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Supreme Court Declines Original Jurisdiction in Lake Erie Pollution Case

J. William Wopat III

stant case as a rejection of explicit and implicit racial classifications as standards to invalidate state action on equal protection grounds, he would not be entirely correct. The Court was clear in stating that the facts of the principal case did not meet the requirements of either an explicit or implicit racial classification.[30] This clarity of expression by the Court precludes misinterpretating this decision as a justification for continued enforcement of existing law which would otherwise be unconstitutional or interpreting the instant case as a license to frame laws that perpetuate the ghetto.[31]

GARY S. SORTOR

SUPREME COURT DECLINES ORIGINAL JURISDICTION IN LAKE ERIE POLLUTION CASE

As water pollution problems continue to mount, citizens and states are seeking effective remedies. The State of Ohio sought to invoke the original jurisdiction of the United States Supreme Court in a complaint praying for an injunction against three non-resident chemical companies,[1] located in Michigan and Canada, which had allegedly created a public nuisance by dumping poisonous mercury into Lake Erie and its tributaries. The Supreme Court *held*, Ohio's motion for leave to file a bill of complaint denied. Discretionary original jurisdiction was declined because the issues were bottomed on local nuisance principles involving no federal law. Furthermore, the majority of eight reasoned that even with the aid of a court appointed special master, they would be ill equipped to act as a trial court. Several competent governmental agencies were already involved in the problem of the pollution of Lake Erie, and, if Ohio still wishes to seek injunctive relief and damages, Ohio courts can obtain jurisdiction.[2] *Ohio v. Wyandotte Chemicals Corp.*, 91 S. Ct. 1005 (1971).

30. James v. Valtierra, 91 S. Ct. 1331, 1333 (1971), where the Court noted that California's article XXXIV does not rest on "distinctions based on race . . . [and that the record] . . . would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority."

31. By this point in history it should be obvious that discrimination is a major cause of the problems facing ghetto inhabitants. *See* Comment, *Decent Housing as a Constitutional Right, 42 U.S.C.* § 1893 *Poor People's Remedy for Deprivation*, 14 How. L.J. 338 (1968); Comment, *Tenant Interest Representation: Proposal for a National Tenants' Association*, 47 TEX. L. REV. 1160 (1969).

1. The defendant companies were Wyandotte Chemicals Corporation, Dow Chemical Company, and Dow Chemical Company of Canada, Ltd.

2. Justice Douglas filed a lone dissent, arguing a special master with the aid of a panel of scientific advisors could overcome the difficulties presented by the complex technical facts. Ohio v. Wyandotte Chemicals Corp., 91 S. Ct. 1005, 1013-17 (1971) [hereinafter cited as *Wyandotte*].

Article III, section 2 of the United States Constitution provides that the Supreme Court's jurisdiction "shall extend . . . to controversies between a state and citizens of another state . . . and between a state and foreign . . . citizens or subjects." Section 2, clause 2 further grants "original jurisdiction in all cases in which a state shall be a party," but the United States Code specifically states such jurisdiction shall be "original but not exclusive."[3] Since the Court's inception only 132 decisions have arisen through the operation of original jurisdiction. As the Supreme Court has evolved into primarily the final federal appellate court, the appearance of original jurisdiction has become extremely rare.[4]

The grant of original jurisdiction has been traced to a desire by the framers of the Constitution to provide a forum for the adjustment of interstate differences[5] without "the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens."[6] An early view held that the sole criteria for invoking original jurisdiction was the nature of the parties.[7] Later, the Court excluded cases with political overtones[8] and cases involving the enforcement of a state's penal statutes.[9]

The bulk of the Court's early litigation founded on original jurisdiction appears to have involved boundary squabbles.[10] Then, in the early part of this century, several cases arose involving actions by states to abate nuisances originating in other states.[11] Clear-cut limitations were soon placed on the use of original jurisdiction, and the Court has consistently tightened these restrictions as its appellate docket has grown.

A state seeking relief under original jurisdiction must generally aver injury to state proprietary interests in support of its motion for leave to file a complaint.[12] Apart from specific injury, a state may also sue as

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3. 28 U.S.C. § 1251(b) (1970).

4. Only about two cases per term out of a docket of over 3,000 cases are founded on the Court's original jurisdiction, and these have mostly been submerged lands disputes. *See The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 98-109 (1958); *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 247-55 (1970).

5. Missouri v. Illinois, 180 U.S. 208 (1901); Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945).

6. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289 (1888).

7. Chief Justice John Marshall wrote:

> If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821).

8. Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866).

9. Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

10. Missouri v. Illinois, 180 U.S. 208 (1901) (dictum). *See generally* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665 (1959).

11. New Jersey v. City of New York, 283 U.S. 473 (1931); New York v. New Jersey, 256 U.S. 296 (1921); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 180 U.S. 208 (1901).

12. United States v. Minnesota, 270 U.S. 181 (1926) (bill to cancel patents issued

parens patriae[13] if the state is a real and substantial party to the litigation.[14] In *Missouri v. Illinois*,[15] Missouri sought to enjoin Illinois from discharging sewage into interstate waters. The Court held that Missouri was a proper party to the suit since the health and comfort of its citizens was endangered and individual suits by citizens themselves would be inadequate. This standard was extended in *Georgia v. Tennessee Copper Co.*[16] to necessitate a showing not only that the entire body of the complaining state's citizens be affected, but also that the citizens have no remedy in another forum. If individual relief was impossible and the state brought the suit, the Court demanded a high standard of proof of the nuisance since the acts complained of were usually those of a sovereign state.[17]

The high standard of proof requirement appears to be the first sign of uneasiness with the use of original jurisdiction in interstate nuisance abatement controversies. The aggrieved state in most of the nuisance disputes has sought to achieve a solution through localized legal action or conferences before resorting to the extraordinary remedy of an original jurisdiction suit. The Court has nonetheless continually underscored its lack of competence in complex interstate trials:

> We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by coöperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.[18]

Where possible, the Supreme Court has dismissed actions when an alternative forum has been available.[19]

In denying Ohio's motion for leave to file a bill of complaint, the majority's reasoning rested on the presence of a plethora of official bodies already investigating mercury contamination of Lake Erie. Although not labelled as such, it seems as if the *Wyandotte* Court applied the equitable principle of declining jurisdiction in a case where not all available remedies have been exhausted.

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under Swamp Lands Acts); Virginia v. West Virginia, 206 U.S. 290 (1907) (bill to account for a debt); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) (bill to establish a boundary).

13. "[T]rustee, guardian or representative of all her citizens." Louisiana v. Texas, 176 U.S. 1, 19 (1900). *See also* Note, 39 HARV. L. REV. 1084-88 (1926).

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

15. *Id.*

16. 206 U.S. 230 (1906).

17. Missouri v. Illinois, 180 U.S. 208 (1901) *cited in Wyandotte* at 1011.

18. New York v. New Jersey, 256 U.S. 296, 313 (1921).

19. Massachusetts v. Missouri, 308 U.S. 1 (1939), where a lower federal court had jurisdiction to adjudicate a tax dispute. Prior to *Wyandotte*, the Court reluctantly accepted interstate nuisance cases.

A Michigan court had enjoined Wyandotte from discharging mercury into Lake Erie, and both Wyandotte and Dow Canada were under close scrutiny by Michigan and Ontario water resource commissions. Additionally, Ohio and Michigan participated in a federal conference concerning the pollution of the lake. Lake Erie is also subject to the supervision of the International Joint Commission, established by the Boundary Waters Treaty of 1909, relating to the boundaries between the United States and Canada.[20] The existence of this myriad number of agencies and other courts persuaded the reluctant Court to stay out of this already crowded sphere. Yet, as Justice Douglas' dissent indicated, many claim that little, if anything, was actually being accomplished by these bodies.[21]

Obviously there is a great need for a unified frontal approach to water pollution commensurate with the gravity of the problem in Lake Erie. However, the Court clearly stated it had neither the time nor the expertise to adjudicate pollution problems which are styled as public nuisances. Paradoxically, an original jurisdiction suit could be the least effective method of cleaning up Lake Erie. Although Justice Douglas places great confidence in using a special master with scientific advisors, historically, final adjudication has been painfully slow in coming in such cases: the final disposition in the *New York v. New Jersey* sewage dispute came thirteen years after the first papers were filed in Washington.[22] Thus, in the long run, the Court, by granting Ohio's motion to file a bill of complaint, could have done more harm to Lake Erie by increasing administrative delays in finding a solution to the problem. Parenthetically, the time which the Court would spend on this problem would of necessity also detract from the Court's "paramount role as the supreme federal appellate court."[23]

The Court went to great length to draw attention to the "changes in the American legal system and the development of American society"[24] which have rendered original jurisdiction obsolete and which have promoted "the enhanced importance of our role as the final federal appellate court."[25] Evolutionary developments far beyond the purview of the

20. Treaty with Great Britain relating to boundary waters between the United States and Canada, January 11, 1901, [1910] 36 Stat. 2448 (1911), T.S. No. 548.

21. Polikoff, *The Interlake Affair*, 3 WASH. MONTHLY 7 (1971) cited in *Wyandotte* at 1015 n.4. On the subject of failure of federal conferences, *see generally* 1 CENTER FOR STUDY OF RESPONSIVE LAW, WATER WASTELAND, ch. X, 5-41 (preliminary draft 1971) [hereinafter cited as WATER WASTELAND].

22. 256 U.S. 296, 301 (1921). Part of the delay is due to the unusual nature of an original suit: "even when the case is first referred to a master, [the] . . . Court has the duty of making an independent examination of the evidence, a time-consuming process. . . ." Georgia v. Pennsylvania R.R., 324 U.S. 439, 470 (1907) (Stone, C.J., dissenting). *See also* Wyoming v. Colorado, 259 U.S. 419 (1922) (eleven years from filing of original bill to rendition of decision).

23. *Wyandotte* at 1013.

24. *Id.* at 1009.

25. *Id.* at 1010.

constitutional framers have gradually forced the Court to take the position that it is an inappropriate body to hear trials involving no federal issues.

> As our social system has grown more complex, the States have increasingly become emeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and non-residents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts and so forth. It would, indeed, be anomalous were this Court to be held out as a potential forum for settling such controversies.[26]

John Marshall's broad view that the nature of the parties governs the grant of original jurisdiction has slowly been eroded to the point reached in *Wyandotte* where the Court stated that original jurisdiction "could . . . be justified only by the strictest necessity. . . ."[27] The subject matter of the suit was appropriate for adjudication; this forum was simply an inappropriate place to adjudicate the subject matter.

If Ohio still wishes to bypass the maze of agencies, commissions, and conferences, they can begin in Ohio courts. The majority noted that original jurisdiction was technically possible but that no concurrent jurisdiction existed in the federal district courts.[28] The Court added, however, that "under the modern principles of the scope of the subject matter and *in personam* jurisdiction,"[29] Ohio's courts are competent to render binding judgments against non-resident defendants, including Dow Canada. The gravaman of Ohio's complaint was common law public nuisance[30] which should not present complicated conflict of law problems. Furthermore, applicable federal pollution statutes expressly provide that state action shall not be pre-empted.[31]

Although the nuisance issues which the complaint presented are essentially local in nature, there is merit to Justice Douglas' contention that the solution to the problem will eventually involve federal law. Ohio may find that basing the abatement action on public nuisance will prove

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26. *Id.* at 1009.

27. *Id.* at 1013.

28. The fact that there is diversity of citizenship among the parties would not support district court jurisdiction under 28 U.S.C. § 1332 because that statute does not deal with cases in which a State is a party. Nor would federal question jurisdiction exist under 28 U.S.C. § 1331 . . . . [A]n action such as this . . . would have to be adjudicated under state law.

Wyandotte at 1010 n. 3. *Contra,* Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971), where it was held that a state's ecological rights constituted a question arising under the laws of the United States for determining whether a federal district court has jurisdiction under 28 U.S.C. § 1331 (1970).

29. *Wyandotte* at 1010-11. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF UNITED STATES § 18 (1965).

30. *Wyandotte* at 1016, *citing* 3 W. BLACKSTONE, COMMENTARIES 218.

31. "Nothing in this chapter shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1151(c) (1970).

to be an unwieldy vehicle. Ohio's first obstacle is the necessity of showing no adequate remedy at law to entitle it to equitable relief against the three chemical manufacturers. The Court's indication of current, ongoing action by the various state and federal agencies may prove fatal to Ohio's case, regardless of the alleged ineffectiveness of the agencies. Second, Ohio's request for damages will present a momumental task of compensation determination. The defendant polluters undoubtedly will attempt to join as co-defendants other polluters of Lake Erie, a number which conceivably could go as high as several hundred.[32] The trial court would have to apportion damages in accordance with the relative culpability of each polluter since, under Ohio law, there is no joint liability and one of the wrongdoers cannot be held liable for the entire amount of damages.[33] If such a state of affairs does come about, Ohio may have no choice but to reactivate the machinery of the Federal Water Pollution Control Act.[34]

Ohio's apparent sense of desperation with Lake Erie's noxious condition[35] occasioned its attempt to invoke original jurisdiction. A similar sense of desperation produced the Court's position that original jurisdiction is hopelessly obsolete and not the most efficacious approach to the problem. The muddled prospects a nuisance suit faces in Ohio courts could be as deleterious to Lake Erie as a ponderous Court using a special master. Ohio could once again call for a federal conference on Lake Erie, although the failure of the last meeting to produce any concrete results seems to have only increased the sense of frustration leading to the attempt to invoke original jurisdiction.[36] The Court has completely ruled itself out as a trial court in this crucial area, and until federal and state officials begin to use existing remedies effectively, the future for Lake Erie in this regard, and the rest of the environment, is, at best, dim.

J. WILLIAM WOPAT III

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32. 2 WATER WASTELAND, ch. XIV, 33.

33. Mansfield v. Bristor, 76 Ohio St. 270, 81 N.E. 631 (1907).

34. 33 U.S.C. § 1160(d)(1) (1970) provides:

> whenever requested by the Governor of any State or a State water pollution control agency . . . the Administrator shall, if such request refers to pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges . . . originates . . . shall call promptly a conference. . . .

35. Lake Erie is an example of an eutrophied lake. . . . Rotting masses of dead plant life float disgustingly upon the surface . . . some 500 centuries of its natural life [have] disappear[ed] in less than 25 years under the strain of industrial, agricultural, and municipal pollution.

1 WATER WASTELAND, ch. IV, 8; *see also* 1 WATER WASTELAND, ch. VI, 8; ch. IX, 2-3.

36. *Id.* at ch. IX, 2-7. *See also* 2 WATER WASTELAND, ch. XI, 11-18. On the federal government's failure to use the River and Harbors Act, 33 U.S.C. §§ 401-418 (1970), to curb the pollution of Lake Erie, see 2 WATER WASTELAND, ch. XV, 19-20. President Nixon has discouraged such action and has instituted a permit program for industry. Exec. Order No. 11574, 3 C.F.R. 188 (1970). *See also* Permits For Discharges Of Deposits Into Navigable Waters, Proposed Policy, Practice, and Procedure, 35 Fed. Reg. 20005 (1970), 36 Fed. Reg. 983 (1971). In any event, relatively few applications for permits have been received. 2 WATER WASTELAND, ch. XV, 2-3, 15-18.