" should be read broadly to include an action brought by the United States for the equitable remedy of specific performance has been raised but not decided.[231] Even if the phrase were not read to include specific performance when the United States is the plaintiff and the issue is whether section 2415(a) applies of its own force, a literal approach to statutory interpretation seems out of place when a state is the plaintiff and the issue is whether to borrow the statute as the most apt analogy. The borrowing context is an especially strong one for allowing the policy concerns behind statutory language to influence its interpretation.[232]

The Senate Report on section 2415 reveals the policy concerns behind the "money damages" language:

> Suits for injunction and other extraordinary relief are not covered by this bill....[A]n injunction is sought when prompt action is essential to prevent irreparable harm, or is

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228. 28 U.S.C. § 2415(a) (2000).

229. *See supra* notes 178–215 and accompanying text. *Cf.* Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92 (1823) (a Contract Clause case in which the court said, "If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that [a compact between states] is a contract. In fact, the terms compact and contract are synonymous...").

230. 482 U.S. 124, 131 (1987).

231. *See* United States v. Ehrlich, 643 F.2d 634, 637 n.1 (1981) (finding it unnecessary to reach that question).

232. *Cf.* Abner J. Mikva & James E. Pfander, *On the Meaning of Congressional Silence: Using Federal Common Law to Fill the Gap in Congress's Residual Statute of Limitations*, 107 YALE L.J. 393, 418 (1997) (arguing that the federal court borrowing of a limitations period when Congress has not provided one for a federal cause of action is an "area of more or less candid judicial lawmaking" in which "congressional texts play a less significant interpretive role").

> required to forestall a significant change in position. The Government must decide to seek an injunction at once or not at all. It also must be recognized that the Government brings the injunction in order to protect and defend Government activities and programs. It simply is not sensible to diminish the power to the Government to utilize an injunction to accomplish these ends.[233]

This paragraph focuses on prospective relief—"prevent," "forestall," and "protect and defend." Ordinarily, injunctions are preventive or protective and do not redress past wrongs.[234] The paragraph suggests that the "money damages" limitation in section 2415(a) reflects a distinction between retrospective relief (money damages) and prospective relief (injunctions). The last sentence of the paragraph adds a concern about ensuring that the government will be able to obtain injunctions protecting its activities and programs even if it delays longer than six years to seek them.

In a suit for breach of a water allocation compact, money damages and payment in water are both forms of retrospective compensatory relief. Borrowing section 2415(a) to limit both forms of retrospective compensatory relief would not run afoul of the retrospective/prospective dichotomy in the Senate Report. Borrowing would not bar the plaintiff state from prospective injunctive relief despite the defendant state's long-continued breach. Section 2415(c) states that "[n]othing herein shall be deemed to limit the time for bringing an action to establish the title to, or right to possession of, real or personal property."[235] This suggests that section 2415(a) should not operate, when borrowed in a water compact case, to enable the defendant state to acquire prescriptive title, by adverse use, to more water than the compact specifies.[236] If the defendant state cannot enlarge its allocation by adverse use, then an injunction ordering future

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233. S. REP. NO. 89-1328 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2509.

234. 42 AM. JUR. 2d *Injunctions* § 2 (2000): "Injunctive relief is designed to meet a real threat of a future wrong or a contemporary wrong of a nature likely to continue or recur. Whether interlocutory or final, injunctive relief is ordinarily preventive or protective in character and restrains actions that have not yet been taken. It is generally not intended to redress, or punish for, past wrongs."

235. 28 U.S.C. § 2415(c) (2000).

236. Section 2415(c) also should preclude borrowing the six-year limitations period in a suit for breach of a boundary compact where the plaintiff state alleges the defendant state is exercising sovereignty (analogous to title or possession in the statute) beyond the compact line. Thus, borrowing the six-year statute of limitations in a suit for breach of a water allocation compact would not conflict with the Court's view that boundary compact suits are to be decided by applying the doctrine of acquiescence rather than a statute of limitations. *See* Illinois v. Kentucky, 500 U.S. 380, 388 (1991).

compliance with the compact would be available despite the plaintiff state's delay in suing.

The other federal candidate for borrowing is the residual four-year statute of limitations noted earlier.[237] Codified as section 1658(a) of title 28, it applies to "any civil action" not having a specific limitations statute if the action "aris[es] under an act of Congress enacted after the date of the enactment of this section [December 1, 1990]." The statute applies by its terms to civil actions arising under acts of Congress enacted after December 1, 1990.

But can section 1658(a) be borrowed for federal causes of action not within its terms?[238] Apparently, no federal court has yet addressed that question. Section 1658(a) should be a viable candidate for borrowing unless the December 1, 1990 date implies that Congress would not want it borrowed for causes of action arising under earlier acts of Congress or under federal common law. Recently, Abner J. Mikva and James E. Pfander advanced an interest group analysis to argue that no such implication exists.[239] They say that if a cut-off date had not been included in the legislative bill that became section 1658(a), the bill probably would have been opposed by well-organized business groups and institutions who, as potential defendants, generally prefer the less clearly defined judicial borrowing process because it is more burdensome and discouraging to plaintiffs.[240] In their view, the December 1, 1990 date was included in the bill only to avoid opposition from these groups[241] and does not indicate Congress intended to make the residual four-year statute off limits to federal courts in their borrowing practice.[242]

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237. *Supra* note 167 and accompanying text.

238. For civil actions not within the terms of section 1658(a), the Supreme Court and the lower federal courts to date have continued to borrow the most analogous statute of limitations. *See* N. Star Steel Co. v. Thomas, 515 U.S. 29 (1995) (borrowing state statute of limitations for federal cause of action under Worker Adjustment and Retraining Notification Act); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) (borrowing federal statute of limitations for private federal cause of action under section 10(b) of Securities Exchange Act of 1934); *see also, e.g.*, Zubi v. AT&T Corp., 219 F.3d 220 (3d Cir. 2000) (borrowing state statute of limitations for federal cause of action under Civil Rights Act of 1870 as amended); Providence Sch. Dep't v. Ana C., 108 F.3d 1 (1st Cir. 1997) (borrowing state statute of limitations for federal cause of action under Individuals with Disabilities Education Act); Barajas v. Bermudez, 43 F.3d 1251 (9th Cir. 1994) (borrowing state statute of limitations for federal cause of action under Migrant and Seasonal Agricultural Worker Protection Act).

239. Mikva & Pfander, *supra* note 232, at 400-08.

240. *Id.* at 404.

241. *Id.* at 402-05.

242. *See id.* at 408. Mikva and Pfander go further and criticize current borrowing practice insofar as it makes state limitations law the fallback preference when Congress has not addressed the limitations issue. *Id.* at 409-14. They urge the Supreme Court to replace the current preference with a preference for borrowing a federal statute of limitations. *Id.* at

If sections 1658(a) and 2415(a) are both available for borrowing, section 2415(a) appears to be the stronger candidate for two reasons. First, it is designed for contract actions, and as the Court has said, a compact is, after all, a contract.[243] Second, the Court has been disinclined to infer that Congress would likely intend it to borrow residual statutes of limitations from state law,[244] and this disinclination might carry over to a residual federal statute of limitations.

Section 1658(a) cannot be ruled out as a possibility, however. In passing section 1658(a), Congress obviously concluded that four years was an appropriate catchall period for federal causes of action under post-December 1, 1990 acts of Congress. The considerations that led Congress to this conclusion arguably make it likely Congress would conclude four years is also an appropriate catchall period for federal courts to borrow for other federal causes of action that lack a specific statute of limitations.[245]

C. Borrowing to Limit Equitable Relief

The Supreme Court's view that borrowing is based on likely congressional intent has led it to impose a constraint on borrowing rooted in historic equity jurisprudence. Courts of equity traditionally have refused to apply any statute of limitations not applicable by its terms in equity if equitable jurisdiction is exclusive.[246] They have applied such a statute only if law and equity have concurrent jurisdiction[247] and have done so then because otherwise the statute's purpose could be evaded by the plaintiff's choice of forum.[248] Supreme Court borrowing practice for federal causes of action mirrors this approach.[249] Although the Court will borrow a statute of limitations not applicable by its terms in equity if law and equity have concurrent jurisdiction,[250] it will not

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396, 414-21. More particularly, they advocate using the residual four-year limit of section 1658(a) as the fallback preference. *Id.* at 396, 416.

243. *Supra* notes 178 and 215 and accompanying text.

244. Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 152-53 (1987); Wilson v. Garcia, 471 U.S. 261, 278 (1985).

245. It is true regarding civil actions arising under post-December 1, 1990 enactments, that Congress could have chosen when enacting the legislation to include a specific statute of limitations if it did not like the four-year period. But for civil actions arising under earlier enactments or federal common law, Congress could have enacted a specific statute of limitations any time it chose.

246. 1 H.G. WOOD, LIMITATIONS OF ACTIONS § 59 (4th DeWitt C. Moore ed. 1916).

247. *Id.* § 58.

248. *Id.* at 267.

249. *See* Cope v. Anderson, 331 U.S. 461 (1947) (action under federal banking legislation); Russell v. Todd, 309 U.S. 280 (1940) (action under Federal Farm Loan Act).

250. Cope v. Anderson, 331 U.S. at 463-64.

borrow if "the sole remedy is in equity."[251] The Court does not borrow when equity has exclusive jurisdiction, because Congress would "hardly expect [it] to break with historic principles of equity in the enforcement of federally-created equitable rights."[252]

This constraint on borrowing practice requires inquiry into whether a suit between states for breach of a water allocation compact would lie concurrently in law and equity or solely in equity. To focus the inquiry with an example that presents the strongest case for finding sole equitable jurisdiction, suppose a state suing for breach of a water compact requests retrospective relief in water, not money, and injunctive relief ordering future performance. The Court has said that retrospective relief might be in "water or money,"[253] and it has characterized payment in water as having "all the earmarks of specific performance, an equitable remedy."[254] Would the hypothetical suit for equitable relief be in the exclusive jurisdiction of equity, or would it be concurrent with law because the plaintiff could have elected to seek only money damages?

In *Cope v. Anderson*,[255] the Supreme Court ruled that jurisdiction was concurrent when the receiver of an insolvent national bank sued the bank's Ohio and Pennsylvania shareholders in equity to enforce assessment liability imposed by federal banking legislation.[256] The suits were in separate federal district courts, one in each state. No federal statute of limitations applied, so the issue arose of whether the federal courts should borrow the states' statutes of limitations. The Supreme Court ruled they should because equity jurisdiction was not exclusive but concurrent: "it is only the scope of the relief sought and the multitude of parties sued which gives equity concurrent jurisdiction to enforce the legal obligation here asserted."[257] The Seventh Circuit has summarized *Cope* and its lower federal court progeny in *Nemkov v. O'Hare Chicago Corp.*[258] as follows: "Equitable jurisdiction is concurrent even though plaintiff chooses to forego damages and seek only equitable relief"[259] and even though the remedy at law "would have been impractical as well as costly."[260] Under this approach, the plaintiff state in

251. Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946); *accord*, Russell v. Todd, 309 U.S. at 289-90.

252. Holmberg, 327 U.S. at 395.

253. Texas v. New Mexico, 482 U.S. 124, 130 (1987).

254. *Id.* at 131.

255. 331 U.S. 461 (1947).

256. *Id.* at 463.

257. *Id.* at 463-64.

258. 592 F.2d 351 (7th Cir. 1979).

259. *Id.* at 355. *See also* Winne v. Queens Land & Title Co., 149 N.Y.S. 664, 665 (N.Y. App. Div. 1914) (a suit in equity for specific performance of a contract to convey land is concurrent with a suit at law for damages and thus is barred by the statute of limitations).

260. *Nemkov*, 592 F.2d at 355.

the compact example could not avoid the borrowing of a statute of limitations by seeking only equitable relief because it could have sued instead for legal relief.

The plaintiff state might object that even if it could have sought retrospective relief in money damages, rather than water, it still needs equitable relief ordering future compliance to avoid irreparable harm—a remedy not available at law. *Nemkov* provides a short answer to the objection. The *Nemkov* plaintiffs opposed borrowing on the ground that they sought only equitable relief not obtainable at law. The court responded, "The inquiry is not whether a plaintiff could obtain the same relief at law; rather, it is whether the statute relied on [for the cause of action] requires the plaintiff to seek relief only in equity."[261] In a suit for breach of a water allocation compact, nothing would require the plaintiff to seek relief only in equity.

In addition to the short answer based on *Nemkov*, the defendant state could respond to the plaintiff state's objection as follows: Even if prospective relief lies solely within the injunctive power of equity, prospective and retrospective relief are separate matters. The defendant is not asserting the statute of limitations (plus the passage of time) to prescriptively modify its compact delivery obligation for the future.[262] Rather, it is asserting the statute of limitations only to limit the period of retrospective relief, and retrospective relief lies in the concurrent jurisdiction of law and equity because the plaintiff state had the option of seeking either damages or specific performance. Jurisdiction is concurrent in that situation—just as it is concurrent in private suits to enforce contracts to convey land because the plaintiffs could seek either damages or specific performance.[263]

A final potential issue about borrowing a statute of limitations in water compact litigation should be addressed. In *Ohio v. Kentucky*,[264] the Court said that its original jurisdiction cases "are basically equitable in nature."[265] Does this mean suits between states are so fundamentally equitable that, regardless of whether damages are or might be sought, they ought to come within the rule against borrowing when the sole remedy is in equity?

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261. *Id.* at 354.

262. *Cf. supra* the text accompanying notes 235-236.

263. *E.g.*, Spates v. Spates, 296 A.2d 581, 586 (Md. 1972); Winne, 149 N.Y.S. 664; Collard's Adm'r v. Tuttle, 4 Vt. 491, 492, 1832 WL 2056 (1832); Smith v. Carney, 11 Ky. (1 Litt.) 295, 1822 WL 1029; WOOD, *supra* note 246, § 58 at 271-72; *contra* Wright v. Leclaire, 3 Iowa 221, 1856 WL 187.

264. 410 U.S. 641 (1973).

265. *Id.* at 648.

Ohio v. Kentucky was an interstate boundary dispute.[266] Ohio sought a declaration of the true boundary[267] based on its interpretation of pre-Revolutionary War documents.[268] Various cases decided by both the U.S. Supreme Court and the Ohio Supreme Court were inconsistent with Ohio's legal theory, but they did not bar Ohio by res judicata because it was not a party to the cases.[269] The Court held Ohio was barred, however, by its long acquiescence in the boundary as located by those cases.[270] The Court explained that "proceedings under this Court's original jurisdiction are basically equitable in nature, and a claim not technically precluded [by res judicata] nonetheless may be foreclosed by acquiescence."[271] Thus, the Court made its "basically equitable" statement for the purpose of applying the doctrine of acquiescence to bar a stale claim.

Later, the Court quoted the "basically equitable" remark in a suit between states to interpret a much earlier equitable apportionment decree for an interstate river.[272] As in *Ohio v. Kentucky*, the Court relied on the "basically equitable" remark for the purpose of using acquiescence to dispose of a stale claim.

In sum, the basically equitable nature of a suit between states in the Court's original jurisdiction has hardly meant that untimely claims are favored. It would be a considerable extension in function of the "basically equitable" remark, almost a reversal in function, to use it to preclude borrowing a statute of limitations in water compact litigation to deal with a stale claim. The remark is too undeveloped and uncertain in function to create any expectation in Congress that water compact enforcement suits are so fundamentally equitable, regardless of the relief sought, that they come within the historic equity rule against applying a statute of limitations when equity has exclusive jurisdiction.

But even if water compact enforcement suits were deemed solely equitable at some fundamental level,[273] this still should not preclude

266. *Id.* at 642-43 (Ohio claimed the boundary was the middle of the Ohio River, while Kentucky maintained it was the northerly side of the river).

267. *Ohio v. Kentucky*, 410 U.S. at 642.

268. *See* Memorandum in Support of Motion for Leave to File Amended Complaint at 10, 17-20, Ohio v. Kentucky, 410 U.S. 641 (1973) (No. 27, Orig.).

269. *Ohio v. Kentucky*, 410 U.S. at 645-47.

270. *Id.* at 648-51.

271. *Id.* at 648 (citations omitted).

272. Nebraska v. Wyoming, 507 U.S. 584, 595 (1993).

273. In *Kansas v. Colorado*, 533 U.S. 1 (2001), Kansas sought a decree ordering Colorado to deliver water in accordance with the Arkansas River Compact, *supra* note 65, plus damages for breach, *supra* note 66. Although the Court accepted the damages characterization of the retrospective relief without comment, *see Kansas v. Colorado*, 533 U.S. at 6-9, it is possible to view the claim differently. Some courts say that when a land sale contract purchaser is granted specific performance plus money to compensate for the

borrowing. The historic equity rule is that a statute of limitations *not applicable by its terms in equity* does not control relief if equity has sole jurisdiction.[274] There is state court authority that a statute of limitations for an action "upon any contract...obligation" applies in equity because the statute "is directed to the subject matter and not to the form of the action, or the forum in which it is prosecuted."[275] Under this reasoning, the Court could borrow section 2415(a), which applies to an action "upon any contract," even if a suit to enforce a water compact were solely equitable.

Also, residual statutes of limitations necessarily use broad language because they are intended to fill gaps left by specific statutes of limitations. State courts have held that residual statutes of limitations apply in equity by their terms.[276] In particular, it has been held that a statute of limitations for "civil actions" embraces equitable as well as legal actions.[277] Under this reasoning, the Court could borrow section 1658(a), which applies to "any civil action," in a compact enforcement suit even if the suit were solely equitable.

V. CONCLUSION

Modern Supreme Court cases on long-continued breach of interstate water allocation compacts have created a risk of huge liability for states that breach their water delivery obligations. This is so even if the state's breach resulted from its good faith misinterpretation of compact language or misunderstanding of hydrologic conditions. To rein in the liability, this article has argued that the *nullum tempus* principle should not apply in water compact enforcement suits between states because its public-benefit rationale fails in that situation and because its application is inconsistent with the constitutional plan of equal footing for litigating states.

With *nullum tempus* out of the way, the defense of laches becomes available and, depending on the facts, may bar or reduce a defendant state's liability for breach. Also, the possibility arises of the Court borrowing a statute of limitations to further limit stale claims. Borrowing a statute of limitations admittedly is more problematic than

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delay, the money is not really damages for breach but is equitable compensation in the nature of an accounting—because in ordering specific performance, the court is confirming the contract and expunging the breach. 71 AM. JUR.2D, *Specific Performance* § 235 (2001).

274. *See supra* note 246 and accompanying text.

275. Lord v. Morris & Goodman, 18 Cal. 482, at 482, 486-87 (1861).

276. *E.g.*, Piller v. Southern Pac. R.R. Co., 52 Cal. 42, 44 (1877); McCord v. Nabours, 109 S.W. 913, 917-18 (Tex. 1908); American Tierra Corp. v. City of West Jordan, 840 P.2d 757, 760 (Ut. 1992).

277. White v. Sheldon, 4 Nev. 280, 1868 WL 1977 at *4 (1868).

applying laches—more problematic but not without arguable justification. Modern federal court borrowing practice is based on what Congress would likely intend as a matter of sound reason. With *nullum tempus* not a factor in water compact suits, congressional awareness and acceptance of the Court's longstanding view about the benefits of limitations periods arguably would provide sound reason for Congress to intend that the Court apply a borrowed statute of limitations. The most closely analogous statute probably would be a federal statute of limitations, either the one for contract actions by the United States for money damages or the residual one for civil actions arising under acts of Congress postdating it.