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William S. Barnes

SUITS BETWEEN STATES IN THE SUPREME COURT

WILLIAM S. BARNES*

James Brown Scott, the eminent authority on international law, published in 1919 a collection of the seventy controversies between states which had been settled by the Supreme Court of the United States.[1] His purpose in analyzing these cases was to point out by analogy the possibilities for the new World Court[2] in the settlement of international disputes by peaceful means. During that period many other writers emphasized the value of the experience of our federal jurisdiction in this regard.[3]

> "The powers of the Supreme Court to settle disputes between states, taken up reluctantly and with extreme caution, have kept pace with the development of national power, have broadened in their scope and become more elastic with the years, and without necessity to use force or even hint at it except in the rarest cases, have become an example to the nations of the constructive possibilities of reason in a world of ever-recurring controversies and disputes. There are few more significant developments in the history of modern jurisprudence."[4]

During the thirty-five years since this was written, over fifty more cases have come before the Court, and another war has caused renewed efforts in the quest for a method of maintaining peace. Yet the re-establishment of an international court of justice has not been heralded with the same enthusiasm, though the analogy has been repeated.[5]

A study of contemporary procedure and jurisdiction of the Supreme Court is a prerequisite of any plans for the expansion of the business of the World Court in the future. The present emphasis on international organization may lead to new legal problems in much the same manner as the growth of federal power has done in this country in the last quarter-century.

This paper will discuss only those cases in which an opinion was

* Secretary, International Legal Studies, Harvard Law School.

1. SCOTT, JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION (1919).

2. The Statute of the Permanent Court of International Justice was signed in 1920.

3. BALCH, A WORLD COURT IN THE LIGHT OF THE UNITED STATES SUPREME COURT (1918); Caldwell, *The Settlement of Interstate Disputes*, 14 AM. J. INT'L L. 38 (1920); Taft, *United States Supreme Court the Prototype of a World Court* in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES No. 21 (1915); WARREN, THE SUPREME COURT AND SOVEREIGN STATES (1924).

4. Caldwell, *The Settlement of Interstate Disputes*, 14 AM. J. INT'L L. 38, 68 (1920).

5. Buchanan, *An Analogy in Support of the World Court*, 30 J. AM. JUD. SOC'Y 130 (1946).

rendered, omitting the admittedly significant memorandum reports for lack of space. Due to the complicated and detailed nature of many of the decrees, analysis of the substantive law of these interstate controversies is confined to a review of general principles.[6]

The history of controversies "between two or more states" goes back to colonial days, when nine cases were referred to the Privy Council of England. "These early settlements were evidently not in any sense international arbitrations, but had all the paternal character of administrative determinations, both in their nature and results."[7] Under the Articles of Confederation, provision was made for a court to determine the controversy, the litigant state naming the persons from whom the judges would be drawn by lot, with power in Congress to do so if the state neglected to name them. The judges were to proceed to judgment even if the defendant state refused to appear, making it the "first judicial tribunal with compulsory jurisdiction over sovereign states."[8] It is interesting to note that the Constitutional Convention considered leaving jurisdiction and boundary disputes to the Senate, but it is reported that unanimity prevailed in adopting the Virginia proposal for compulsory jurisdiction in the Supreme Court.[9] Of the three ways of settling disputes (force, agreement, and judicial decision) the first two were prohibited by the Constitution, except by consent of Congress. Nevertheless, it was fifty years before any important disputes were decided by the Court, and those involved only boundary questions. The early litigation was experimental in many respects and provides us with a perfect example of the delicacy of the judicial process.[10] The states were suspicious of the effectiveness of the Court in view of the fact that there was no body of law applicable to states, but this objection was overcome in the course of a lengthy series of cases between

6. U.S. CONST. Art. III, § 2:
"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 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. [Italics supplied].
"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 the 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."
7. Caldwell, *supra* note 4, at 41.
8. WARREN, THE SUPREME COURT AND SOVEREIGN STATES 5 (1924).
9. Warren, *The Supreme Court and Disputes between States,* 103 WORLD AFFAIRS 197, 200 n. 6 (1940).
10. New York v. Connecticut, 4 Dall. 1, 1 L. Ed. 715 (U.S. 1799); New Jersey v. New York, 6 Pet. 323, 8 L. Ed. 414 (U.S. 1832).

Rhode Island and Massachusetts.[11] It would only be repetitious to summarize the rest of the cases, which are adequately covered by Dr. Scott, but most of the established principles are based on those precedents.

Before taking up the recent cases, some mention should be made of other federal systems. The most highly developed is the Swiss Federation, where disputes between cantons have been within the jurisdiction of the Federal Court since 1874;[12] it "is bound to decide every cantonal dispute submitted to it" and applies both federal and international law. "A canton may represent the private interests of its citizens if it alleges incidentally an interest of its own," but most of the cases have been in the capacity of a private juridical person.[13] In Canada, there have been only five cases between provinces, the first being in 1886. Recently the Privy Council has denied its jurisdiction over such appeals[14] and it may mean that all future cases will be settled by arbitration. There has only been one case in Australia[15] and it was decided "on grounds almost exactly similar to the earliest controversies between American states."[16] Apart from Switzerland, the United States is the only country which has successfully developed its federal jurisdiction to include suits between states.

In analyzing the experience of the last twenty-seven years, certain conclusions are inescapable. Judicial settlement of interstate disputes is only an incidental by-product of the development of federal rights in individuals. The analogy to the World Court is weak in that the Supreme Court jurisdiction would not function without the federal system of justice between individuals. The meaning of "justiciable controversy" is constantly expanded by the Court, and the *ad hoc* quality of each case has encouraged litigation. The appointment of a Special Master in water rights cases has resulted in a new administrative function for the Court. The Court is making new law which could not be administered if the Court did not have jurisdiction over individuals.

The development of controversies between states since 1919 has indicated that increasing attention is being given to the potentialities of the original jurisdiction of the Supreme Court. The principal considerations have been jurisdictional and procedural rather than substantive. For example, the most recent cases involving new disputes between states have been handled on motion or by reference to a

11. The final decision is found in 4 How. 591, 11 L. Ed. 1116 (U.S. 1846).
12. SWISS FEDERAL CONSTITUTION OF 1874, Arts. 5, 110, 113.
13. Schindler, *The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes*, 15 AM. J. INT'L L. 149, 155, 159 (1921).
14. A.G. of Ontario v. A.G. of Canada, [1953] 1 All E.R. 137 (P.C.).
15. South Australia v. Victoria, 18 Commonwealth L.R. 115 (1914).
16. Caldwell, *The Settlement of Interstate Disputes*, 14 AM. J. INT'L L. 38, 52 (1920).

Special Master. The older suits which have involved boundaries and water rights have come back on the docket for modification of the substantive decree, in one instance[17] to conform to an agreement between the parties, and in another[18] to take account of the changed situation resulting from the construction of dams.

During the last thirty-five years, the tremendous development of irrigation, flood control, and hydro-electric power has resulted in many disputes over water rights, which have given a new function to the Supreme Court. The balance of interests involved in an equitable division between states requires delicacy and an infinite capacity for detail. Although there are still some boundary disputes, the years of litigation since the first decision of such a suit between states[19] has been marked by a tendency for the Court to rely on the appointment of Special Masters. It is interesting to note that the interstate business of the Swiss federal court is parallel to our own as to boundary disputes and water rights, the only major difference being in the field of double taxation where the Swiss court has always held it to be inadmissible, and since 1874 it has been outlawed by the Constitution.[20]

The facts presented to the Supreme Court in the various cases between states are discussed below in some detail in order to suggest the atmosphere in which the procedural problems of original jurisdiction are posed. They fall into three broad categories: boundary disputes, interstate water rights, and prevention of injury to a state by the action of another state.

(1) *Boundary Disputes*

In a suit to determine the boundary along the Mississippi River, the facts showed that in 1848 a bend in the river was straightened by a sudden shift in the channel, which shift left an island on the Mississippi side.[21] Although no agreement had been made by the parties, the boundary of Arkansas on admission to the Union was declared to be the main channel, whereas that of the defendant was "on the river and up the same." Mississippi contended that it should be equally distant from the two banks, a solution which would give her half of the new island. The Court held that the line was fixed at the middle of the channel of navigation as it existed before the

17. Kansas v. Missouri, 340 U.S. 859, 71 Sup. Ct. 86, 95 L. Ed. 628 (1950).
18. Nebraska v. Wyoming, 345 U.S. 981, 73 Sup. Ct. 1041, 97 L. Ed. 1394 (1953).
19. Rhode Island v. Massachusetts, 4 How. 591, 11 L. Ed. 1116 (U.S. 1846).
20. Schindler, *The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes*. 15 AM. J. INT'L L. 149, 165 (1921). See also SWISS CONST. Art. 46(2).
21. Arkansas v. Mississippi, 250 U.S. 39, 39 Sup. Ct. 422, 63 L. Ed. 832 (1919).

sudden change in the course of the river, the controlling consideration being equality of access to navigation. A commission of three men was appointed to ascertain the exact line. The Court did not give any weight to the decision of the Mississippi courts which had given individuals rights to the middle of the island. The doctrine of the "thalweg," as it is called in international law, is not absolute. Where the avulsion has moved the navigable channel, the boundary remains in the old channel.

> "Equality in the beneficial use often would be defeated . . . by fixing the boundary on a given line merely because it connects points of greatest depth."[22]

Another exception to the doctrine of "thalweg" is carved out where there is no navigable channel. On the basis of the Treaty of 1787, Georgia contended that the line in the Savannah River and its upper reaches was midway between banks, and that where there were islands, it was in the middle of the northerly branch. The line was important in regard to taxation rights over dams and electric plants. South Carolina claimed to the low-water mark on the Georgia bank. The decision was an interpretation of the Convention and held that Georgia was entitled to half the river and the islands.[23]

The next case of a boundary concerning the middle of the river channel involved the difficult problem of determining where the current ran in 1850, over seventy-five years earlier. The evidence, for what it was worth, seemed to indicate that the river had been all over the Rio Grande Valley during that period but was substantially as alleged in the cross-bill during the crucial year.[24] The witnesses presented conflicting testimony and the master's findings were accepted as "substantially correct." This case points out the weakness of a reference back to a particular date in the practical problem of proof.

Another aspect of the doctrine is brought out by the case of *Louisiana* v. *Mississippi*[25] where the master found that changes in the course of the river were by erosion and accretion prior to 1913 but in that year there was an avulsive change. It is strange that so much should depend on the subtle distinction between a gradual and a sudden change in the flow of the river, especially where it depends on doubtful testimony.

The most recent case in this category concerned the boundary at

22. Minnesota v. Wisconsin, 252 U.S. 273, 282, 40 Sup. Ct. 313, 64 L. Ed. 558 (1919).
23. Georgia v. South Carolina, 257 U.S. 516, 42 Sup. Ct. 173, 66 L. Ed. 347 (1922).
24. New Mexico v. Texas, 275 U.S. 279, 48 Sup. Ct. 126, 72 L. Ed. 280, *modified*, 276 U.S. 558 (1927).
25. 282 U.S. 458, 51 Sup. Ct. 197, 75 L. Ed. 459 (1931).

Forbes Bend in the Missouri River.[26] Kansas relied on accretions between 1900 and 1917 to establish her right to a large island shaped like a horseshoe, and when the channel on her side of the island became predominant, she claimed it was an avulsion and that she therefore still owned the island. The Court held that Kansas failed to sustain the burden of proof that the main channel ever flowed on the Missouri side. The States were agreed on the law as to accretions and avulsions, so the case was based on the development of testimony, making an issue of fact which was really decided by the findings which the master made.

The rule that the boundary shall be the middle of the channel of strongest current had disadvantages and raised doubts:

> "Even so, there has emerged out of the flux of an era of transition a working principle of division adapted to the needs of the international community. . . . The line of division is to be the center of the main channel unless the physical conditions are of such a nature that a channel is unknown."[27]

Old chapters, laws, agreements and treaties have supplied a starting point for judicial reasoning in some of these cases. *Vermont v. New Hampshire*[28] was decided in 1933 on the theory that the order-in-council placing the colonial boundary on the top of the west bank of the Connecticut River was nullified by the successful Revolution, and that Vermont had been admitted to the Union as an independent state with self-constituted boundaries. As a result of the terms of the state charter, the line was found to be at the low-water mark on the Vermont side, and exceptions by New Hampshire were overruled on the ground that she had not asserted dominion over the west bank, and Vermont had need for access to the water. It is hard to state any general rule as to the importance of colonial boundaries and conveyances in view of these two cases, but great weight is usually given to the original limits of territory unless it is expressly changed.

The two elements of most of these border problems which make them unpredictable are the influence of treaties or other agreements and the ripening of a prescriptive right based on long continued dominion over a strip of land. Both factors played a part in the Red River case,[29] making it unique in river boundary litigation. One of the grounds on which Texas established her right to the flood plains south of the water was the fact that she had exercised jurisdiction

26. Kansas v. Missouri, 322 U.S. 213, 654, 64 Sup. Ct. 975, 88 L. Ed. 1234 (1944).
27. New Jersey v. Delaware, 291 U.S. 361, 383, 54 Sup. Ct. 407, 78 L. Ed. 847 (1934).
28. 289 U.S. 593, 53 Sup. Ct. 708, 77 L. Ed. 1392 (1933).
29. Oklahoma v. Texas, 272 U.S. 21, 47 Sup. Ct. 9, 71 L. Ed. 145 (1926).

over the area around Big Bend for fifty years. Of course, title by prescription can only be acquired if the state acquiesces in the assertion of sovereignty.[30] Failure to exercise dominion coupled with acquiescence in the other state so doing was one basis of the decision in *Vermont* v. *New Hampshire*.[31]

Although there was language in the leading case of *Rhode Island v. Massachusetts* to the effect that the rule of limitations should not be applied in disputes between two political communities "who cannot act with the same promptness as individuals," it is no longer "equally evident that a possession so obtained . . . cannot give a title of prescription."[32] This is borne out by the case which involved a dispute between Michigan and Wisconsin over islands in the Green Bay section.[33] There was a voluminous record of eighty years' history, setting forth the fact that Wisconsin had always been in possession of the disputed area, collecting taxes, holding elections and enforcing its laws there. The Court held that the doctrine of adverse possession applied not only to individuals but to sovereign states as well.[34]

The Court has recently held that even the rule of "thalweg" does not preclude the right of a state to acquire land by prescription.[35] This doctrine of prescriptive right to territory may provide a new approach to boundary questions, giving some flexibility to rules which were based on historical considerations no longer significant. As a matter of fact, the division of the surface of the earth into states is only justified by the exigencies of political administration, and should be based on the practical convenience of separate jurisdictions rather than time-worn concepts of sovereignty. The tremendous increase in the powers of the federal government and the development of communication have conspired to reduce the importance of boundary questions, as can be seen by the way in which these suits were handled. It has come to be little more than a technical academic question save in exceptional cases, and the Court has been shifting its emphasis to a different type of interstate controversy.

(2) Interstate Water Rights

During the last century, there have been ten separate controversies

30. Louisiana v. Mississippi, 282 U.S. 458, 51 Sup. Ct. 197, 75 L. Ed. 459 (1931), and New Jersey v. Delaware, 291 U.S. 361, 54 Sup. Ct. 407, 78 L. Ed. 847 (1934) denied prescriptive claims on this ground.

31. 289 U.S. 593, 53 Sup. Ct. 708, 77 L. Ed. 1392 (1933).

32. 15 Pet. 233, 272-73, 10 L. Ed. 721 (U.S. 1841).

33. Michigan v. Wisconsin, 270 U.S. 295, 46 Sup. Ct. 290, 70 L. Ed. 595 (1925).

34. As to territorial jurisdiction in respect to fishing, the Court said that "equality of right can best be attained by a division of the area as nearly equal as conveniently may be made having regard to matters heretofore litigated." Wisconsin v. Michigan, 295 U.S. 455, 462, 55 Sup. Ct. 786, 79 L. Ed. 1541 (1935).

35. Arkansas v. Tennessee, 310 U.S. 563, 60 Sup. Ct. 1026, 84 L. Ed. 1362 (1940).

before the Supreme Court over water rights in interstate streams. Nine of these, involving twenty-one different opinions, have come up in the last thirty-five years. There have been over a hundred memorandum decisions[36] issued by the Court in connection with these disputes, to say nothing of the countless volumes of testimony which have been taken.

The original suit of *Kansas v. Colorado*[37] involved the use of the Arkansas River; the first phase of the suit established the jurisdiction of the Court and the last phase dismissed the bill without prejudice to the right of Kansas to bring another suit if the equitable apportionment of benefits should be destroyed in the future. The important point of the case was that in a situation where the States operated on different rules as to water rights,[38] the benefits of the river could be equitably divided by the Court whenever either state was injured by the diversion of water by the other. Kansas was not entitled to the whole flow, as in the state of nature, nor could Colorado be justified in cutting her off by disposing of all the waters within her borders.

As a consequence of the dismissal of the suit, Colorado improved her irrigation system to the point that certain private suits had been brought to enjoin the upstream users. Colorado brought suit for an injunction against these private suits asserting that a proper settlement can only be made in litigation between the two states. Kansas answered that the increase in Colorado use had enjoined the downstream users and asked for an injunction against further diversion until its rights were satisfied. The case went to a Special Master who reported that the private suits ought to be enjoined, that Kansas had been injured and that an allocation in acre feet should be made giving 5/6 to Colorado and 1/6 to Kansas. The court allowed the injunction, but dismissed the states on the ground that there was no substantial injury to Kansas and the case is "not to be determined as if it were one between two private riparian appropriators" allotting fractions to each.[39]

This case represents the only time in which two states having divergent water law principles attempted to get an apportionment in the Supreme Court, and it is important to note that no relief was given. This conclusion seems to have resulted from the absence of any controlling legal basis for determining respective rights:

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36. One case was decided without opinion by memorandum confirmation of the master's report. Texas v. New Mexico, 308 U.S. 503, 510, 60 Sup. Ct. 63, 84 L. Ed. 435 (1939); 344 U.S. 906, 73 Sup. Ct. 326, 97 L. Ed. 699 (1953).

37. 185 U.S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838 (1902) (opinion by Chief Justice Fuller), 206 U.S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956 (1907) (opinion by Justice Brewer).

38. Kansas applied the common law rule of riparian rights whereas Colorado adhered to the doctrine of priority of appropriation.

39. Colorado v. Kansas, 320 U.S. 383, 393, 64 Sup. Ct. 176, 88 L. Ed. 116 (1943).

> "Laws in respect of riparian rights that happen to be effective for the time being in both states do not necessarily constitute a dependable guide or just basis for the decision of a controversy."[40]

A very important case[41] was filed by Arizona as a result of the Boulder Canyon Project authorizing the Secretary of the Interior to build a dam and hydro-electric plant for the purpose of improving navigation and flood control as well as reclamation and electric power. The complainant state alleged an invasion of its quasi-sovereign rights by diverting water and an attempt to enforce the terms of the Colorado River Compact which it never ratified. The Court upheld the action of the United States as an exercise of the power over navigation, without deciding whether it had any power over irrigation.

Of the four controversies yet to be discussed, three follow a fairly definite pattern which obviously represents a departure from the earlier approach without specifically overruling any of the above mentioned decisions. Mr. Justice Holmes paved the way in 1931 in the apparently innocuous settlement of *New Jersey v. New York*.[42] This was a suit to enjoin the diversion of the tributaries of the Neversink and Delaware Rivers by New York to provide a new water supply for New York City. New Jersey insisted on the strict application of the common law rule of riparian rights alleging interference with navigation and injury to the oyster industry in Delaware Bay and to the use of the river for recreational purposes. The latter basis was held to be valid and an injunction was granted against diversion in excess of 440 million gallons per day.

The only exception to the earlier cases was that of *Wyoming* v. *Colorado*, finally decided in 1939, but filed in 1911. The case was reargued three times before the Supreme Court because of "the novelty and importance of some of the questions involved."[43] The suit joined two corporate defendants who were diverting water from the Laramie River under the authority and permission of Colorado. The complainant state sought an injunction on two grounds; that water cannot lawfully be diverted from the watershed and that it had made appropriations prior to those which Colorado was asserting. The first ground was held to be untenable as was the answer of the defendant that it had a right to dispose of the water "regardless of any prejudice it may work." The other grounds of defense were that under an equitable division, she was not exceeding her share and that there was

40. Connecticut v. Massachusetts, 282 U.S. 660, 670, 51 Sup. Ct. 286, 75 L. Ed. 602 (1931).
41. Arizona v. California and the Secretary of the Interior, 283 U.S. 423, 51 Sup. Ct. 522, 75 L. Ed. 1154 (1931).
42. New Jersey v. New York, 283 U.S. 336, 51 Sup. Ct. 478, 75 L. Ed. 1104 (1931).
43. Wyoming v. Colorado, 259 U.S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999 (1922).

enough water left for the needs of Wyoming after she had made the division complained of. The first thing which Mr. Justice Van-Devanter did in the opinion was to distinguish the case of *Kansas* v. *Colorado,* because here both states recognized the same system. As the United States was not trying to impose a policy of its own, what basis was to determine the respective rights of the parties? The combined demand for water was in excess of the dependable flow, a fact which never fails to generate action on the part of the court.[44]

The long history of this case illustrates the difficulties in which the Court may become enmeshed by assuming the role of distributor when there is not enough to go around.

Undaunted by this experience, the Court has recently undertaken an even more complicated job of "equitable apportionment" of water rights among states. The facts were presented to a Special Master and the case came back on exceptions to his report.[45] The case involves allegedly wrongful diversions of the North Platte which is a non-navigable river. Since 1930, drought conditions have prevailed and as a result, the Pathfinder Reservoir in Nebraska has never been full although water for it was appropriated in 1913. Wyoming completed the Kendrick Project in 1940, and there can be no water in that reservoir without violating the Nebraska priority. This is another case where the dependable natural flow has long been over-appropriated, but the situation is serious because Nebraska is totally dependent on water from Wyoming and Colorado. As Mr. Justice Douglas points out in the opinion, "the dry cycle has precipitated a clash of interests which between sovereign powers could be traditionally settled only by diplomacy of war."[46] The complications in this case develop out of the system of dams and canals which makes for an interstate scope of water distribution without interstate administration. Nevertheless, the opinion states that the situation is "not basically different from that where two or more persons claim the right to the same parcel of land."[47] The decision really goes one step further than any previous decrees in apportioning the natural flow according to an allocation submitted by the Master which in the critical section of the river establishes a flat 25%—75% ratio. Recognizing that a genuine controversy exists, the opinion states the reasons for this particular action as follows:

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44. See Texas v. Florida, 306 U.S. 398, 59 Sup. Ct. 563, 83 L. Ed. 817 (1939), where the aggregate tax demand exceeded the amount of the estate, and compare Massachusetts v. Missouri, 308 U.S. 1, 60 Sup. Ct. 39, 84 L. Ed. 3 (1939), where it did not.

45. Nebraska v. Wyoming, 325 U.S. 589, 65 Sup. Ct. 1332, 89 L. Ed. 1815 (1944).

46. *Id.* at 608

47. *Id.* at 610

> ". . . if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible . . . there is evidence that a river-wide priority system would disturb and disrupt long established uses."[48]

The total impact of these three cases can not be overemphasized especially in view of what was said by Mr. Justice Brandeis in his dissent in *Pennsylvania* v. *West Virginia* to the effect that jurisdiction should be denied because the court was unable to grant the only relief appropriate.[49] Yet such a determination of how to divide benefits between states has been involved in these water rights cases and the Court has not declined to hear them. It is clear that a change has taken place in the ideas about the function of the Court, but it is not yet clear how revolutionary a step has been taken.

No better example of this tendency can be found than the litigation over the Chicago Sewage Canal which lasted fifteen years and involved eleven states.[50] The bill sought an injunction to prevent Illinois and the Sanitary District of Chicago from permanently diverting water from Lake Michigan. The case was referred to Charles E. Hughes as Special Master, and he reported that the bill presented a 'justiciable controversy' and that it was within the power of Congress to regulate the diversion. A diversion of 4,000 cubic feet per second was permitted and the Sanitary District was enjoined from diverting any more than that amount. The decree issued in the first case of the series not only ordered a reduction of the diversion to the point where it rests on a legal basis, but also required Illinois to put in some other means of sewage disposal. The case was referred back to the Master to find out about practical measures which would have to be taken to dispose of the sewage without any unlawful diversions. The next decree was framed on the second report which recommended a gradual reduction in the amount which could be lawfully diverted while building storm works and a sewage plant at the same time.[51] Later the decree was enlarged to require completion of the plants and a report on progress. It was hinted that "the Court did not exhaust its power by the provisions enjoining diversion of water."[52] When

48. *Id.* at 618.
49. Pennsylvania v. West Virginia, 262 U.S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117 (1923).
50. Wisconsin v. Illinois, 278 U.S. 367, 49 Sup. Ct. 163, 73 L. Ed. 426 (1929). The other complainants were Michigan, Minnesota, New York, Ohio and Pennsylvania. A motion to dismiss brought by Kentucky, Missouri, Tennessee and Louisiana as intervenors was denied in 270 U.S. 634 (1925). The earlier history of this project includes Missouri v. Illinois, 180 U.S. 208 (1901), 200 U.S. 496 (1906); United States v. Sanitary Dist. of Chicago, 266 U.S. 405 (1924).
51. 281 U.S. 179, 696 (1930) (6500 cub. ft. per second till the end of 1935, then 5000 c.f.s. till the whole system is completed in 1938).
52. 289 U.S. 395, 406, 53 Sup. Ct. 671, 77 L. Ed. 1283 (1933).

Illinois petitioned for a temporary modification allowing diversion until 1942, the court issued a per curiam decision to have a special master investigate the facts as "no adequate excuse has been presented for the delay."[53] As a result, an agreement was suggested and the Great Lakes states accomodated Illinois to the extent of allowing a limited increase in the diversion for 10 days to flush out the canal.[54] The entire history of this litigation shows a reluctance on the part of the Court to use harsh measures against a state, depending more on the force of repetition and firmness to bring about obedience in time. One could almost say that the Court regretted its acceptance of the Master's recommendation to specify the exact manner and time in which each step was to be carried out and would have preferred to avoid the supervision of compliance. The difficulty lay in the fact that the wrongful diversion of lake water could only be stopped by providing some other means of disposing of the sewage, but in view of the fact that no showing of injury or nuisance due to the sewage was made, the Court could have left this problem to the state.

Prevention of Injury

Among the controversies in which one state seeks to prevent injury by another, *Pennsylvania* v. *West Virginia*[55] stands out for its influence on constitutional law. It is one of the few cases in which the merits of the claim for relief depended upon a specific clause in the Constitution, in this case, the exclusive power of Congress over interstate commerce. The West Virginia legislature passed a law requiring public service companies to fill the needs of inhabitants of the state before sending any natural gas outside its border. Before the first World War, West Virginia produced more gas than she needed and many pipe lines were run into surrounding states with a continuous flow of gas from the point of production to the point of use. The complainants alleged that over five million people in their states depend on this supply to cook and heat and the states use it in charitable and penal institutions, schoolhouses and city waterworks. They claimed that enforcement of the new law would cause irreparable injury, costing every user at least $100 to change over to other kinds of fuel. The court enjoined the enforcement of the statute on the ground that it directly interfered with interstate commerce, and could not be sustained as a legitimate measure of conservation in the interest of the people when it really amounted to an embargo. The only other case of

53. 309 U.S. 569, 571, 60 Sup. Ct. 789, 84 L. Ed. 953 (1940).
54. 311 U.S. 107, 61 Sup. Ct. 154, 85 L. Ed. 73 (1940). Exceptions to the final report were overruled *per curiam,* 313 U.S. 547, 61 Sup. Ct. 1090, 85 L. Ed. 1513 (1941).
55. 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117 (1923).

this kind, *Louisiana* v. *Texas*,[56] where the suit was dismissed because there was no injury to the state as such but only to her citizens, was distinguished by the majority on the ground that here the state had a proprietary interest of its own. As far as the concept of a "justiciable controversy" is concerned, this case was the razor's edge on which two lines of decision were precariously balanced. The majority opinion seems to have put the old doctrine to rest although the ghost still walks among the minority. The Court answered all the arguments of the defendants as follows: the suit was not premature because the injury was "certainly impending" even though damage had not yet resulted; the pipe line companies were not essential parties, because they were adequately represented by the defendant state. This case not only allowed the complainant state to sue in behalf of its citizens to a greater extent than ever before, but it also liberalized some of the rules as to indispensable parties, allowing a state to be sued as representative of the real or active defendants.[57] Mr. Justice Holmes dissented on the merits of an analogy to the regulation of game, colored oleomargarine and spirits, which had not yet begun to move in interstate commerce, whereas McReynolds and Brandeis denied the jurisdiction of the Court altogether. Perhaps their best point was that "the vindication of the freedom of interstate commerce is not committed to any state as *"parens patriae."* Mr. Justice Brandeis goes into the 'legislative facts' in great detail, and concludes that it is an attempt to enjoin legislation, without any danger of an invasion of rights, and therefore not a 'controversy' within the meaning of the federal Constitution. The reference to public consumption of natural gas is a mere "make-weight" and there can be no injury to the Pennsylvania users until the twelve exporting companies cut off their service.

Although suits have been entertained for the collection of state-owned bonds[58] and the execution of a contract to pay a debt,[59] the first specific performance of a contract was granted only 24 years ago.[60] The highway commissions of the two states agreed to build a bridge across the Ohio River at Evansville. Citizens of Indiana sued in their state courts to enjoin the construction on the ground that the contract was invalid under state law. Indiana admitting that its officers had authority and that the contract was valid, delayed per-

56. 176 U.S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347 (1900). For an excellent analysis of the case, see SCOTT, JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION 334-44 (1919).

57. On this point, see also Wisconsin v. Illinois, 289 U.S. 395, 53 Sup. Ct. 671, 77 L. Ed. 1283 (1933).

58. South Dakota v. North Carolina, 192 U.S. 286, 24 Sup. Ct. 269, 48 L. Ed. 448 (1904).

59. Virginia v. West Virginia, 246 U.S. 565, 38 Sup. Ct. 400, 62 L. Ed. 883 (1918).

60. Kentucky v. Indiana, 281 U.S. 163, 50 Sup. Ct. 275, 74 L. Ed. 784 (1930).

formance of the contract until the suits were settled. The Court took no action against the individual defendants apparently on the ground that they could not hold up the construction merely by bringing suit and that the state would have to obey the decree of specific performance.

> "While this Court always examines with appropriate respect the decisions of state courts bearing upon such questions, such decisions do not detract from the responsibility of this court in reaching its own conclusions as to the contract obligation and impairment . . . for otherwise the constitutional guaranty could not be properly enforced."[61]

A similar fact situation was presented in the recent case involving interference with contractual obligations.[62] The University of Arkansas, an official state instrumentality, had agreed to build a hospital with funds to be provided by a private foundation organized under the laws of Texas. Texas sought to enjoin this action on the ground that Texas law required that the trust funds must be expended for the benefit of Texas residents. Litigation was pending in the Texas courts to determine the state law on this matter. The motion for an injunction against Texas has been continued until the litigation is concluded. A vigorous dissent expressed the view that it is up to the state to decide and no purpose is served by the threat implicit in keeping the case on the docket.

No review of the principles of interstate law would be complete without going into the problem of double or multiple taxation. Two cases in the same year point out the exact line between what is 'justicible' and what is not.[63] The facts of the first case indicate that four states (besides the federal Government) claimed the right to tax the estate of Colonel E. H. R. Green on the basis of domicile at the time of his death. Texas had only a weak claim but the case was referred to a Special Master and his report that Massachusetts was the true domicile was confirmed. Short of a complete renovation of the basis of jurisdiction to tax, some adjudication of this problem was deemed to be necessary because the taxes claimed were more than the net estate and it could not be decided in any state court. It would seem that this was just what the Supreme Court's original jurisdiction was designed to accomplish.

It is disappointing to find that jurisdiction was denied where one cannot collect its tax without going into the other state just because

61. *Id.* at 176.
62. Arkansas v. Texas, 346 U.S. 368, 74 Sup. Ct. 109, 98 L. Ed. 71 (1953).
63. Texas v. Florida and Massachusetts, 306 U.S. 398, 59 Sup. Ct. 563, 83 L. Ed. 817 (1939); Massachusetts v. Missouri, 308 U.S. 1, 60 Sup. Ct. 39, 84 L. Ed. 3 (1939).

there is enough to cover both claims. The Court suggested that Massachusetts had an adequate remedy against the trustees in Missouri. The states had passed reciprocal laws to avoid such a situation but nevertheless both states claimed the exclusive right to tax a trust estate left by a domiciliary of Massachusetts with trustees who were residents of Missouri. The argument of the complainant state, asking for a decision as to which had the lawful right to impose the tax is persuasive:

> "If the evils of multiple taxation are to be solved by reciprocal legislation of the States, as this court has suggested, it is essential that there be a forum where recalcitrant states may be compelled to observe the reciprocity their legislatures have provided."[64]

The Court does not seem to have faced this argument squarely in the opinion written by Chief Justice Hughes:

> "Apart from the fact that there is no agreement or compact between the states having constitutional sanction, enactment by Missouri of so-called reciprocal legislation cannot be regarded as conferring upon Massachusetts any contractual right."[65]

Before attempting to puzzle out the direction and scope of these recent cases, we must examine the procedural aspects of the cases already discussed and others which never got to the merits. There is no sharp division between substance and procedure in this field because there is no reason for making it, but it may be useful to examine the methods which the Supreme Court has used, outlining the various steps through which the litigation must go.

Jurisdiction and Procedure

In the foregoing analysis of certain interstate disputes, one may have noted the relation between the substantive result and the way in which the Supreme Court approached the controversy. The problem of acting in the capacity of a trial court in this respect is solved in many different ways. This unique branch of federal jurisdiction cannot be ignored if we are to discover the elements which make the Court successful in doing a job which other countries have left to arbitration or agreement. Of course, there is always the alternative of interstate compacts but in many instances the states have tried such a solution and failed; some other system by which disputes may be settled peacefully is obviously necessary.

The original jurisdiction over cases between states is derived directly from the Constitution and cannot be enlarged or assigned either by the Court or Congress. As Mr. Justice Brewer pointed out in *Kansas* v. *Colorado*:

64. Massachusetts v. Missouri, 308 U.S. 1, 4, 60 Sup. Ct. 39, 84 L. Ed. 3 (1939).
65. *Id.* at 16.

> "through these successive disputes and decisions, this Court is practically building up what may not improperly be called interstate common law."[66]

The cornerstone of this body of law, the "linchpin of jurisdiction" is provided by the right to sue a state without its consent. If a state does not appear, it may be subpoenaed, and proceeded against *ex parte*. The state may appear as *parens patriae* of a large body of citizens but "the interests of the State as a political community must be really involved."[67] The Court has always proceeded on principles of equity in these cases, usually in a liberal spirit. "One important phase of all these suits is to be particularly noted; the mere pendency of the suit in the Court for long periods of time, is a great mollifier."[68] An example of a typical case is that of *Vermont* v. *New Hampshire*,[69] filed in 1916 and finally closed 21 years later. It has been repeatedly pointed out that this jurisdiction and procedure differs from that which the Court pursues in suits between private parties, presumably because of the dignity of the litigants and possibly because they involve "disputes which might properly be the subject of diplomatic adjustment."[70]

The suit is generally instituted by an application for leave to file an original complaint against the named state or states, and a return by the defendant to show cause why leave should not be granted. Four recent cases were nipped in the bud when the court denied leave. Alabama sought to enjoin Arizona and four other states from forbidding sale of convict-made goods and on a return that the suit was multifarious and based on insufficient facts, the Court refused to allow the bill.[71] In the course of an opinion by Mr. Justice Butler, many of the faults of the bill are brought out which we will have occasion to discuss in another connection. Alabama failed to allege sufficient injury, there being a greater burden on states to prove the absolute necessity of the suit than on private parties.

In a later case, the Court refused to entertain a bill to perpetuate testimony of those persons who arranged the Colorado River Compact, on the ground that Arizona was not a party to the Compact, and therefore its meaning would never be material to the litigation.[72] This case came as a result of the dismissal of Arizona's bill without preju-

66. 206 U.S. 46, 98, 27 Sup. Ct. 655, 51 L. Ed. 956 (1907).
67. Caldwell, *The Settlement of Interstate Disputes*, 14 AM. J. INT'L L. 38, 64-65 (1920). For a recent discussion of this problem, see New Jersey v. New York, 345 U.S. 369, 73 Sup. Ct. 689, 97 L. Ed. 1081 (1953).
68. Warren, *The Supreme Court and Disputes between States*, 103 WORLD AFFAIRS 197, 207 (1940).
69. 300 U.S. 636, 57 Sup. Ct. 429, 81 L. Ed. 853 (1937), *supra* p. 499.
70. Chief Justice Taft in North Dakota v. Minnesota, 263 U.S. 365, 374, 44 Sup. Ct. 138, 68 L. Ed. 342 (1923).
71. Alabama v. Arizona, 291 U.S. 286, 54 Sup. Ct. 399, 78 L. Ed. 798 (1934).
72. Arizona v. California, 292 U.S. 341, 54 Sup. Ct. 735, 78 L. Ed. 1298 (1934).

dice in case stored water is used in such a way as to interfere with perfected rights or the right of Arizona to make additional legal appropriations. Two years later, Arizona was again turned down, when she sought the judicial apportionment of the waters of the Colorado River, without alleging infringement of her appropriations.[73] This time the Court went on the ground that the United States was an indispensable party (the stream was navigable) and had not consented to be sued. In the opinion, Mr. Justice Stone said that contentions that the United States cannot control water until commerce is actually moving on the river cannot be judicially determined in a proceeding to which the United States is not a party and in which it cannot be heard, as the decree could have no finality.

Another case in which motion for leave to file a bill was denied is *Massachusetts* v. *Missouri*,[74] involving the question of which state had lawful right to impose a tax on intangible property in a trust estate. The Court heard argument on both sides and Chief Justice Hughes pointed out that "Missouri cannot be brought into court by the expedient of making its citizens, parties to a suit otherwise not maintainable against the state," as recourse to the protection of the State is not necessary. He added that it would make far too much business in the Supreme Court and suggested that Massachusetts sue the trustees in the Missouri courts as the property there was sufficient to satisfy both claims.

Another aspect of this opinion is the assertion that the controversy is not 'justiciable', because the complainant is not asserting a right susceptible of judicial enforcement. It is difficult to see how this suit differs in this respect from *Texas* v. *Florida*,[75] decided earlier in the same year, the only factual difference being that there was not enough property to cover the taxes in the latter case. Nevertheless, the Court seems to accept the argument of Missouri that "the constitutional provision conferring jurisdiction is not mandatory" and that "suits not justiciable before the Constitution are not made justiciable by the Constitution."[76] But if this contention is really true then the classification of a particular subject as "political" or "non-justiciable" can never be changed and the jurisdiction must remain stagnant. It also means that the states are left with no way of deciding the controversy as "none of the states will consent to become a party to any proceedings for determining the right to collect tax in any other state."[77] We have only to look at the majority opinion in *Rhode Island* v. *Massachusetts* to discover that a political question may become judicial,

73. Arizona v. California, 298 U.S. 558, 56 Sup. Ct. 848, 80 L. Ed. 1331 (1936).
74. 308 U.S. 1, 60 Sup. Ct. 39, 84 L. Ed. 3 (1939).
75. 306 U.S. 398, 59 Sup. Ct. 563, 83 L. Ed. 817 (1939).
76. 308 U.S. 1, 10, 60 Sup. Ct. 39, 84 L. Ed. 3 (1919).
77. Texas v. Florida, 306 U.S. 398, 410, 59 Sup. Ct. 563, 83 L. Ed. 817 (1939).

although Chief Justice Taney dissented on the ground that the complaint for "sovereignty" and "dominion" should be dismissed as political.[78] It would seem that the consent to be sued and the submission to the jurisdiction of the Supreme Court would have made all interstate controversies "justiciable." As the inventor of the word himself admits, "the establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between states."[79] In other words, controversies or other relations between states are not excluded from the Court (made non-justiciable) because they are political,[80] but rather on other grounds which we will not examine.

In order to be within the judicial power of the Supreme Court, it must be a "controversy" within the words of Article III of the Constitution. With the exception of a few general remarks in some cases,[81] this problem narrows down to two points; (1) whether the suit is somehow premature and (2) whether there is any actual or threatened injury and invasion of rights. Both situations presuppose that the state has a real interest in the subject matter of the dispute; in a long line of decisions, a proprietary interest or a strong quasi-sovereign capacity have been held to be sufficient,[82] but where individual suits could remedy the situation, jurisdiction has been denied.[83] During the period in question, the right of a state to maintain suit has been recognized when the "health, comfort and prosperity of the people of the state and the value of their property are being gravely menaced."[84] But the opinion in that case by Mr. Justice Clarke goes on to say:

> Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of a serious magnitude and it must be established by clear and convincing evidence.[85]

78. 4 How. 591, 639, 11 L. Ed. 1116 (U.S. 1846).
79. Mr. Justice Bradley in Hans v. Louisiana, 134 U.S. 1, 15, 10 Sup. Ct. 504, 33 L. Ed. 842 (1889).
80. *Cf.* Cherokee Nation v. Georgia, 3 Pet. 1, 7 L. Ed. 581 (U.S. 1831); POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1936).
81. Texas v. Florida, 306 U.S. 398, 405, 59 Sup. Ct. 563, 83 L. Ed. 817 (1939); Kentucky v. Indiana, 281 U.S. 163, 50 Sup. Ct. 275, 74 L. Ed. 784 (1930); Pennsylvania v. West Virginia, 262 U.S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117 (1923); in all the cases the Court held that it had jurisdiction.
82. Georgia v. Pennsylvania R.R., 324 U.S. 439, 65 Sup. Ct. 716, 89 L. Ed. 1051 (1945); Georgia v. Tennessee Copper Co., 206 U.S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038 (1907); Missouri v. Illinois, 180 U.S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497 (1901); Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. Ed. 1233 (U.S. 1838).
83. Louisiana v. Bowles, 322 U.S. 707, 64 Sup. Ct. 1049, 88 L. Ed. 1551 (1943); Massachusetts v. Mellon, 262 U.S. 447, 43 Sup. Ct. 597, 67 L. Ed. 1078 (1923); Oklahoma v. Atchison, T. and S.F. R.R., 220 U.S. 277, 31 Sup. Ct. 434, 55 L. Ed. 465 (1911).
84. New York v. New Jersey and Passaic Valley Sewerage Comm'n, 256 U.S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937 (1921).
85. *Id.* at 309.

The tunnel which New Jersey proposed to build emptying into New York harbor did not amount to a definite threat of injury to New York State but the dismissal of the bill was without prejudice to the right to renew application if conditions should change in the future.

A similar ruling issued as to one paragraph of New York's bill against Illinois to enjoin diversion of water from Lake Michigan on the ground that there was a future possibility of interference with future water power developments at Niagara; the motion to strike the paragraph was sustained without prejudice.[86] Another premature suit was the one brought by Arizona against California and the Secretary of the Interior to enjoin the building of Boulder Dam on the ground that it is an unlawful diversion of the water of the Colorado River. It was dismissed on two grounds, the latter being that there is no present invasion of her quasi-sovereign rights.[87]

Another group of cases does not leave the state free to litigate later because the Court finds that the state has no right which could ever be invaded.[88] The recent modifications of the earlier decree in *Nebraska* v. *Wyoming* bear out the warning expressed by Mr. Justice Roberts in his dissent:

> "Without proof of actual damage in the past, or any threat of substantial damage in the future, the court now undertakes . . . to supervise for all time the respective uses of an interstate stream on the basis of past use. . . . Experience teaches the wisdom of the rule we have so often announced, that in such cases, the complaining state must show actual or immediately threatened damage, of substantial magnitude to move the court to grant relief, and that until such a showing is made, the court should not interfere."[89]

Some cases have been referred to a Special Master and after a hearing on the merits have been dismissed on various grounds.

> "The fact that the Court, for reasons of policy or convenience, does not exercise the power which it possesses and which has been traditionally exercised in like cases between private suitors, does not deprive the suit of its character as a case or controversy cognizable by this Court in an original suit."[90]

In other words, jurisdiction may be retained even though the situation does not warrant the relief sought by the complainant. Evidently the exceptional case may "impose a risk of loss upon the state" which is

86. New York v. Illinois, 274 U.S. 488, 47 Sup. Ct. 661, 71 L. Ed. 1164 (1927).
87. Arizona v. California, 283 U.S. 423, 51 Sup. Ct. 522, 75 L. Ed. 1154 (1931).
88. Colorado v. Kansas, 320 U.S. 383, 64 Sup. Ct. 176, 88 L. Ed. 116 (1943); Massachusetts v. New York, 271 U.S. 65, 46 Sup. Ct. 357, 70 L. Ed. 838 (1926).
89. Nebraska v. Wyoming, 325 U.S. 589, 657, 660, 664, 65 Sup. Ct. 1332, 89 L. Ed. 1815 (1944), 345 U.S. 906, 73 Sup. Ct. 1041, 97 L. Ed. 1394 (1953).
90. Texas v. Florida, 306 U.S. 398, 412, 59 Sup. Ct. 563, 83 L. Ed. 817 (1939).

sufficient to set in motion the adjudicating machinery even though something less than an injunction is the end product. If this is what the opinion means, it will expand the possibilities of states that wish to get a decision as to their rights even before a "controversy" has developed. We will have occasion to refer to this decision again when we take up declaratory decisions of the Court.

Once jurisdiction attaches, the Court goes ahead to decide all the incidental elements of the case. For example, it was necessary to appoint a receiver to hold the disputed flood plains in the heated boundary controversy on the Red River between Oklahoma and Texas.[91] As a result, the United States claimed ownership of this land and the southerly half of the bed of the stream (as the boundary was declared to be the south bank).

> Claims to property of which the court has taken possession and controls through a receiver may be dealt with as ancillary to the suit wherein possession is taken and control exercises—and this although independent suits to enforce the claims could not be entertained in that court.

After settling the ownership of flood plains, and river bed, the next phase of the litigation involved the expenses of drilling oil wells during the receivership, then the claims to royalty interests in proceeds held by the receiver, and finally the validity of surveys of private tracts.

There is also some language in the opinion in *Kentucky* v. *Indiana* (granting specific performance of a contract to build a bridge) that indicates how far the incidental jurisdiction of the court extends:

> The fact that the solution of these questions may involve the determination of the effect of local legislation of either state, as well as of acts of Congress, said to authorize the contract, in no way affects the duty of this court to act as the final, constitutional arbiter in deciding questions properly presented . . . neither can determine their rights inter sese, and this Court must pass upon every question essential to such determination. . . .[92]

Although the Court follows the equity principle of dealing with all phases of a dispute properly before it, the rule as to joinder of parties is less liberal. In *Alabama* v. *Arizona*,[93] a bill was refused because of the fact that suit against any one of the five states joined would be enough. However, the Chicago Sanitary District litigation seems to

91. Oklahoma v. Texas, 256 U.S. 70, 41 Sup. Ct. 420, 65 L. Ed. 831 (1921), 258 U.S. 574, 42 Sup. Ct. 406, 66 L. Ed. 771 (1922), 265 U.S. 505, 44 Sup. Ct. 604, 68 L. Ed. 1152 (1924), 268 U.S. 252, 45 Sup. Ct. 497, 69 L. Ed. 937 (1925).

92. Kentucky v. Indiana, 281 U.S. 163, 176, 177, 50 Sup. Ct. 275, 74 L. Ed. 784 (1930).

93. 291 U.S. 286, 54 Sup. Ct. 399, 78 L. Ed. 798 (1934).

indicate that they are not so strict with complainants.[94] Several cases have indicated that the individuals who would cause the injury need not be joined because the state was an adequate representative of their interests.[95] This is a more liberal view of the doctrine as to indispensable parties than exists in the law applicable to suits between private individuals.

Whenever a state attempts to bring suit on behalf of its citizens, it may be barred by the 11th Amendment as in the case of North Dakota claiming money damages.[96] In the converse situation, where the state tries to get at citizens of another state by suing that state, the cases are not decisive.[97] The rule would seem to depend on the circumstances of the particular case and the extent to which such a practice is necessary to make an effective decision of the controversy.

The number of cases in which the United States has been allowed to intervene has increased with the development of federal interests throughout the country.[98] Where each of four states claimed to be the domicile of the deceased for inheritance tax purposes, the parties were brought before the court in a suit in the nature of a bill of interpleader.[99] This device proved effective where the net estate was not sufficient to pay the aggregate amount of taxes claimed, but would not seem to be necessary in view of the power of the Court to hear controversies involving any number of states.

Once the Court has the subject matter and the parties before it, the next step is the trial of the facts. Except in the case of *Kentucky* v. *Indiana* where there was an agreed statement of facts, the Court has usually referred the case to a master to hear the facts and submit a report. In twelve cases, involving all kinds of questions, the report of the master was accepted by the Court substantially as presented. In six cases, the losing state excepted to the report and in every case, the exceptions were overruled.[100] In one case, both litigants excepted

94. Wisconsin joined with New York, Michigan, Minnesota, Ohio and Pennyslvania in the suit against Illinois for diversion of water from the Great Lakes, 278 U.S. 367, 49 Sup. Ct. 163, 73 L. Ed. 426 (1929). *But cf.* New Jersey v. New York, 345 U.S. 369, 73 Sup. Ct. 689, 97 L. Ed. 1081 (1953).

95. Arkansas v. Texas, 346 U.S. 368, 74 Sup. Ct. 109, 98 L. Ed. 71 (1953); Pennsylvania v. West Virginia, 262 U.S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117 (1923).

96. North Dakota v. Minnesota, 263 U.S. 365, 44 Sup. Ct. 138, 68 L. Ed. 342 (1923).

97. Massachusetts v. Missouri, 308 U.S. 1, 18, 60 Sup. Ct. 39, 84 L. Ed. 3 (1939). *Cf.* Colorado v. Kansas, 320 U.S. 383, 64 Sup. Ct. 176, 88 L. Ed. 116 (1943).

98. New York v. New Jersey, 256 U.S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937 (1921); Oklahoma v. Texas, 258 U.S. 574, 42 Sup. Ct. 406, 66 L. Ed. 771 (1922); Nebraska v. Wyoming, 325 U.S. 589, 65 Sup. Ct. 1332, 89 L. Ed. 1815 (1944).

99. Texas v. Florida, New York and Massachusetts, 306 U.S. 398, 59 Sup. Ct. 563, 83 L. Ed. 817 (1939).

100. Wisconsin v. Illinois, 313 U.S. 547, 61 Sup. Ct. 1091, 85 L. Ed. 1513 (1940); Washington v. Oregon, 297 U.S. 517, 56 Sup. Ct. 540, 80 L. Ed. 837 (1936); Wisconsin v. Michigan, 297 U.S. 547, 56 Sup. Ct. 584, 80 L. Ed. 856

and the decree was modified slightly and one of the exceptions sustained.[101] Most of these reports involve the apportionment of water rights or the location of a boundary. Where further proof was needed, in the early cases,[102] specific questions were set down for a rehearing, whereas the more recent cases were merely referred back to the master.[103] The Court is coming to depend more and more on the hearings before the master to bring out the intricate details of its ever-expanding business.

When a boundary is established by decree of the Court, a commissioner is appointed to run it and establish the actual line by monuments. There are often many difficulties involved in designating the line on the ground but absolute accuracy is not required so long as there is a reasonable degree of certainty.[104] In establishing the boundary along the bank of the Red River, the commissioner had trouble with the uneven, sometimes non-existent cut bank and resorted to a gradient. Oklahoma protested but after a hearing, the court sustained the way in which the commissioner had construed the decree.[105] Exceptions to the report of the commissioner have been overruled in every boundary controversy to date.

If the case has not been settled in some stage of the foregoing procedure a decree will be issued on the merits. Even though the suit has not been dismissed earlier in the proceeding, injunctive relief may be denied on the ground that the complainant has not sustained the burden of proving a threatened invasion of its rights. This burden is "much greater than that generally required to be borne by one seeking an injunction in a suit between private parties."[106] Where the evidence resulted in a denial of injunctive relief; the opinion, stated the situation as follows:

> "The case comes down to this: the court is asked upon uncertain evidence of prior right and still more uncertain evidence of damage, to destroy possessory interests enjoyed without challenge for over half a century."[107]

The wisdom of granting injunctive relief is brought into question

(1936); Vermont v. New Hampshire, 289 U.S. 593, 53 Sup. Ct. 708, 77 L. Ed. 1392 (1933); Louisiana v. Mississippi, 282 U.S. 458, 51 Sup. Ct. 197, 75 L. Ed. 459 (1931); Wisconsin v. Illinois, 278 U.S. 367, 49 Sup. Ct. 163, 73 L. Ed. 426 (1929).

101. New Mexico v. Texas, 276 U.S. 558, 48 Sup. Ct. 344, 72 L. Ed. 699 (1927).

102. North Dakota v. Minnesota, 256 U.S. 222, 41 Sup. Ct. 626, 65 L. Ed. 899 (1921); New York v. New Jersey, 249 U.S. 202, 39 Sup. Ct. 261, 63 L. Ed. 560 (1919).

103. Wisconsin v. Michigan, 295 U.S. 455, 55 Sup. Ct. 786, 79 L. Ed. 1541 (1935); Wisconsin v. Illinois, 281 U.S. 179, 50 Sup. Ct. 266, 74 L. Ed. 799 (1930).

104. Arkansas v. Tennessee, 269 U.S. 152, 46 Sup. Ct. 31, 70 L. Ed. 206 (1925).

105. Oklahoma v. Texas, 265 U.S. 493, 44 Sup. Ct. 571, 68 L. Ed. 1118 (1924).

106. Connecticut v. Massachusetts, 282 U.S. 660, 51 Sup. Ct. 286, 75 L. Ed. 602 (1931).

107. Washington v. Oregon, 297 U.S. 517, 56 Sup. Ct. 540, 80 L. Ed. 837 (1936).

when we examine the cases of *Wyoming* v. *Colorado* and *Wisconsin* v. *Illinois*. The original decrees in both controversies gave strong relief—in the latter, affirmatively requiring acts to be done to remedy the situation.[108] The state did not disobey the order of the Court to reduce the diversion of water from Lake Michigan but it delayed action on the construction of sewage disposal plants so long that the injunction really served to make matters worse. In the other case, a bill to enforce the injunction was brought and the Court held that Colorado could not avoid the decree by claiming that the unlawful diversions are being made by individuals—not party to the earlier suits.[109] The only effective way to deal with recalcitrant states is to proceed against the government official individually rather than contempt proceedings against the State as was suggested in a later phase of *Wyoming v. Colorado*.[110] As Warren points out:

> "neither the authority of a superior office, if in violation of a law nor the authority of a law if in violation of the Constitution will save a man from liability. . . . Before we are required to fall back on the element of force for the execution of a Court's judgment against a state, we have this element of individual liability."[111]

In addition to the decree in the *Chicago Drainage Canal* case, there is only one other case in which affirmative relief was granted and in this instance it was evidently never brought into force because the water was never diverted. The injunction against diverting in excess of 440 million gallons per day was coupled with a decree that a plant for the treatment of sewage be constructed.[112] It cannot be said that the positive decrees of the Supreme Court have been enforced too readily, yet the passage of time seems to remove the necessity of drastic measures being taken and the Court has generally avoided a show-down by framing its decrees in accordance with the difficulty of enforcement.

Recently a new kind of remedy has been applied over the strong objections of Justices Frankfurter and Black. Although it is not as broad as an advisory opinion, it is difficult to fit into the category of a judgment. There are certain cases in which irreparable injury may be prevented by a mere adjudication of rights which is binding on the parties. In *Nebraska* v. *Wyoming*, a mathematical allocation of water rights is made by the Court. Difficult as it is to separate the judicial from the administrative, this flexible remedy has been heavily criticised by Mr. Justice Roberts:

108. Wisconsin v. Illinois, 289 U.S. 395, 53 Sup. Ct. 671, 77 L. Ed. 1283 (1933).
109. Wyoming v. Colorado, 286 U.S. 494, 52 Sup. Ct. 621, 76 L. Ed. 1245 (1932).
110. 309 U.S. 572, 60 Sup. Ct. 765, 84 L. Ed. 954 (1939).
111. WARREN, THE SUPREME COURT AND SOVEREIGN STATES 81 (1924).
112. New Jersey v. New York, 283 U.S. 336, 51 Sup. Ct. 478, 75 L. Ed. 1104 (1931).

> I doubt if in such interstate controversies, any state is ever entitled to a declaratory judgment from this court—I am sure that on the present record, none of the states is entitled to a declaration of rights.[113]

In spite of the dissenters, the Court seems prepared to issue a declaration of rights whenever it is satisfied that a controversy exists, a compromise which may have been made to avoid the embarrassment of unenforced decrees.

The costs in most of these controversies are divided equally between the parties. There are cases in which the losing party has had to pay all the costs.[114] In the dispute between Massachusetts and New York, the complainant was held to pay for the whole thing, presumably because of the spurious character of her claim. A more burdensome court bill fell upon the protesting shoulders of the government of Illinois at the close of her lengthy litigation with the Great Lakes states over the unlawful draining of Lake Michigan. The Court is not opposed to punishing litigious or recalcitrant states any more than individuals although normally interstate suits are brought in good faith. The mere threat or possibility of bringing the Court to the point of using its enforcement machinery has served to limit the number of unwarranted claims.

It would seem that the Court has profited by its experience in some fields, but still rushes into others with a reckless abandon. The suits have been handled efficiently, but slowly, in order to allow time for tempers to cool. The memorandum decisions indicate that most of the references to special masters are general and their reports must be invaluable as guides to the decisions of the Court. The oral argument is usually limited to two hours but even that much time is not given when a satisfactory report has been received from the master. It should not be forgotten that litigation between states is only a tiny part (1%) of the business of the Supreme Court.

These particular controversies which have been settled in the Supreme Court yield certain general principles. In the cases which involved the boundaries between states, there are three major factors which have been considered. Starting with the doctrines of international law applicable to such disputes, the Court has decided each case on a judicial interpretation of the original charter which defined the extent of the state territory, conditioned by the evidence of long-continued exercise of sovereignty over the disputed region. In other words, legal precepts or rules, the history of the state, and the facts of the particular situation have all been important bases of decision. In

113. Nebraska v. Wyoming, 325 U.S. 589, 657, 65 Sup. Ct. 1332, 89 L. Ed. 1815 (1944).

114. Missouri v. Illinois, 202 U.S. 598, 26 Sup. Ct. 713, 50 L. Ed. 1155 (1906); Louisiana v. Mississippi, 202 U.S. 58, 26 Sup. Ct. 571, 50 L. Ed. 913 (1906).

the field of water rights, the doctrines of equity and fair division of benefits have been subordinate to the local law under which individual users of the stream have established their rights. The state has been considered as the champion of the aggregate claim of its citizens and the convenience of this approach to the problem is recognized. This emphasis on the importance of local rules keeps the Court from formulating any general principles. In the absence of such principles, self-ordering is impossible and the Court is burdened with the necessity of deciding each case *ad hoc*, which can only lead to an increase in litigation. The next step will probably be central administration of interstate water disputes by a federal agency. The only other alternative is a greater use of the compact approved by Congress,[115] but such a solution fails to take advantage of the existence of a federal system. The problem of interpretation and enforcement of such compacts will still remain, at any event. It is significant that the question of multiple taxation by states should have come up in the form of a controversy before the Supreme Court. The absence of any constitutional provision on the subject may be the reason, and this fact may give us a clue to the greater scope of the original jurisdiction over states in the United States than in other federal systems.

With the exception of the natural gas embargo, there is no case which we have discussed in which the Constitution provides the principle upon which it is to be decided. It would seem that citizens of the United States only turn to their state government for help when they are unable to assert their rights under any provision of the federal Constitution. In view of the fact that only one case out of a hundred is between states, the Supreme Court naturally uses the same machinery and the same basis of decision as it does in the other ninety-nine. There is no magic in the idea of a state being party to the suit when we look at the substance of the claim. In every case, had the Constitution so provided, the controversy could have been settled between the groups concerned. Even if there were no state boundaries, disputes would arise which would involve the question where one administrative jurisdiction left off and another began. The idea of state sovereignty has fallen into disrepute in our federation to such an extent that individuals no longer press their claims in the name of their state but rather as individual citizens living in a certain geographical territory. It is not strange that the methods which the Court has found adequate for these individuals should prove equally adaptable to states. The politically organized unit is no more of a privileged character than the economically organized corporation.

115. For example, the decree in *Kansas v. Missouri* was recently modified to conform to a subsequent agreement. 340 U.S. 859, 71 Sup. Ct. 86, 95 L. Ed. 628 (1950).

The limitations on the power of the Supreme Court in the exercise of this jurisdiction are the same as those which occasionally appear in private suits; for example, the *Dred Scott* case did not settle the controversy between slave states and free states over control of the federal union. It has been asserted that the Court has failed as a substitute for force, that it cannot compel a state to abide by its decree,[116] yet if this criticism is valid, it does more than question the jurisdiction in controversies "between two or more states." The Court is enforcing decrees against the states every day under the Constitution, quite apart from their original jurisdiction docket.

When we examine the opinions of the Court in suits between states, we cannot help but notice a difference approach from suits between individuals. There is a greater burden on the state to prove its right to have a judicial decree, which shows a desire on the part of the Court to discourage this type of suit. Most of the differences between the treatment of individual and state stem from this motive. The Supreme Court is not willing to take disputes that come up in interstate form unless there is no other remedy.

The function of a judiciary is to administer justice according to law all along the line and if justice can be obtained by individuals as such, the court is not to be criticized for refusing to hear their claim under the guise of a state suit.

The myth of state "sovereignty" has been dissolved by the growth of the law as judicial and administrative process. Where the suit is between individual and state, the state must act as judge in its own cause. In the United States, we have achieved just results in such cases by a strict separation of powers. But such a division of "sovereignty" in the legal sense, whether local or national in character, presupposes the existence of a principle upon which a fair distribution of "sovereign" powers can be made. "The fundamental political belief of the people of the United States has always been that there exists a supreme universal law governing the actions of states."[117] This faith lies at the root of the growing conception of a constitutional law supreme over states, based on more than mere agreement and acquiescence. The Supreme Court recognizes the integration of all law as its primary responsibility and therefore views its jurisdiction as a single whole of which suits between states form a very small part.

The unique design of our federal legal structure does not encourage analogy to the International Court of Justice now sitting at the Hague.

116. Note, *Original Jurisdiction of the United States Supreme Court,* 39 HARV. L. REV. 1085, 1087 (1926).

117. Snow, *The Development of American Doctrine of Jurisdiction of Courts over States* in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES No. 460 (1911).

This World Court has no appellate jurisdiction, only states may be parties, and its competence depends on the extent to which each state voluntarily submits to it. There is no World Constitution, no system or hierarchy of courts, and no world law. No doubt, what Caldwell says of the old Privy Council is true of the World Court:

> The strength of a judiciary is no greater than that of the executive and legislative departments on which it must necessarily depend. . . . In the world of larger states, there must be international government before any international court can really achieve the judicial settlement of disputes.

Before we come to the practical problem of enforcement, there is a more vital element. We have seen that the Supreme Court had little time for suits between states, and settled them as by-products of a greater legal order. Until a court has jurisdiction over the individuals who compose the state and those who control its government, "judicial" settlement of such controversies is a misnomer. A court cannot be successful if its power is limited to applying a segment of the law. Judicial power must extend to every situation and provide an opportunity to obtain justice at any stage of a controversy in order to be effective in the ordering of world society.