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Exclusive Original Jurisdiction of the United States Supreme Court: Does It Still Exist?

The Constitution of the United States enumerates the jurisdictional heads to which the federal judicial power extends.[1] The Constitution vests this power in the Supreme Court and divides the Court's jurisdiction into appellate and original jurisdiction. Though the framers of the Constitution believed that the original jurisdiction of the Supreme Court would be its most vital function,[2] in fact, the opposite has proven true. The Court's appellate role has grown in importance to fill American society's need for final constitutional interpretation in numerous aspects of life; thus, the original jurisdiction has had to give up its anticipated preeminent role. The current status of the original jurisdiction of the Supreme Court is defined by the Constitution, acts of Congress, and interpretation by the Supreme Court—interpretation which continues to diminish the scope of cases that will actually be heard by the Court under the head of original jurisdiction.

Article III of the Constitution is fairly explicit about what types of cases come within the Supreme Court's original jurisdiction, but does not speak to the issue of whether the Court's original jurisdiction is to be exclusive or concurrent with federal and state courts.[3] This issue was addressed by the first Congress. The Judiciary Act of 1789 divided the Supreme Court's original jurisdiction into "exclusive" and "not exclusive" jurisdiction.[4] The division remains to this day. The current statute, 28 U.S.C.

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1. U.S. CONST. art. III, § 2, cl. 1.

2. Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B.U.L. REV. 1, 6 (1951).

3. U.S. CONST. art. III, § 2, cl. 2, which reads, "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other cases before mentioned, the supreme Court shall have appellate Jurisdiction."

4. The Judiciary Act of 1789 reads:

> Sec. 13. *And be it further enacted*, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.

Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80 (1853) (repealed by act, ch. 231, § 297, 36 Stat. 1168 (1911)).

§ 1251, divides the Supreme Court's original jurisdiction into (a) "original and exclusive jurisdiction" and (b) "original but not exclusive jurisdiction."[5] Subsection (a) of section 1251 states that the Court's jurisdiction is exclusive in "all controversies between two or more States." Subsection (b) states that the jurisdiction is not exclusive in "[a]ll controversies or proceedings by a State against the citizens of another State."[6] The Supreme Court has recognized that when original jurisdiction is not exclusive, as in section 1251(b) cases, such jurisdiction is concurrent with lower federal courts or with state courts.[7] Section 1251(b) effectively allows the Court discretion with respect to the exercise of its concurrent original jurisdiction.

In the early history of the Supreme Court, original jurisdiction was exercised over all cases that came within the article III definition, regardless of the suit's status under the statute. Later, however, the Court began to utilize the statutory distinction between exclusive and concurrent jurisdiction. The Court developed a line of analysis to be used in assessing the appropriateness of exercising original jurisdiction in cases which fell within the concurrent original jurisdiction of section 1251(b). Based on this analysis, the Court declined to exercise jurisdiction over several cases that otherwise met all the requirements for original jurisdiction.

In the decade of the 1970's, however, the Supreme Court began to blur the distinction which Congress had drawn between exclusive and concurrent original jurisdiction. The analysis which had been developed under section 1251(b) to determine

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5. 28 U.S.C. § 1251 (1976) reads:

§ 1251. Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions and proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

28 U.S.C. § 1251 (1976).

6. *Id.*

7. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898); Ames v. Kansas, 111 U.S. 449 (1884).

when it was appropriate for the Court to exercise its concurrent original jurisdiction began to be applied to cases between two states which, under section 1251(a), are within the Supreme Court's exclusive original jurisdiction.

This Comment will review the history of the statutory distinction as it has been interpreted and applied by the Supreme Court. The development of the test to determine appropriateness of exercising section 1251(b) original jurisdiction will be traced and its application to cases within section 1251(a) will be analyzed. Finally, the Comment will assess the appropriateness of declining to exercise "exclusive original jurisdiction" in light of the historical purposes for the article III grant of original jurisdiction and the Court's current concern for its more important appellate function.

I. Historical Application of the Statutory Distinction Between Exclusive and Concurrent Original Jurisdiction

During the first one hundred and fifty years of its existence, the Supreme Court exercised original jurisdiction over all cases that came within the article III definition of original jurisdiction, regardless of the exclusive or nonexclusive nature of the jurisdiction. The Court temporarily ignored its statutory discretion and focused on whether original jurisdiction existed, rather than whether such jurisdiction, admittedly existing, should be exercised.[8] Early determinations of whether original jurisdiction existed were based on such things as: what types of controversies came within the Court's jurisdiction as enumerated in article III;[9] whether the issue in controversy was directly between two states;[10] whether the controversy was directly between a state

8. During this period, the Supreme Court did draw one important distinction between exclusive and nonexclusive original jurisdiction. The Court recognized that when its original jurisdiction was not exclusive, jurisdiction could also be invoked in the lower courts. The case of Ames v. Kansas, 111 U.S. 559 (1884), marked the Court's first recognition of concurrent jurisdiction in the lower federal courts in a suit in which a state was suing both a citizen of itself and a citizen of another state. "[T]he original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a State and citizens of other States or aliens." *Id.* at 465.

9. Wisconsin v. Pelican, 127 U.S. 265 (1888) (Supreme Court will entertain civil but not criminal cases in its original jurisdiction).

10. Louisiana v. Texas, 176 U.S. 1 (1900). "But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another." *Id.* at 22.

and a citizen of another state;[11] whether the plaintiff state was the real party in interest;[12] whether a state may sue as *parens patriae* for the benefit of its citizens;[13] and whether a state may sue to protect its quasi-sovereign interests.[14] Whenever the Supreme Court found that its original jurisdiction existed, it exercised that jurisdiction. Indeed, one early case stated that, as a general rule, a court possessed of jurisdiction must exercise it.[15]

A. The Court's First Use of Its Discretion in Refusing to Exercise Original Jurisdiction over a § 1251(b) Case

The 1939 case of *Massachusetts v. Missouri*[16] was the first case in which the Supreme Court declined to exercise its original jurisdiction. In that case a Massachusetts domiciliary died, leaving three trusts in the charge of Missouri trustees. Both states claimed the exclusive right to exact inheritance taxes from the trusts, and Massachusetts sought declaratory and injunctive relief to that end in the Supreme Court. The Court first determined that the controversy was not between the two states. The Court reasoned that because trust assets were sufficient to pay taxes to both states, neither state would be injured if the other exacted its tax. Therefore, the tax claims were not, as the states claimed, mutually exclusive. The Court went on to characterize the controversy as being between the state of Massachusetts and the trustees—citizens of Missouri. The Court recognized an exception to the statement that "a court having jurisdiction must exercise it,"[17] noting that other federal courts have "properly withheld the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum."[18] The following language from *Massachusetts v. Missouri* sets forth the test that is still used to determine when the exercise of concurrent original jurisdiction is appropriate.

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11. Oklahoma v. Atchison, Topeka & Santa Fe R.R. Co., 220 U.S. 277 (1911).

12. Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 393 (1938); New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883).

13. Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Kansas v. Colorado, 185 U.S. 125 (1902).

14. Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).

15. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). This broad statement has since been held to have exceptions. See *infra* notes 17-18 and accompanying text.

16. 308 U.S. 1 (1939).

17. *Id.* at 19.

18. *Id.* The Court here refers to the forum non conveniens doctrine of Rogers v. Guaranty Trust Co., 288 U.S. 123, 130-31 (1933).

> In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction in an action by a State . . . is necessary for the State's protection.[19]

The language delineates two elements to be taken into consideration when determining whether to exercise concurrent original jurisdiction.[20] First, the Court looks to the type and quality of the interest being asserted by the plaintiff state. Second, the Court analyzes whether its original jurisdiction is necessary to protect that asserted interest.

In applying this test to *Massachusetts v. Missouri,* the Court found it appropriate to decline exercising original jurisdiction. The Court noted that an action by a state to collect taxes from citizens of another state was not the type of interest that merits the exercise of original jurisdiction. Furthermore, it appeared to the Court that this suit could be brought in a Missouri state court or a federal district court. Therefore, the Supreme Court determined that an exercise of its original jurisdiction was not necessary to protect the state's interest.

The rationale underlying this landmark decision was the Court's concern that its more important duties would be neglected if it were required to take original jurisdiction over all cases that met the technical requirements of article III. The Court reasoned that accepting original jurisdiction

> in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it.[21]

This rationale has formed the basis of the Supreme Court's more recent argument that its appellate function is more important than its original function and must not be impaired by unnecessary exercise of original jurisdiction.

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19. 308 U.S. at 18.

20. Once a case has met the requirements of concurrent original jurisdiction (here a controversy between a state and citizen of another state), the Court will use this test to determine whether it should exercise its original jurisdiction.

21. 308 U.S. at 19.

B. *Use and Revision of the* Massachusetts v. Missouri *Test*

The test enunciated in *Massachusetts v. Missouri* was little used until the 1970's.[22] In the interim, the original jurisdiction cases brought to the Court were not numerous,[23] but because of their complex factual issues they often required a considerable amount of time to dispose of properly.[24] The Court began to voice a concern that its ever increasing appellate duties were being slighted by time-consuming original jurisdiction cases. The Court has said that such cases represent "a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court."[25] The 1969 case of *Utah v. United States*[26] set the course for the decade to follow in proclaiming that "our original jurisdiction should be invoked sparingly."[27] Not surprisingly, the Court began to use the *Massachusetts* test as an aid in deciding which cases should be refused its original jurisdiction.

Three significant cases in the 1970's show the Court's use of its section 1251(b) discretion. In each, the Court used a form of the *Massachusetts* test to assess the appropriateness of exercising original jurisdiction. These cases refined the *Massachusetts* test. They gave more substantial reasons for the rationale behind the test and even made the rationale part of the test. Finally, some of the cases added additional factors for the Court to consider in determining whether to exercise concurrent original jurisdiction.

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22. The only use of the *Massachusetts* test between its inception and 1971 was in the case of Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945), in which the Supreme Court found that the lack of an appropriate alternative forum where all of the defendants could be joined required the Court to exercise its original jurisdiction. *Id.* at 464-68.

23. There were never more than seventeen cases on the original docket in any year between 1940 and 1969, though the cases on the appellate and miscellaneous dockets each numbered over 1,000 for many of those years. 1970 ANN. REP. OF THE DIRECTOR OF THE AD. OFF. OF THE U.S. CTS. 204; 1960 ANN. REP. OF THE DIRECTOR OF THE AD. OFF. OF THE U.S. CTS. 206; 1950-51 ANN. REP. OF THE DIRECTOR OF THE AD. OFF. OF THE U.S. CTS. 126.

24. *See, e.g.*, Arizona v. California, 373 U.S. 546 (1963) (dealing with the factual complexities of apportioning the waters of the Colorado River among five states and the United States); Nebraska v. Wyoming, 325 U.S. 589 (1945).

25. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 505 (1971).

26. 394 U.S. 89 (1969) (per curiam).

27. *Id.* at 95.

1. Placing more emphasis on the priority of the Court's appellate jurisdiction over its original jurisdiction

In the first of these cases, *Ohio v. Wyandotte*,[28] Ohio sued several corporations of other states and of Canada to enjoin the dumping of mercury into waters that eventually reached Lake Erie. The Court found the case to be within its original jurisdiction, but declined to exercise it.

The *Wyandotte* Court made explicit the rationale underlying the *Massachusetts* test—the Court's concern that original jurisdiction cases might detract from more important cases. In *Wyandotte* the Court specified what kind of cases were more important—those cases brought to the Supreme Court on final appeal. In support of this premise, the Court pointed to "the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court."[29] The Court also noted that it was ill-equipped as a court of first instance, not prepared for the factfinding that frequently takes so much time in original jurisdiction cases.[30] Therefore, in rearticulating the test to determine the proper exercise of original jurisdiction in a case between a state and a citizen of another state, the Court held that

> as a general matter, we may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities.[31]

The Court specified that the article III policies referred to in part one of this test include both the concern that a state

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28. 401 U.S. 493 (1971).

29. *Id.* at 499.

30. *Id.* at 498. The factfinding procedure normally utilized by the Supreme Court in original jurisdiction cases is reference to a special master for taking testimony and preparing findings of fact. The Court may then accept or reject the special master's recommendation. Although the seventh amendment applies to cases at common law in the Court, there have been no jury trials since the eighteenth century. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 244 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

31. 401 U.S. at 499.

should not have to sue in another state where "parochial factors might . . . lead to . . . partiality" and the consideration (as recognized by part two of the *Massachusetts* test) that a state needs a forum which can exercise jurisdiction over nonresident defendants.[32] The Court reasoned that because Ohio could sue in its own court the partiality of another state's courts would be avoided.[33] The Court assumed that Ohio's long-arm jurisdiction could bring all the necessary nonresident defendants into Ohio court.[34] Part two of the *Wyandotte* test focused on the inappropriateness of the Supreme Court as a forum in which to resolve complex factual issues in light of the Court's more important appellate duties.[35] Thus, the rationale underlying *Massachusetts v. Missouri* was incorporated explicitly into the *Wyandotte* test, placing even greater emphasis on the Court's appellate function than previously existed. Although later cases returned to the formulation of the *Massachusetts* test, they continued to give great weight to the priority of the appellate function over the original jurisdiction function as the *Wyandotte* case had.[36]

2. *Rearticulating the* Massachusetts *test in a more specific manner*

One year after *Ohio v. Wyandotte,* the Court again used the formulation of the *Massachusetts* test in the case of *Illinois v. Milwaukee.*[37] Characterizing the case as one between a state and a citizen of another state, the Court stated that the original ju-

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32. *Id.* at 500. The Court here ignored one of the historical purposes underlying the article III grant of original jurisdiction, the dignity of the states. *See infra* note 88 and accompanying text.

33. However, one commentator noted that the parochialism of state courts, which article III original jurisdiction was designed to avoid, may be practiced on the nonresident defendants in Ohio state court. Note, *Ohio v. Wyandotte Chemicals Corp.: Forum Non Conveniens in the Supreme Court,* 67 NW. U.L. REV. 59, 69 (1972).

34. A number of law review articles have noted dissatisfaction with the Court's treatment of the *Wyandotte* case. These articles have pointed out that Ohio's long-arm jurisdiction may not be effective in bringing the foreign defendants into state court. Even more disturbing is the possibility proffered by several authors that there may not be a forum in which Ohio can bring its suit. *See* Ficken, *Wyandotte and its Progeny: The Quest for Environmental Protection Through the Original Jurisdiction of the Supreme Court,* 78 DICK. L. REV. 429, 435-37 (1973-74); Note, *Original Jurisdiction—Interstate Water Pollution: Alternatives to the Original Jurisdiction of the United States Supreme Court*—Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), 47 WASH. L. REV. 533, 536-51 (1972).

35. *See* 401 U.S. at 498-99, 503, 505.

36. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971).

37. 406 U.S. 91 (1972).

risdiction of the Supreme Court was to be "obligatory only in appropriate cases."[38] The Court then set forth two factors to be assessed in determining appropriateness: (1) the "seriousness and dignity of the claim" and (2) "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had."[39] Thus the Court particularized the *Massachusetts* test, substituting two specific criteria, "the seriousness and dignity of the claim,"[40] for the "quality of the right asserted."[41] The *Massachusetts* test had looked generally to see if resort to the Supreme Court was "necessary for the State's protection."[42] The *Illinois* case specified those things that obviated this necessity—the availability of another forum where all parties could be joined, where the issues could be litigated, and where relief could be had.[43]

The Court applied this more specific test to the *Illinois v. Milwaukee* controversy in which Illinois sued four Wisconsin cities to enjoin the dumping of raw or inadequately treated sewage into Lake Michigan. The *Illinois* Court found that the defendants could be sued and the issues could be adequately resolved in federal district court. Therefore, the Court declined to exercise its concurrent original jurisdiction.

3. Ignoring one prong of the Massachusetts v. Missouri *test: the dignity of the state's claim*

In its analysis of *Illinois v. Milwaukee,* the Court looked very carefully to the second part of the revised Massachusetts test, but the first part of the test was conspicuous by its absence. The Court may have silently assumed that the claim was not serious or dignified; however, such an assumption is unlikely in light of the Court's history of hearing claims seeking to enjoin a nuisance originating in a neighboring state.[44] More likely, the Court realized that part one of the test would always be met if a plaintiff state had standing to sue, and so disregarded this part in the analysis of appropriateness of exercising concurrent origi-

38. *Id.* at 93.
39. *Id.*
40. *Id.*
41. 308 U.S. at 18.
42. *Id.*
43. 406 U.S. at 93.
44. *See, e.g.,* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).

nal jurisdiction. Abandonment of this part of the test—the assessment of the seriousness and dignity of the plaintiff state's claim—will effectively make it more difficult for a plaintiff state to persuade the Court to exercise its original jurisdiction. As noted above, most original jurisdiction claims would be considered serious and dignified, a factor that argues in favor of the exercise of jurisdiction by the Supreme Court. When part one of the test is passed over, emphasis is placed on the availability of an alternative forum, thus ignoring the one factor that might persuade the Court to exercise original jurisdiction.[45]

The cases during the 1970's have not only refined the *Massachusetts* test and emphasized the preeminence of the appellate docket over the original docket, but have articulated additional factors to be taken into consideration when determining the appropriateness of exercising original jurisdiction over a particular case. These developments are substantial departures from prior rulings in original jurisdiction cases and make it more difficult than ever before to persuade the Court to exercise its concurrent original jurisdiction.

4. Adding a prong to the Massachusetts *test: a state law issue will help persuade the Court not to exercise original jurisdiction*

Washington v. General Motors[46] appears to add an additional prong to the two-part *Massachusetts* test. The Court first found that the case did not meet the *Massachusetts* test because the nature of the interest asserted and relief requested (abatement of air pollution through development of motor vehicle air pollution control equipment) made the case inappropriate for the Supreme Court and because there was an alternative forum in which the controversy could be resolved. But the Court advanced a further argument against exercising original jurisdiction—the necessity of applying state law. The Court stated, "[A]s a matter of law as well as practical necessity corrective remedies for air pollution, therefore, necessarily must be consid-

45. The Supreme Court has often ignored the first prong of the *Massachusetts* test in cases since *Illinois v. Milwaukee*. *See* Arizona v. New Mexico, 425 U.S. 794 (1976); United States v. Nevada, 412 U.S. 534 (1973)(per curiam). The most crucial aspect of the test, thus, has become the availability of an alternative forum.

46. 406 U.S. 109 (1972) (Washington was only one of eighteen plaintiff states in this action).

ered in the context of localized situations."[47] Thus, the Court considered the need to apply state law as an additional factor militating against the exercise of concurrent original jurisdiction. The Court relegated the causes of the eighteen plaintiff states to their appropriate federal district courts for resolution under local law. *Washington* is not the only case in recent years to view the necessity of applying state law as a factor leading to the refusal to exercise original jurisdiction. *Ohio v. Wyandotte* emphasized the Supreme Court's lack of special competence in local law and expressed concern at the time that these local controversies would take away from important federal questions.[48]

However, declining to exercise original jurisdiction because of the necessity of construing state law is at odds with precedent. One of the early cases between two states, *Kansas v. Colorado*,[49] recognized the wisdom and necessity of the Court's applying state law to appropriate controversies. "Sitting, as it were, as an international, as well as domestic tribunal, we apply federal law, state law, and international law, as the exigencies of the particular case may demand . . . ."[50] The Court has historically exercised original jurisdiction over cases involving common-law nuisance, including air pollution and water pollution.[51] The Court has also exercised original jurisdiction when a plaintiff state sought to enjoin enforcement of a statute of a sister state.[52]

The issue of the appropriateness of exercising jurisdiction over a case based on state law was faced squarely in the 1953 case of *Arkansas v. Texas*.[53] Arkansas sought to enjoin Texas from interfering with a contract between the University of Arkansas—an agent of the state—and a charitable foundation of Texas. The foundation had contracted to contribute money to the university, but Texas filed suit in Texas court to stop the gift on the ground that under Texas law the money must be used for the benefit of Texas residents. The Supreme Court rec-

47. *Id.* at 116.

48. 401 U.S. at 497-98, 504.

49. 185 U.S. 125 (1902).

50. *Id.* at 146-47. This case involved the application of state common law regarding water rights to protect Kansas from Colorado's appropriation of too much water from a river that ran through both states.

51. Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (air pollution); New York v. New Jersey, 256 U.S. 296 (1921) (water pollution).

52. Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

53. 346 U.S. 368 (1953).

ognized that there was a real controversy between the two states and continued the motion for leave to file a complaint until pending Texas court litigation interpreted the Texas law. The majority of the Court refused to deny original jurisdiction merely because a state law question was involved in the controversy.[54] Even the four dissenting justices recognized that "[l]ocal questions may be intertwined with . . . federal rights, and if there are sufficient grounds for delaying final action we may wait in order to 'have the advantage of the views of the state court.' "[55] *Arkansas v. Texas* notwithstanding, the *Washington* case indicates that the necessity of applying state law will weight the *Massachusetts* test toward declining to exercise original jurisdiction.

5. Subdivisions of states not considered states to meet definition of original jurisdiction

The Court in *Illinois v. Milwaukee* made it still more difficult for a case to qualify under section 1251(a) or (b) for the original jurisdiction of the Supreme Court. Borrowing a rule from diversity of citizenship analysis, the Court held that a subdivision of a state will no longer be considered a state for purposes of invoking original jurisdiction in the Supreme Court. Until *Illinois* the Court had held that state instrumentalities, when not "acting without or in excess of lawful authority," were "wholly within the control of the State"[56] and suits by them, therefore, would be deemed to be suits by the state. In an earlier case, referring to a New Jersey sewage commission, the Court stated that the commission's "action, actual or intended, must be treated as that of the State itself."[57] Despite this clear precedent that political subdivisions of states are essentially agents of the states, the Court in *Illinois v. Milwaukee* refused to allow the joinder of the State of Wisconsin as a party defendant and then ruled that "the term 'states' as used in 28 U.S.C. § 1251(a)(1) should not be read to include their political

54. Arguably, the statutory distinction would not allow the Court to decline to exercise original jurisdiction in this case because the suit was between two states, but the *Arkansas* Court did not face this issue. Instead, both the majority and the dissenters were concerned with whether the Supreme Court could exercise original jurisdiction over a case that was based on state law. *Id.*

55. 346 U.S. at 373.

56. Missouri v. Illinois, 180 U.S. 208, 241-42 (1901).

57. New York v. New Jersey, 256 U.S. 296, 302 (1921).

subdivisions."[58]

This ruling makes it more difficult for both plaintiff and defendant to meet the definition of *state* for purposes of original jurisdiction. If both parties attempt to characterize themselves as states, the result of one party losing its state status under this new ruling will be to take the case out of the section 1251(a) exclusive original jurisdiction and put it into the section 1251(b) concurrent original jurisdiction with its attendant *Massachusetts* test. If only the plaintiff attempts to qualify as a state for purposes of a section 1251(b) original jurisdiction, failure to qualify under *Illinois v. Milwaukee* will take the case out of the Supreme Court's original jurisdiction entirely.

As a result of the changes in and additions to the *Massachusetts* test, it is much more difficult for a plaintiff state to bring a case over which the Supreme Court will actually exercise original jurisdiction. The Court has placed greater emphasis on its appellate function in relation to its original function. The criteria that obviate the exercise of original jurisdiction have been particularized. The first prong of the *Massachusetts* test has essentially been abandoned by ignoring the importance of a state's claim as a criterion persuading the Court to exercise original jurisdiction, while the requirement of application of state law to an original case has become one more criterion on the side of refusing to exercise original jurisdiction. Finally, subdivisions of states are no longer considered states for purposes of meeting the definition of original jurisdiction cases.

As shown above, the Court has been extremely reluctant to exercise its original jurisdiction. This reluctance is appropriate in the concurrent original jurisdiction of section 1251(b). The statute was an attempt to divide the jurisdiction granted in article III of the Constitution, but it did not articulate standards for the appropriate exercise of less than exclusive original jurisdiction. The *Massachusetts* test and its progeny are the Supreme Court's self-imposed standards.[59]

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58. 406 U.S. at 98.

59. In 1973 the Supreme Court expanded the use of its discretion beyond § 1251(b)(3) to another concurrent original jurisdiction situation. The Court applied the *Massachusetts v. Missouri* test to a case in which the United States was suing a state. United States v. Nevada, 412 U.S. 534 (1973) (per curiam). It seems appropriate that the test developed for concurrent original jurisdiction in controversies between a state and a citizen of another state (§ 1251(b)(3)) should be applied to concurrent original jurisdiction in controversies between the United States and a state (§ 1251(b)(2)). The same need for standards existed, and the Court used the ready-made and clearly analogous

II. Blurring the Distinction Between Exclusive and Concurrent Original Jurisdiction

The Supreme Court's increased discretion in granting original jurisdiction has had one unfortunate, confusing effect: the Court has begun to apply the test developed to determine when original jurisdiction should be exercised under section 1251(b), concurrent original jurisdiction, to controversies between two states—a situation in which the Court has exclusive original jurisdiction under section 1251(a).

This phenomenon was foreshadowed by dicta in the *Illinois v. Milwaukee* case. The controversy in *Illinois* was characterized as being between a state and a citizen of another state, an appropriate case for the application of the *Massachusetts* test. Although explicitly noting the statutory distinction between 28 U.S.C. § 1251(a) exclusive original jurisdiction and section 1251(b) discretionary, concurrent original jurisdiction,[60] the Court used the following language in restating the *Massachusetts* test:

> We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.[61]

This language appears to call for the application of the restated *Massachusetts* test to a 1251(a)(1) case. However, it is clearly inappropriate to apply the 1251(b) discretionary test to section 1251(a). Section 1251(a)(1) by its terms declares that the Supreme Court has *exclusive* original jurisdiction of "all controversies between two or more states."[62] Since the test as stated was applied to the *Illinois v. Milwaukee* situation of state versus citizen of another state, the reference to section 1251(a)(1) was dicta. The Court's dicta might be dismissed as harmless were it not for the subsequent application of the discretionary test to two cases that clearly fall within section 1251(a)(1) exclusive

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test of *Massachusetts v. Missouri*. The expansion was logical and consistent with § 1251.

60. 406 U.S. at 93, 98.

61. *Id.* at 93.

62. 28 U.S.C. § 1251(a)(1) (1976).

original jurisdiction.

A. Arizona v. New Mexico

The first case embracing the *Illinois* dicta was *Arizona v. New Mexico*.[63] In that case, Arizona, suing in its proprietary capacity and as *parens patriae* for its citizens, sought declaratory and injunctive relief against a New Mexico tax on electricity generated in New Mexico. The nature of exemptions and credits resulted in this tax being imposed only on three Arizona utilities while New Mexico utilities were unaffected. Arizona sought to invoke the Supreme Court's original jurisdiction under article III, section two, clauses one and two, and under 28 U.S.C. § 1251(a)(1), as a controversy between two states.

In deciding whether to grant the motion for leave to file a bill of complaint the Court quoted the *Illinois v. Milwaukee* version of the discretionary test including the language about 1251(a)(1).[64] The Court went on to quote the *Massachusetts v. Missouri* test in its entirety.[65] Both of those cases, however, were between a state and citizens of another state, the appropriate situation for application of the 1251(b) discretionary test. The Court in *Arizona v. New Mexico* never characterized the suit as anything but a controversy between two states. Nevertheless, the Court applied the discretionary test, finding that a pending state-court action in New Mexico in which the three Arizona utilities were seeking a declaratory judgment on the tax would provide "an appropriate forum in which the *issues* tendered here may be litigated."[66] Although the Court mentioned a possible alternative rationale,[67] the fact that there was an appropriate alternative forum appears to have been the Court's basis for denying the plaintiff state's motion for leave to file a complaint.

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63. 425 U.S. 794 (1976) (per curiam).

64. *See supra* text accompanying notes 60-61.

65. 425 U.S. at 797. *See supra* text accompanying note 19.

66. 425 U.S. at 797 (emphasis in original).

67. The Court stated, "In denying the State of Arizona leave to file, we are not unmindful that the legal incidence of the electrical energy tax is upon the utilities." 425 U.S. at 797-98. If, as this statement implies, the Court believed that Arizona was not the real party in interest, there is ample precedent for denying jurisdiction on that ground alone without resorting to the discretionary test developed for § 1251(b). The controversy would not only be outside the exclusive original jurisdiction of the Court because it was not between two states, *see, e.g.*, Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 392 (1938), but would also be outside the jurisdiction of any federal court because the eleventh amendment precludes jurisdiction over a suit in which a citizen of one state sues another state without its approval. *See* U.S. CONST. amend. XI.

Justice Stevens' concurring opinion asserted that Arizona did not have standing since neither it nor its citizens had yet been affected by the tax.[68] The Justice questioned the majority's confusion of exclusive and nonexclusive original jurisdiction. "[E]xcept to the extent that they apply to Arizona's attempt to litigate on behalf of an entity which has access to another forum, I do not believe the comments which the Court has previously made about its nonexclusive original jurisdiction adequately support an order denying a State leave to file a complaint against another State."[69]

The majority in *Arizona v. New Mexico* might have reached the right decision in declining to exercise its original jurisdiction, based on either Justice Stevens' concurrence or the majority's possible alternative rationale. However, the Court based its decision on faulty analysis, applying the 1251(b) discretionary test to a 1251(a) situation. The misapplication of this test may not always have such equitable results.

B. Maryland v. Louisiana

The second case to apply the 1251(b) discretionary test to a 1251(a) situation was *Maryland v. Louisiana*.[70] Maryland and eight other states, joined by the United States, the Federal Energy Regulatory Commission, and seventeen pipeline companies brought an original action, challenging the constitutionality of Louisiana's first-use tax.[71] The tax was imposed on natural gas passing through Louisiana after being produced in the Outer Continental Shelf—an area which by court ruling and by statute belongs to the federal government.[72] The first-use tax on Outer Continental Shelf-produced gas was equal to the severence tax Louisiana imposed on gas produced within the state's boundaries, and was challenged as violating the supremacy clause and the commerce clause of the Constitution.

The Supreme Court first determined that the plaintiff states had standing to sue as proprietary users of gas and as *parens patriae* for their citizens, because both the states and the

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68. *Arizona v. New Mexico* is a per curiam opinion with only Justice Stevens concurring.

69. 425 U.S. at 798-99 (Stevens, J., concurring).

70. 451 U.S. 725 (1981).

71. LA. REV. STAT. ANN. §§ 1301-1315 (West Supp. 1980).

72. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1343 (1976); *see, e.g.*, United States v. Louisiana, 446 U.S. 253 (1980).

citizens sustained the eventual economic burden of the tax.[73] The Court then found that the controversy was between two or more states despite the presence of non-state intervenors.[74] This finding should have ended the jurisdictional inquiry; the definition of section 1251(a) was satisfied and the Court had exclusive original jurisdiction. Instead, the Court cited *Illinois v. Milwaukee* for the requirement that a case meet the *Massachusetts* test before the Supreme Court would exercise its exclusive original jurisdiction. "It is true," stated the Court, "that we have construed the congressional grant of exclusive jurisdiction under § 1251(a) as requiring resort to our obligatory jurisdiction only in 'appropriate cases.' "[75]

The Court drew a distinction between "obligatory jurisdiction" and "exclusive jurisdiction." However, if the Supreme Court has exclusive jurisdiction over a case, no other court can have jurisdiction over it.[76] *California v. Arizona*[77] reiterated this rule, stating that "this is the only federal court in which California can sue Arizona, because Congress has conferred upon it 'original and *exclusive* jurisdiction' over controversies between states."[78] "[A] district court could not hear the claims against Arizona, because this Court has exclusive jurisdiction over such claims."[79] Thus, no satisfactory distinction can be drawn between the words obligatory and exclusive in the context of the Supreme Court's original jurisdiction.

Nevertheless, in *Maryland v. Louisiana,* the Court quoted the discretionary test articulated in *Illinois v. Milwaukee* and applied it to the case. As usual, the analysis of the seriousness of the plaintiff's claim was passed over. For the second part of the test, the Court looked to the availability of another appropriate

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73. 451 U.S. at 736-39.

74. The Supreme Court resolved an issue that was not previously settled in original jurisdiction cases: "In a suit between states, would the intervention of a person other than a state as plaintiff violate the Eleventh Amendment?" HART & WECHSLER, *supra* note 30, at 250. In one footnote in the case of *Maryland v. Louisiana,* the Court accepted a special master's recommendation that seventeen pipeline companies be allowed to intervene as plaintiffs in the action against Louisiana. The Court appears not to have noticed the implications of this decision, but it has nonetheless effectively answered the above question in the negative. 451 U.S. at 748 n.21.

75. 451 U.S. at 739.

76. Illinois v. Milwaukee, 406 U.S. at 100-01; Ames v. Kansas, 111 U.S. 449, 470-72 (1884).

77. 440 U.S. 59 (1979).

78. *Id.* at 61 (emphasis in original).

79. *Id.* at 63.

forum for the parties and issues. The issues tendered in the original action were all being litigated in three contemporaneous lawsuits—two in Louisiana state court and one in federal district court.[80] The United States and the plaintiff states had not moved to intervene in the state suits even though Louisiana represented that such motions would not be opposed.[81] Because the Court found that none of the plaintiff states were directly represented in these pending actions in lower courts, it reasoned that it was required to exercise its original jurisdiction for lack of an appropriate alternative forum.

The Court recognized the similarity between *Maryland v. Louisiana* and *Arizona v. New Mexico,* but distinguished *Arizona* in order to reach the opposite result in *Maryland.*[82] In the *Arizona* case a pending state court action between the taxed utilities and the taxing state had been held to be an appropriate forum for the issues tendered in the original jurisdiction case. The Court pointed out that one of the utilities in the state court action was a political subdivision of Arizona and could represent the state. In the *Maryland* case, there were no subdivisions of the plaintiff states that could represent them in the lower courts. The Supreme Court further distinguished *Maryland v. Louisiana* because the case involved "unique" concerns of federalism and because the United States had a special interest in the administration of the Outer Continental Shelf.[83]

The dissent in *Maryland v. Louisiana,* though not recognizing the distinction that is statutorily drawn between concurrent and exclusive original jurisdiction cases, did recognize that the majority did a poor job of applying the *Massachusetts v. Mis-*

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80. As of the date of the Supreme Court opinion, the State of Louisiana had sued in its own state court for a declaratory judgment that the tax was constitutional. Edwards v. Transcontinental Gas Pipe Line Corp., No. 216,867 (19th Judicial Dist., East Baton Rouge Parish). The pipeline companies had removed the case to federal district court, but it was remanded back to state court. Edwards v. Transcontinental Gas Pipe Line Corp., 464 F. Supp. 654 (M.D. La. 1979). The pipeline companies then filed a refund suit in state court after paying the tax under protest. Southern Natural Gas Co. v. McNamara, No. 225,533 (19th Judicial Dist., East Baton Rouge Parish). The Federal Energy Regulatory Commission also sued several state officials in federal district court to enjoin enforcement of the tax. F.E.R.C. v. McNamara, No. 78-394 (M.D. La.). Only the last action was stayed pending the original action before the Supreme Court. 451 U.S. at 740-41.

81. 451 U.S. at 741.

82. *Id.* at 743-45.

83. *Id.* at 743-44.

souri test to the facts.[84] Justice Rehnquist pointed out that had the Court followed its own precedent in exercising its original jurisdiction sparingly and only in cases with a demonstrated need, original jurisdiction would have been denied in this case.[85]

In addition to doing an inadequate job of applying the *Massachusetts* test (as was pointed out by the dissent), the majority has also broken with precedent in holding that because the plaintiff states were not actually parties to pending court action below, the Supreme Court had to exercise original jurisdiction because of the lack of an appropriate alternative forum. Before *Maryland v. Louisiana*, in cases using the *Massachusetts* test, the plaintiff states had always had the burden of proving that in actuality no alternative forum existed.[86] In this case the Court assumed the lack of an alternative forum despite noting that there were several pending lower court actions in which the plaintiff states did not even try to intervene. The Court had to turn the *Massachusetts* test on its head in order to reach a result that could have been simply based on the definition of exclusive original jurisdiction.[87]

Once again, the Court reached the appropriate result, in exercising original jurisdiction over a case between states, through inappropriate analysis—an *incorrect* application of the *wrong* test.

III. Historical Purposes of the Article III Grant of Original Jurisdiction in the Supreme Court

From the analysis in *Arizona v. New Mexico* and *Maryland v. Louisiana*, it appears that the Court has committed itself to using the 1251(b) discretionary test, which was designed for concurrent original jurisdiction, in the context of 1251(a) cases between two or more states—a context in which the Court's original jurisdiction is by definition exclusive. This course of action not only ignores the statutory distinction in section 1251, but also defeats the traditional purposes of the article III grant of

84. *Id.* at 760-71 (Rehnquist, J., dissenting).

85. *Id.*

86. Georgia v. Pennsylvania R.R. Co., 324 U.S. at 470; Massachusetts v. Missouri, 308 U.S. at 19.

87. If exclusive original jurisdiction is truly exclusive in the Supreme Court, no other court could exercise jurisdiction over a suit between two states, resulting in no valid alternative forum even under the *Massachusetts v. Missouri* test. The Supreme Court in *Maryland v. Louisiana* did not recognize this exclusivity.

original jurisdiction to the Supreme Court.

Traditionally, two reasons have been cited for the grant of original jurisdiction to the Supreme Court. The first was to afford an appropriate tribunal—the highest in the land—to those whose rank and dignity required it.[88] The Supreme Court was thus historically opened to states and foreign ambassadors.[89] The second was to avoid the partiality that was expected to exist to some degree in the state courts.[90]

These bases for original jurisdiction in the Supreme Court were considered especially relevant in cases between two or more states. Men who had figured prominently in the framing of the Constitution were members of the first Congress, the Congress that enacted the Judiciary Act of 1789.[91] This Act was an enunciation of the exclusive-nonexclusive distinction we now find in 28 U.S.C. § 1251(a) and (b).[92] Apparently those men felt that some controversies enumerated in the article III grant of original jurisdiction could be adjudicated in courts other than the Supreme Court, *i.e.*, those listed in what is now section 1251(b), but that other controversies, those set forth in section 1251(a), needed to be brought exclusively before the Supreme Court. Apparently, in suits in which both the plaintiff and the defendant are sovereign states, no less than the Supreme Court of the United States was to be open to them. In addition, no sovereign state was to be forced to subject itself to the courts of another state. A third reason for the article III grant, the state's need for

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88. Alexander Hamilton, in THE FEDERALIST, said of the Supreme Court's original jurisdiction, "In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." THE FEDERALIST No. 81, at 508 (A. Hamilton) (H. Lodge ed. 1888). *See also* Ames v. Kansas, 111 U.S. at 464.

89. Article III of the Constitution also designates that the Supreme Court shall have original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls." U.S. CONST. art. III, § 2, cl. 2. Section 1251(a)(2) provides that the Supreme Court's original jurisdiction shall be exclusive when the foreign representative is a defendant. However, because of the development of the doctrine of diplomatic immunity, only three cases have ever sought to invoke the Supreme Court's exclusive original jurisdiction over diplomats. *See The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 667-68 (1959). *See generally* HART & WECHSLER, *supra* note 30, at 288-90; Wagner, *The Original and Exclusive Jurisdiction of the United States Supreme Court*, 2 ST. LOUIS U.L. REV. 111, 119-34 (1952).

90. THE FEDERALIST No. 80, at 498 (A. Hamilton) (H. Lodge ed. 1888). *See also* Ohio v. Wyandotte, 401 U.S. at 500; Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 475-76 (1793).

91. Speaking of the first Judiciary Act, the Supreme Court noted that this "bill was drawn by Mr. Ellsworth, a prominent member of the convention that framed the Constitution, who took an active part in securing its adoption by the people, and who was afterwards Chief Justice of this Court." Ames v. Kansas, 111 U.S. at 463.

92. 28 U.S.C. § 1251 (1976) (cited in full, *supra* note 5).

a forum in which to bring all defendants, has been added by later cases.[93] Because of the emphasis placed on this last reason by the Supreme Court, it has essentially eclipsed the aforementioned historical purposes underlying the jurisdictional grant.

A. *Current Use of the* Massachusetts *Test Undercuts the Historical Purposes of the Article III Grant*

The Court's recent use of the *Massachusetts* test in the context of a controversy between two states, with the test's emphasis on the availability of an alternative forum, has undercut the traditional purposes underlying the grant of original jurisdiction. The *Massachusetts* test focuses mainly on finding an alternative forum where jurisdiction can be had over all the parties, where the issues may be tendered, and where relief may be had. Thus, the first consideration, the dignity of the parties, is often completely ignored. The second consideration, avoiding partiality in the state courts, can also be completely negated by the inquiry into the availability of an alternative forum. Although the Court has recently noted that "parochial factors might often lead to the appearance, if not the reality, of partiality to one's own" in a state court,[94] this issue was not considered when the appropriate case came before the Court. In *Arizona v. New Mexico,* a controversy between two states,[95] the Court refused to exercise its original jurisdiction because the issues tendered could be litigated in a pending state court action. The resulting spectacle of a state, or its subdivision, defending suit in the court of a sister state was precisely what the framers of the Constitution were seeking to avoid by the grant of original jurisdiction.

Relegation of a suit to state court will frequently occur under the *Massachusetts* test as it is now applied. When the Supreme Court decides not to exercise original jurisdiction over a case, jurisdiction is not automatically conferred on a lower federal court. Even a suit between two states must be grounded in some statutory jurisdictional basis, such as diversity of citizenship or federal question jurisdiction, in order to bring a case before a lower federal court. Oddly enough, when two states are in controversy, there is no diversity of citizenship under 28

93. *E.g.,* Ohio v. Wyandotte, 401 U.S. at 500.
94. *Id.*
95. *See supra* notes 65-67 and accompanying text.

U.S.C. § 1332.[96] A state suing in its sovereign capacity is not considered a citizen of itself for purposes of diversity of citizenship jurisdiction.[97] Therefore, unless the party states can find some statutory jurisdictional basis other than diversity they will be forced to adjudicate in a state court. Because of the Supreme Court's recent addition to the *Massachusetts* test of the requirement that the controversy not be based on state law, many more cases will be refused the Court's original jurisdiction.[98] Thus, when two states need the exercise of the Supreme Court's original jurisdiction in order to have any federal forum at all, the Court is even more likely to decline exercise of its jurisdiction because the controversy turns on state law. Again, the purposes of the article III grant of original jurisdiction are defeated.

The historical purposes of the article III grant of original jurisdiction, to make available the highest tribunal to the dignified states and to avoid partiality in the state courts, are ignored by the Court's current use of the 1251(b) test in 1251(a) situations. These purposes may be completely devitalized in any suit between two states that is relegated to a state court, an occurrence that is more than likely under the *Massachusetts v. Missouri* test.

B. The Court's Persuasive Reasons for its Reluctance to Exercise Original Jurisdiction

The Supreme Court's reluctance to exercise original jurisdiction is understandable.[99] Although the number of original jurisdiction cases heard by the Court each year is small,[100] original jurisdiction cases have proven to be extremely time consuming.[101] In cases since *Massachusetts v. Missouri*, the Court has voiced a concern that exercising jurisdiction in cases that do not

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96. Section 1332 states that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 . . . and is between—(1) citizens of different states . . . . " 28 U.S.C. § 1332 (1976).

97. Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 487 (1894).

98. *See supra* notes 46-48 and accompanying text.

99. See 451 U.S. at 761-63 (Rehnquist, J., dissenting) for an overview of the Court's reasons for limiting original jurisdiction.

100. The Supreme Court disposed of only 6 original cases in the years 1976 through 1979 and only 22 out of 892 cases remaining on the docket as of July 2, 1980 were original cases. 1980 ANN. REP. OF THE DIRECTOR OF THE AD. OFF. OF THE U.S. CTS. 353.

101. For example, a complex case between Wyoming and Colorado came before the Supreme Court four times before final resolution. Wyoming, v. Colorado, 259 U.S. 419 (1922); 286 U.S. 494 (1932); 298 U.S. 573 (1936); 309 U.S. 572 (1940).

require its original jurisdiction will impair its most important function—that of final appellate tribunal.[102] "The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired."[103]

The Court has also voiced concern that it is not well suited to be a court of first instance.[104] "The Court is . . . structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original jurisdiction cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence."[105] The Court's use of a special master to take evidence and make reports does not solve the problem nor does it relieve the strain original cases can place on the appellate docket. "In an original suit, even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time-consuming process which seriously interferes with the discharge of our ever-increasing appellate duties."[106]

The Court's reasons for the expansion of its discretion into the area of exclusive original jurisdiction are compelling. Suits between states are by far the most burdensome of the Supreme Court's original jurisdiction cases.[107] Though the traditional reasons underlying the article III grant of original jurisdiction played an important role in the early history of the country, these reasons may no longer be so important. The requirement that states' controversies be brought before the Supreme Court was an attempt to ensure the states of the dignity thought to be

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102. Massachusetts v. Missouri, 308 U.S. at 19.

103. Washington v. General Motors, 406 U.S. at 113. *See also* Illinois v. Milwaukee, 406 U.S. at 93-94.

104. This rationale has been likened to the doctrine of forum non conveniens, which allows a court having jurisdiction to refuse to exercise it when considerations of convenience, efficiency and justice, and the availability of an appropriate alternative forum call for it. Rogers v. Guaranty Trust Co., 288 U.S. 123, 130-31 (1933). Use of this doctrine in original jurisdiction cases is unique in one important aspect. The convenience being served is that of the Court and not the litigants. *Federal Courts—Suits to Which State is a Party—Exercise of Original Jurisdiction of Supreme Court Held Discretionary*, 53 HARV. L. REV. 679 (1940); HART & WECHSLER, *supra* note 30, at 284. Perhaps as the Court's recent rationale would lead one to believe, the convenience being served is that of the entire United States in its interest in the Supreme Court's function as final appellate court.

105. Ohio v. Wyandotte, 401 U.S. at 498.

106. Georgia v. Pennsylvania R.R. Co., 324 U.S. at 470 (Stone, C.J., dissenting).

107. HART & WECHSLER, *supra* note 30, at 287.

due them. The concern for dignity has been replaced by an interest that states as well as citizens have a fair day in court, something that the Supreme Court cannot provide as easily as the lower courts, which are equipped to try cases.[108] The concern of partiality in the state courts has arguably been soothed by the establishment of a system of lower federal courts,[109] and by the fact that the state courts themselves appear to be less partial than anticipated.[110]

The reasons for the exercise of original jurisdiction by the Supreme Court are less compelling when compared to the Supreme Court's vital appellate role. Other courts can probably do a better job than the Supreme Court in trying cases between two states. No other court can replace the Supreme Court as the final appellate tribunal. Thus, the result of the Supreme Court's expanded exercise of its discretion into "exclusive" original jurisdiction cases may be appropriate in light of the reasons underlying this expansion. The Court is placing greater emphasis on its appellate function—the one function that no other court can serve. However, in doing so, the Court directly contravenes the statutory distinction between the concurrent original jurisdiction of section 1251(b) and the exclusive original jurisdiction of section 1251(a). The Court's disregard of this statute raises serious questions. Did Congress have the power to make and apply the section 1251 distinction to the constitutional grant of original jurisdiction? May the Supreme Court override such congressional action?

The language of the article III grant of original jurisdiction does not appear to require enabling legislation by Congress, and the Supreme Court has interpreted it to require none.[111] Presumably, the grant is self-executing and Congress can neither

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108. Maryland v. Louisiana, 451 U.S. at 761-63 (Rehnquist, J., dissenting).

109. The Judiciary Act of 1789 created thirteen federal district courts, divided into three circuits. Judiciary Act of 1789, ch. 20, §§ 2-4, 1 Stat. 73-75 (1853). The federal district courts have jurisdiction over many, though not all, cases that fall within the Supreme Court's original jurisdiction. *See supra* text accompanying notes 95-98.

110. *See* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 L. & Soc. Ord. 557, 559; Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem*, 1981 B.Y.U. L. Rev. 545, 548-53; Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved*, 21 De Paul L. Rev. 701, 716 (1972). *But see* Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the* Wyandotte *Case*, 12 Ariz. L. Rev. 691, 696, 700 (1970).

111. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861).

contract nor enlarge the Court's original jurisdiction.[112] Furthermore, the exceptions clause of article III appears to apply only to the appellate function of the Supreme Court, thus leaving the original jurisdiction within the power and interpretation of the Court and not the Congress.[113] Perhaps Congress overstepped its bounds in making the section 1251 distinction. Clearly, the Supreme Court can declare the statute to be invalid if the Court finds it unconstitutional.[114] However, the Court should face this statute squarely and decide whether Congress has the power to define the article III grant of original jurisdiction.

Even if the Supreme Court declares the statuory distinction between exclusive and concurrent original jurisdiction to be invalid, the Court has chosen an inappropriate method of expanding its use of discretion in original jurisdiction cases. Application of the *Massachusetts v. Missouri* test to controversies between two states defeats the purposes underlying the grant of original jurisdiction. The Court must consider what is left of the historical purposes for the article III grant in defining a new test for controversies between states. The concern of relegating a state to the courts of another state may be all that is left of these historical purposes, but the Court should face the issue and resolve it rather than abandon the article III purposes sub silentio.

As the Court's most recent original jurisdiction cases have shown, exclusive original jurisdiction in the Supreme Court no longer exists. Perhaps the Court is right in making this change. However, the change should be recognized for what it is, a complete disregard of the statute that purports to divide original jurisdiction into exclusive and concurrent original jurisdiction, and a substitution of new reasons for the article III grant of original jurisdiction in the Supreme Court.

Julie Vick Stevenson

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112. HART & WECHSLER, *supra* note 30, at 242; South Carolina v. Katzenbach, 383 U.S. 301, 357 n.1 (1966) (Black, J., dissenting).

113. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

114. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see* Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B.U.L. REV. 1, 13-14 (1951).