SUITS BY STATES WITHIN THE ORIGINAL JURISDICTION OF THE SUPREME COURT*

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The orginal jurisdiction of the United States Supreme Court does not embrace the consideration and adjustment of every possible type of conflict of state powers which one of the states may seek to bring to its attention, although a perusal of the constitutional language[1] alone might lead one to that conclusion.[2] The original jurisdiction of the Supreme Court may not be invoked in every cause in which a state elects to make itself a party plaintiff.[3] Whether the Supreme Court has jurisdiction over an action brought by a state depends upon whether the action involves a "case" or "controversy" within the meaning of the constitutional provision as it is interpreted by the Supreme Court.[4]

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1. U. S. Const. Art. III, sec. 2: "The judicial power shall extend * * * to controversies between two or more States; * * * 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."

2. Missouri v. Illinois (1901) 180 U. S. 208, 239.

3. Wisconsin v. Pelican Ins. Co. (1888) 127 U. S. 265, 287: "Notwithstanding the comprehensive words of the Constitution, the mere fact that a state is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another state or her citizens * * *." Massachusetts v. Mellon (1923) 262 U. S. 447, 480.

4. Rhode Island v. Massachusetts (U. S. 1838) 12 Pet. 657, 721.

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The term "conflicts of state powers" embraces all types of interstate disturbances traceable to state action of a governmental character. Such conflicts of state powers may be direct controversies between states themselves; they may involve action by one state of such a character as to threaten or injure the welfare and prosperity of inhabitants of other states, indirectly affecting those states in their governmental capacities; they may arise from the exercise of governmental power by more than one state, with consequences inimical to an individual or group of individuals, even though no state considers itself injured in its governmental capacity either directly or indirectly.

There are many possible methods for the adjustment of conflicts of state powers, including the creation of new governmental machinery especially designed to deal with interstate relations, reorganization on a regional basis, voluntary efforts at interstate cooperation, the employment of compacts between states, and the enactment of uniform or reciprocal legislation. Among these available methods is that of the adjustment of such

MEANING OF "CASE" OR "CONTROVERSY"

The criteria by which the Supreme Court determines whether it has jurisdiction of an action brought by a state are set forth nowhere in precise terms. Although statements of general guiding principles appear frequently, the factors which seem to be determinative vary with the circumstances of the case at hand. Suits seeking to invoke the original jurisdiction of the Supreme Court are relatively infrequent, and the points thus far pricked out by the process of judicial inclusion and exclusion are not spaced closely enough to fill in all the gaps and make an unbroken line of demarcation.

Controversies between sovereign states may be settled by diplomatic negotiation or, that failing, by force. When the previously sovereign American states relinquished their sovereign powers in adopting the Constitution, they were denied resort to the means ordinarily open to sovereign states for the settlement of disputes between them. In order to replace these lost facilities, the Constitution provided that the states might, with the consent of Congress, enter into compacts to settle such disputes,[5] or that they might invoke the original jurisdiction of the Supreme Court.[6] Since the latter provision was intended to serve as a substitute for the powers of diplomacy and of waging warfare which had been surrendered by the states upon their entrance into the Union, the Supreme Court, in determining the extent of

5. Art. I, sec. 10.
6. Art. III, sec. 2.

conflicts by the federal courts in cases brought within the federal jurisdiction. The dissertation is a study of the possibilities and limitations of judicial adjustment of conflicts of state powers.

Since, under the Constitution, only a limited number of conflicts of state powers are justiciable, the scope of judicial adjustment is severely restricted. Among the primary constitutional sanctions of the judicial adjustment of such conflicts is the clause conferring original jurisdiction upon the Supreme Court in cases in which a state is a party. This article is confined to the adjustment of conflicts of state powers in suits by states within the original jurisdiction of the Supreme Court.

In efforts to adjust conflicts of state powers, however, the Supreme Court has made use of other Constitutional provisions as well. Of these, the most significant are the due process clause of the Fourteenth Amendment, and the interstate commerce clause. Of particular interest is the use by the Supreme Court of the due process clause as a means of attacking the problem of double state taxation through the imposition of Constitutional limitations which extend beyond recognized common law restrictions upon state jurisdiction to tax. This series of decisions demonstrates the practical difficulties, and indicates the Constitutional implications, of

its original jurisdiction over controversies between states, has said that that jurisdiction is limited to disputes which are properly the subject of diplomatic adjustment between independent states.[7]

Even a matter in controversy between states such as might be the subject of diplomatic negotiation between sovereign states may not be brought before the Supreme Court for settlement under its original jurisdiction, unless the matter is in itself properly justiciable. True, the Supreme Court acts as a substitute for the use of diplomacy, but it remains a judicial tribunal. Unless the subject matter of the controversy is susceptible of judicial solution, the Supreme Court will not take jurisdiction of a dispute between states, any more than another court would take jurisdiction of a suit between private parties involving a non-justiciable dispute. For a state to invoke the Supreme Court's original jurisdiction, it must show that it will sustain

7. North Dakota v. Minnesota (1923) 263 U. S. 365, 372, 373: "The jurisdiction and procedure of this court in controveries between states of the Union differ from those which it pursues in suits between private parties. This grows out of the history of the creation of the power, in that it was conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force. The jurisdiction is therefore limited generally to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment." See also Missouri v. Illinois (1901) 180 U. S. 208, 241; Missouri v. Illinois (1906) 200 U. S. 496, 518; Georgia v. Tennessee Copper Co. (1907) 206 U. S. 230, 237; Kansas v. Colorado (1902) 185 U. S. 125, 141, 143; Wyoming v. Colorado (1922) 259 U. S. 419, 464; Pennsylvania v. West Virginia (1923) 262 U. S. 553, 592; Rhode Island v. Massachusetts (U. S. 1838) 12 Pet. 657, 720.

resort to the judicial process for the solution of such a complicated problem of interstate relations. The interstate commerce clause has served to invalidate many types of state legislation setting up obstacles to trade with other states, discriminating against industries located without the state, or designed to preserve natural resources for the exclusive use of the inhabitants of the state. In a series of recent cases, however, the interstate commerce clause has been invoked with only partial success in attempts to strike down the increasing number of trade barriers erected between states during the last decade.

Subsidiary possibilities for the judicial adjustment of conflicts of state powers have been or conceivably may be provided by means of the full faith and credit clause, the privileges and immunities clause, and the equal protection of the laws clause.

The record of judicial adjustment of conflicts of state powers through justiciable conflicts brought within the federal jurisdiction indicates that, although there is a restricted area in which its utility is demonstrable, the compass of its practicable operation is limited, and reliance upon it is likely to diminish with the gradual perfection of more efficient methods of adjustment.

some special and peculiar injury, such as would enable a private person to maintain a similar action in another court.[8]

Suits Involving Property Rights

If a state can show that its property or pecuniary rights are directly involved, the Supreme Court will take jurisdiction over an action brought by the state to secure adjudication of such rights. A state may bring suit to recover a debt owed to it by another state under a contract between the two states,[9] or to collect on bonds owned by it and issued by another state.[10] When the right to levy an inheritance tax against an estate is confined to the state of the domicile of the deceased owner and each of several states claims to have been the state of the domicile, if the estate is insufficient to meet all the assessments, the Supreme Court will take jurisdiction to decide as to the domicile, in order to prevent financial loss to the state with a valid tax claim, although it will not decide the question of domicile otherwise.[11] A petition filed by a state for an injunction for the removal of a bridge has been entertained upon a showing that the bridge was an obstruction to navigation and resulted in direct injury to the complaining state.[12]

The amount and kind of property right which must be at stake is not clear. In *Alabama v. Arizona*,[13] Alabama was denied leave to file a bill of complaint to establish the invalidity of statutes of other states forbidding the sale of goods produced by convict labor. The anticipated loss to the state of an important source of revenue was held not to present a justiciable issue.

Boundary Disputes

Questions of disputed boundary are always proper subjects of suits between states. The contention that disputes over bounda-

8. South Carolina v. Georgia (1876) 93 U. S. 4, 14; Louisiana v. Texas (1900) 176 U. S. 1, 18; Wisconsin v. Duluth (1878) 96 U. S. 379, 382; Pennsylvania v. Wheeling and Belmont Bridge Co. (U. S. 1851) 13 How. 518, 559, 560; Hans v. Louisiana (1890) 134 U. S. 1, 15; Wisconsin v. Pelican Insurance Co. (1888) 127 U. S. 265, 288, 289; Rhode Island v. Massachusetts (U. S. 1838) 12 Pet. 657, 718; Texas v. Interstate Commerce Commission (1922) 258 U. S. 158, 162; Massachusetts v. Mellon (1923) 262 U. S. 447, 480; Texas v. Florida (1939) 306 U. S. 398.

9. Virginia v. West Virginia (1915) 238 U. S. 202.

10. South Dakota v. North Carolina (1904) 192 U. S. 286, 318.

11. Texas v. Florida (1939) 306 U. S. 398.

12. Pennsylvania v. Wheeling and Belmont Bridge Co. (U. S. 1851) 13 How. 518, 559, 560.

13. (1934) 291 U. S. 286, comment (1934) 20 Va. L. Rev. 909.

ries are political questions and not susceptible of judicial solution was heard and rejected as early as 1838.[14] Similarly, a state may sue in its capacity as quasi-sovereign, to protect its dominion over the air and soil within its boundaries.[15]

State as Parens Patriae

As *parens patriae* and representative of the public, a state is considered to have such an interest in the health, comfort, and welfare of its population, apart from the interests of the individuals affected, as to give it a right of legal action.[16] A state has been allowed to bring suit as *parens patriae* and guardian of its citizens to enjoin the discharge of noxious gases over its territory by an industrial plant in another state,[17] to restrain the discharge of sewage into interstate waters to the detriment of the health of its citizens,[18] to prevent the diversion of waters flowing into the state from another state,[19] to halt the artificial hastening of drainage into an interstate river to the injury of lands in the plaintiff state,[20] to limit the withdrawal by one state of water from a chain of lakes bordering on several other states,[21] and to enjoin the enforcement of a statute of another state granting a preference to its inhabitants in the use of the natural gas resources of the state so as to curtail the supply available for consumption by citizens of the plaintiff state.[22]

Claims of Individual Citizens

The Supreme Court will not permit a state to secure for its citizens access to the original jurisdiction of the court by bring-

14. Rhode Island v. Massachusetts (U. S. 1838) 12 Pet. 657, 737. See also Missouri v. Iowa (U. S. 1849) 7 How. 660; Florida v. Georgia (U. S. 1855) 17 How. 478; Alabama v. Georgia (U. S. 1860) 23 How. 505; Virginia v. West Virginia (U. S. 1871) 11 Wall. 39; Louisiana v. Mississippi (1906) 202 U. S. 1.

15. Georgia v. Tennessee Copper Co. (1907) 206 U. S. 230, 237.

16. New York v. New Jersey (1921) 256 U. S. 296, 301, 302; Missouri v. Illinois (1901) 180 U. S. 208, 241; Georgia v. Tennessee Copper Co. (1907) 206 U. S. 230, 237; Kansas v. Colorado (1902) 185 U. S. 125, 141-143; Wyoming v. Colorado (1922) 259 U. S. 419, 464; Pennsylvania v. West Virginia (1923) 262 U. S. 553, 592; North Dakota v. Minnesota (1923) 263 U. S. 365, 374.

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

18. Missouri v. Illinois (1901) 180 U. S. 208; New York v. New Jersey (1921) 256 U. S. 296.

19. Kansas v. Colorado (1902) 185 U. S. 125; Wyoming v. Colorado (1922) 259 U. S. 419.

20. North Dakota v. Minnesota (1923) 263 U. S. 365.

21. Wisconsin v. Illinois (1929) 278 U. S. 367.

22. Pennslyvania v. West Virginia (1923) 262 U. S. 553.

ing a suit in the name of the state to enforce the claims of individual citizens.[23] The owners of state bonds, who are precluded by the Eleventh Amendment from prosecuting suits against the issuing state in their own names, cannot sue in the name of the state in which they reside.[24] Nor may a state sue to relieve its citizens injured by the maladministration of the laws of another state,[25] to enjoin a railroad from charging illegal rates in which the state in its governmental capacity has no interest,[26] to claim lands allegedly granted by Congress to the state as trustee for the benefit of a railway company,[27] to enjoin the enforcement of an alleged unconstitutional act of Congress,[28] or to seek damages for its inhabitants whose farms were damaged and whose crops were lost by floods allegedly caused by the arti-

23. North Dakota v. Minnesota (1923) 263 U. S. 365, 375, 376: "The right of a state as parens patriae * * * is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state."

24. New Hampshire v. Louisiana, New York v. Louisiana (1883) 108 U. S. 76. The legislature of New Hampshire passed an act providing for the assignment of the defaulted obligations of other states to the state and for an attempt to collect the claims of its citizens; a similar act was passed in New York. The Supreme Court found that the state, in bringing suit on these bonds against Louisiana, was "nothing more or less than a mere collecting agent of the owners * * *; and while the suits are in the names of the states, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them" (p. 89). The power of a sovereign state to enforce the monetary claims of its citizens against another state has been given up by the states of the United States. Where the individual owner gives the bonds outright and absolutely to the state, however, so that the title of the state is clear, the state may sue the issuing state to compel payment, even though the donor made the gift in expectation that an action would be brought and in the hope that the action might enure to his benefit as the owner of other like bonds. South Dakota v. North Carolina (1904) 192 U. S. 286.

25. Louisiana v. Texas (1900) 176 U. S. 1. Louisiana filed a bill to restrain the enforcement by Texas officials of a quarantine law in such a way as to place in effect, it was alleged, an embargo on interstate commerce between Louisiana and Texas. Emphasizing that for it to maintain jurisdiction, the controversy must be one arising directly between the two states and not one in vindication of the grievances of particular individuals, the Supreme Court held that the contention that the citizens of one state are injured by the maladministration of the laws of another is not sufficient to constitute a justiciable controversy between states. Acts of state officers in abuse of their powers are not to be considered state action. Whether Louisiana, as *parens patriae*, might have been able to invoke the jurisdiction of the Court on behalf of her citizens had Texas so authorized or confirmed the alleged action of her health officer as to make it her own, was not decided.

26. Oklahoma v. Atchison, T. & S. F. Ry. (1911) 220 U. S. 277.

27. Kansas v. United States (1907) 204 U. S. 331, 340, 341.

28. Massachusetts v. Mellon (1923) 262 U. S. 447.

ficial hastening of drainage into an interstate river by another state.[29]

Political Questions

The original jurisdiction of the Supreme Court does not embrace the determination of political questions[30] which may be raised in an action brought by a state.[31] The distinction between judicial and political questions was noted in the early case of *Rhode Island v. Massachusetts.*[32] In *Georgia v. Stanton,*[33] the Supreme Court dismissed for want of jurisdiction a bill to restrain the Secretary of War from carrying into execution the provisions of the Reconstruction Act of 1867, on the ground that political questions were presented for the judgment of the court. An original suit by Massachusetts to enjoin the enforcement of the Maternity Act passed by Congress was dismissed, the court saying that the question presented, being political in character, did not admit of the exercise of the judicial power.[34]

Suits to Enforce a Penal Law

A state may not maintain a suit within the original jurisdiction of the Supreme Court to enforce a penalty for the violation of its own laws. The Court reached this conclusion in view of the rule that the courts of no country execute the penal laws of another, and the precedents that the original jurisdiction of the court does not extend to suits between states to compel the performance of obligations which, if the states had been independent nations, could not have been enforced judicially.[35]

RELUCTANCE TO GRANT RELIEF

Even after it has assumed jurisdiction of a suit brought by a state, the Supreme Court is reluctant to grant the relief prayed, unless the circumstances are exceptional. Not every matter which

29. North Dakota v. Minnesota (1923) 263 U. S. 365, 375. The farm owners injured had contributed to a fund used in the preparation and prosecution of the case, and each contributor expected to receive a share of the damages sought in proportion to the amount of his loss.

30. For a general discussion of political questions in constitutional law, see Post, "The Supreme Court and Political Questions," *The Johns Hopkins Univ. Studies in Hist. and Pol. Science* (1936) ser. LIV, no. 4.

31. Louisiana v. Texas (1900) 176 U. S. 1, 23.

32. (U. S. 1838) 12 Pet. 657.

33. (U. S. 1867) 6 Wall. 50, 77.

34. Massachusetts v. Mellon (1923) 262 U. S. 447, 483.

35. Wisconsin v. Pelican Ins. Co. (1888) 127 U. S. 265, 288, 290; Oklahoma ex rel. West v. Gulf, C. & S. F. Ry. (1911) 220 U. S. 290, 298.

would give a private person a right to recover will suffice to warrant interference by the Supreme Court with the action of one state at the behest of another state. Mr. Justice Holmes has expressed the view of the court in the following language:

> "the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between states the same system of municipal law in all its details which would be applied between individuals. * * * It may be imagined that a nuisance might be created by a state upon a navigable river like the Danube, which would amount to a *casus belli* for a state lower down, unless removed. If such a nuisance were created by a state upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court. But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a state. * * * Before this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."[36]

When, however, a state has succeeded in proving its case in a suit in equity, the court, speaking again through Mr. Justice Holmes, has said that "it is somewhat more certainly entitled to specific relief than a private party might be."[37]

RIGHT OF SUPREME COURT TO ENFORCE ITS DECISION

No state has as yet refused to comply with a judgment rendered against it by the Supreme Court in a controversy between it and another state, so that there is no instance in which the Supreme Court has acted to enforce its judgment against a state. However, extended litigation between Virginia and West Virginia regarding a debt owed by West Virginia to Virginia elicited from the court an expression of its right to enforce such a judgment. Following delay by West Virginia in paying the sum adjudged due to Virginia by the terms of a Supreme Court decision, the Court announced that the original jurisdiction con-

36. Missouri v. Illinois (1906) 200 U. S. 496, 520, 521. See also New York v. New Jersey (1921) 256 U. S. 296, 309; North Dakota v. Minnesota (1923) 263 U. S. 365, 374; Alabama v. Arizona (1934) 291 U. S. 286, 291, 292.

37. Georgia v. Tennessee Copper Co. (1907) 206 U. S. 230, 237, 238 (nuisance abatement).

ferred upon it by the Constitution includes the power to enforce its judgment by appropriate remedial processes, operating where necessary upon the governmental powers and agencies of a state.[38]

CLASSES OF DISPUTES ADJUSTED IN CONTROVERSIES BETWEEN STATES

Interstate Boundaries

By far the most common type of controversy submitted by states to the Supreme Court for adjudication under its original jurisdiction are disputes as to boundary. Approximately two-thirds of the total number of controversies between states come within this category. In the consideration and determination of these cases, however, the Court ordinarily needs to devise no novel rules of decision, but accepts and applies the principles of international law relating to the settlement of boundary controversies. Boundary questions are minor among the conflicts of state powers of present significance—there is no doubt as to the jurisdiction or willingness of the Supreme Court to consider them, and their solution is only meagerly suggestive of the Court's view in the settlement of other types of controversies between states.

Because of their frequency, and the detailed investigatory work involved in their solution, boundary issues make heavy demands upon the time and attention of the Supreme Court. Many of the cases appear time and again in the reports before they are finally settled. The early dispute between Rhode Island and Massachusetts appears eight times in the reports before the final decision.[39] The boundary between Missouri and Iowa was fixed at the middle of the nineteenth century,[40] and had to be re-designated almost fifty years later because some of the boundary markers had been obliterated in the interval and the dispute had broken out afresh.[41] The citations to the boundary controversy

38. Virginia v. West Virginia (1918) 246 U. S. 565, 591, 592. The satisfaction by West Virginia of the claim against her, following this decision, relieved the Supreme Court of the necessity of attempting to take specific steps to compel the execution of the judgment, in accordance with the principle thus declared.

39. (U. S. 1833) 7 Pet. 651; (U. S. 1837) 11 Pet. 226; (U. S. 1838) 12 Pet. 657; (U. S. 1838) 12 Pet. 755; (U. S. 1839) 13 Pet. 23; (U. S. 1840) 14 Pet. 210; (U. S. 1841) 15 Pet. 233; (U. S. 1846) 4 How. 591.

40. Missouri v. Iowa (U. S. 1849) 7 How. 660; (U. S. 1850) 10 How. 1.

between Oklahoma and Texas, disposed of in 1928, reach a grand total of at least fifty-four.[42] In numerous instances cases have been pending well over a decade before final disposition. Nevertheless, litigation in notable instances has failed to settle permanently contentions between states as to boundary, and compacts between the contending states have been resorted to as a solution.[43]

Sewage Disposal

On two occasions a state has invoked the original jurisdiction of the Supreme Court to enjoin another state from discharging its sewage into interstate waters to the injury of the health and comfort of the citizens of the plaintiff state.

In 1900 the city of Chicago began discharging its sewage through an artificial channel into the Desplaines River, a tributary of the Illinois River, which empties into the Mississippi above St. Louis. When Missouri sought to enjoin Illinois and the Sanitary District of Chicago from discharging any sewage into the artificial channel, alleging pollution of the waters of the Mississippi River, the Supreme Court took jurisdiction of the action.[44] Five years later, in 1906, after protracted consideration of the evidence presented, the court dismissed the bill.[45]

Approaching the evidence upon the presupposition that the relief asked was not to be granted except upon the strictest proof, the court found that the case presented by Missouri fell far below the allegations of the bill. Missouri did not show with certainty that the causes of infection complained of might not have come from dangers of her own creation or at least from other sources than the Chicago drainage canal. Until such convincing evidence should be produced, the Supreme Court declined to intervene to enjoin the action of Illinois.

New York and New Jersey were the disputants in a similar controversy regarding the disposal of sewage. In 1902 New Jersey passed an act creating the Passaic Valley Sewerage District, leading to the adoption of a plan for a tunnel under Newark

41. Missouri v. Iowa (1896) 160 U. S. 688; (1897) 165 U. S. 118.
42. The initial citation to this controversy is Oklahoma v. Texas (1920) 252 U. S. 372.
43. Frankfurter and Landis, "The Compact Clause of the Constitution —A Study in Interstate Adjustments" (1925) 34 Yale L. J. 685. The Supreme Court has suggested this method of settlement on several occasions.
44. Missouri v. Illinois (1901) 180 U. S. 208.
45. Missouri v. Illinois (1906) 200 U. S. 496.

Bay and the cities of Bayonne and Jersey City to a point in Upper New York Bay, for the conveyance of sewage from the cities along the Passaic River. Previously these populous cities had drained their sewage into the Passaic River, causing dangerous pollution of the stream, eighty-four per cent of the water of which found its way ultimately through the natural channel of Kill van Kull, into Upper New York Bay. Conferences between representatives of New Jersey and New York failed to produce a mutually satisfactory course of action. As a consequence, New York commenced a suit in 1908 before the Supreme Court to enjoin the discharge of sewage into Upper New York Bay by the Passaic Valley Sewerage District.

The Supreme Court again sustained the right of a state to bring such a suit as the representative of its citizens, and again found the evidence presented insufficient to support the injunction sought.[46] Pollution of the waters of the Bay by sewage from sources within the state was a factor weighing against New York. New Jersey officials were found to have proceeded with the purpose of respecting the rights of New York. On condition that certain methods of treatment of the sewage be used, and the manner of dispersion at the outlet be improved, the Supreme Court declined to issue the injunction, although the way was left open for New York to reapply for relief should future conditions strengthen her case enough to justify judicial interference with the actions of New Jersey.

Interference with Interstate Waters

In 1902 another type of conflict of state powers involving the use of interstate waters was presented to the Supreme Court for consideration. Kansas filed an original bill to enjoin Colorado from diverting the water of the Arkansas River, which flowed through both states.[47] The diverted water had been used for the irrigation of arid land in Colorado, much of which could be reclaimed only by the application of water from the Arkansas River. The appropriation by Colorado naturally tended to make the lands along the stream in Kansas less arable.

Each state pressed an extreme contention. Colorado claimed that it had the right to appropriate all the waters of the stream

46. New York v. New Jersey (1921) 256 U. S. 296.
47. Jurisdiction was maintained by the Supreme Court in Kansas v. Colorado (1902) 185 U. S. 125.

for the irrigation of its soil and the improvement of its territory, while Kansas claimed that English common law required that the flow continue in its customary natural way, and that no portion of it be appropriated in Colorado for the purposes of irrigation. The Supreme Court adopted as proper the rule that one state has the right of appropriating the waters of an interstate stream for the purposes of irrigation, subject to the condition of an equitable division between the states through which the stream flows. The appropriation of water for irrigation in Colorado had diminished the flow into Kansas, but had made possible the reclamation of thousands of acres of formerly barren land in Colorado. Although the diminution of flow had produced perceptible injury to portions of the Arkansas valley in Kansas, the conclusion of the Court was that, considering the right of each state to receive benefit from the waters of the interstate stream, Kansas had not made out a case entitling it to a decree. The injunction was denied, with the proviso that Kansas might call for relief should the depletion of the waters of the river by Colorado continue to increase until an equitable division of benefits no longer existed between the two states.[48]

Wyoming, in 1911, commenced a similar suit against Colorado to prevent the proposed diversion in Colorado of part of the waters of the Laramie River, a stream flowing from Colorado into Wyoming. Both states had used the stream for irrigation for many years. It was proposed, by means of the so-called Laramie-Poudre project, to divert a large portion of the water of the river and conduct it into another watershed, with the result that none of the water could ever return to the stream or reach Wyoming.

Wyoming v. Colorado differed in certain respects from the earlier case of *Kansas v. Colorado*. Both Wyoming and Colorado had adopted the doctrine of appropriation in preference to the common law doctrine of riparian rights, whereas, in the earlier case, one state had recognized the common law rule and one the doctrine of appropriation. In that case, the diversion complained of was not to a watershed from which none of the water could find its way into the complaining state. Here it was sought to prevent a proposed diversion for the benefit of lands as yet un-

48. Kansas v. Colorado (1907) 206 U. S. 46.

reclaimed, whereas in the former case the challenged diversion had been practised for years.

The doctrine of appropriation was applied by the Supreme Court, as furnishing the most equitable basis for a settlement, especially in view of the fact that each of the contending states had incorporated the rule into its own constitution. Consequently a decree was entered enjoining the diversion of more than a specified amount of water per year from the Laramie River in Colorado by means of the Laramie-Poudre project.[49]

A further phase of the clashing demands of the western states for the use of the scarce waters flowing through their boundaries appears in *Arizona v. California*, decided in 1931.[50] The Boulder Canyon Project Act of 1928 was passed by Congress, authorizing construction of a dam on the Colorado River, subject to the terms of the Colorado River compact, an agreement for the apportionment of the water of the river and its tributaries, which had been drawn up by representatives from the states of Arizona, Colorado, Wyoming, Utah, New Mexico, Nevada, and California. The act was to become effective upon the ratification of the compact by the legislatures of California and of at least five of the six other states. By June, 1929, the legislatures of all except Arizona had ratified the compact, and the act accordingly was declared to be in effect. Arizona then brought an original suit against the Secretary of the Interior and the states of California, Nevada, Utah, New Mexico, Colorado, and Wyoming to enjoin the carrying out of the Boulder Dam project.

Arizona alleged that the act interfered with its right to control additional appropriations. Approximately half of the average annual flow of the Colorado River system had been appropriated by Arizona and the other states, the unappropriated flow being then subject to appropriation in Arizona under its laws. The Supreme Court found that the contention was based only upon assumed potential invasions of the rights of Arizona. The act was interpreted as not limiting the legal right of Arizona, as long as Arizona did not accept the interstate agreement, to appropriate any of the unappropriated flow of water. Hence the bill was dismissed without prejudice to an application for relief in case of future interference with the rights of Arizona.

49. Wyoming v. Colorado (1922) 259 U. S. 419.
50. 283 U. S. 423.

An original suit was brought by North Dakota against Minnesota to enjoin, not the diversion of waters from, but the artificial hastening of drainage into, an interstate river.[51] Floods caused by an unusual rise in the level of a stream flowing from Minnesota into North Dakota had done widespread damage to the lands, crops and property of Dakota farm owners. North Dakota contended that the floods were traceable to a change in the methods of draining water from lands within Minnesota; the defendant state denied the allegation and attributed the flood to unusual rainfall. The Supreme Court agreed that if the use of artificial drainage ditches in one state increases the flow into an interstate stream so as to flood the farms of another state, that state has a right to seek relief from the Court by means of an original suit against the offending state, but concluded upon the evidence presented that Minnesota was not responsible for the floods of which complaint was made.

The operations of the Sanitary District of Chicago, which had been the cause of the suit between Missouri and Illinois at the turn of the century, led to additional litigation before the Supreme Court almost thirty years later. In order to dilute and carry away the sewage of Chicago, the amount of water diverted from Lake Michigan was gradually increased until 8,500 or more cubic feet of it per second was being allowed to flow from the lake into the Chicago drainage canal, and thence to the Illinois and Mississippi rivers. Wisconsin, together with Minnesota, Ohio, and Pennsylvania, all of them affected by the diversion of water from Lake Michigan, began an original action before the Supreme Court to enjoin the Sanitary District of Chicago and the state of Illinois from continuing such diversion. Michigan and New York filed similar suits against Illinois. Missouri, Kentucky, Tennessee, Louisiana, Mississippi, and Arkansas, states in the Mississippi basin reluctant to see a reduction in the amount of water entering the Mississippi River from the Illinois, became intervening defendants. Charles Evans Hughes, as special master for the court, reported that the diversion of water from Lake Michigan at Chicago had lowered the levels of Lakes Michigan, Huron, Erie, and Ontario, and of their connecting waterways, five or six inches, with resulting damage to naviga-

51. North Dakota v. Minnesota (1923) 263 U. S. 365.

tion and commercial interests, and to riparian property generally. The court concluded that the complainant states were entitled to a decree, so framed as to accord to the Sanitary District a reasonable time to provide some other means of disposing of the sewage and to reduce the diversion.[52]

Refusal of One State to Furnish Commodity to Another State

In 1919 West Virginia passed a statute for the purpose of reserving for the use of its own inhabitants the natural gas resources of the state, permitting only surplus gas to be sent into other states. Every pipe line company operating in the state was required to satisfy the demands of domestic consumers first. In 1918 approximately 69 per cent of the natural gas produced in West Virginia was sent outside the state, principally to Pennsylvania and Ohio, where it was used by state and municipal institutions as well as by domestic and industrial consumers. Anticipating a drastic curtailment in the supply of gas available should the statute go into operation, Pennsylvania and Ohio filed similar suits against West Virginia before the Supreme Court, seeking to enjoin enforcement of the statute on the ground that it constituted an unconstitutional interference with interstate commerce.

The Supreme Court assumed jurisdiction,[53] holding that the complainant state had a right to sue to protect its own proprietary interest and as representative of the consuming public. Upon the authority of the earlier case of *West v. Kansas Natural Gas Co.*,[54] the transmission from one state to another of natural gas was termed interstate commerce, and the enforced withdrawal for the benefit of local consumers of a large volume of gas from an established interstate current, by a state law according to

52. Wisconsin v. Illinois (1929) 278 U. S. 367. The decree subsequently rendered enjoined the defendants from diverting water in excess of an annual average of 6,500 cubic feet per second after July 1, 1930, with gradual reductions in the withdrawals permitted to an amount not in excess of 1,500 cubic feet per second after December 31, 1938, required the filing of semi-annual reports by the defendants, and provided that any of the parties might apply for appropriate relief when necessary. Wisconsin v. Illinois (1930) 281 U. S. 179.

53. Pennsylvania v. West Virginia, Ohio v. West Virginia (1923) 262 U. S. 553. Justices Brandeis, Holmes, and McReynolds, contended that the Court had no jurisdiction.

54. (1911) 221 U. S. 229, 255.

consumers within the state a preferred right of purchase over consumers in other states, was held a forbidden interference with interstate commerce.[55]

Determination of Domicile for Taxation Purposes

After the Supreme Court, early in the 1930's, announced that thenceforward only the state of the domicile of a deceased owner might levy inheritance taxes upon the transfer of intangible personalty, in numerous instances more than one state claimed to have been the state of the owner's domicile. Litigation was resorted to in an effort to gain a judicial determination as to which of two or more such competing claims was valid. In the course of a prolonged campaign to get the Supreme Court to decide between the conflicting claims of New Jersey and Pennsylvania as to domicile in connection with inheritance taxation of the Dorrance estate, an original proceeding was brought by New Jersey against Pennsylvania to determine the taxing rights of the two states. The Supreme Court refused to take jurisdiction.[56]

When, however, an original suit in the nature of a bill of interpleader was brought by Texas against Florida, New York, and Massachusetts to determine the true domicile of Edward H. R. Green in order to decide between the rival claims of the four states for death taxes upon his estate, jurisdiction was upheld by the Supreme Court, in a decision announced in 1939.[57] This case differed from the previous one in that, whereas the Dorrance estate had been ample to meet the tax demands of both New Jersey and Pennsylvania, the Green estate was not sufficient to pay the aggregate amount of the taxes claimed by the four states and by the federal government, so that the right of either Texas or one of the other states might have been defeated unless the Supreme Court stepped in. Terming the case "exceptional in its circumstances and in the principles of law applicable to them, all uniting to impose a risk of loss upon the state lawfully entitled to collect the tax,"[58] the Supreme Court agreed to settle the question of domicile in this instance.

55. 262 U. S. 553, 596, 597.
56. New Jersey v. Pennsylvania (1933) 287 U. S. 580.
57. Texas v. Florida (1939) 306 U. S. 398. Justices Frankfurter and Black argued that the Court should not take jurisdiction.
58. 306 U. S. 398, 411.

Enforcement of Contracts and Compacts between States

With the increasing use of interstate compacts in dealing with complex aspects of interstate relations, differences of construction are likely to arise between the contracting states, and resort to the Supreme Court for authoritative interpretation and effective enforcement of contracts and compacts between states may be expected. The authority of the Supreme Court to enforce a compact between states was confirmed in the lengthy litigation between Virginia and West Virginia for the collection of a debt owed by the latter state to the former.[59] In 1930, in an original suit brought by Kentucky against Indiana for specific performance of a contract for the building of a bridge across the Ohio River, the Supreme Court reaffirmed its authority with respect to a contract between states, to determine all questions pertaining to the obligations of the contract.[60]

EVALUATION OF SUITS BETWEEN STATES AS MEANS OF ADJUSTMENT OF CONFLICTS OF STATE POWERS

An evaluation of the practical utility of suits between states as a means of adjustment of conflicts of state powers calls for consideration of the willingness of the Supreme Court to decide disputes between states, of the past record of adjustment of conflicts of state powers by this means, and of available alternative methods of settlement the use of which might obviate resort to the original jurisdiction of the Supreme Court.

In addition to the strictness with which it has interpreted the meaning of "case" or "controversy" in determining whether it might assume jurisdiction of an original action brought by a state, and the reluctance with which it grants relief even after jurisdiction is maintained, the Supreme Court has frequently urged states bringing disputes before it to adjust their differences by other means than a resort to the original jurisdiction of the Supreme Court.[61] These official misgivings about the advisa-

59. See Virginia v. West Virginia (1907) 206 U. S. 290; (1911) 220 U. S. 1; (1915) 238 U. S. 202; (1918) 246 U. S. 565.

60. Kentucky v. Indiana (1930) 281 U. S. 163, 176.

61. For example, in New York v. New Jersey (1921) 256 U. S. 296, 313: "We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally

bility of resort to a suit between states before the Supreme Court for the adjustment of many types of conflicts of state powers were repeated by Justice Frankfurter in his dissenting opinion in *Texas v. Florida*:

> "The authority which the Constitution has committed to this Court over 'Controversies between two or more States,' serves important ends in the working of our federalism. But there are practical limits to the efficacy of the adjudicatory process in the adjustment of interestate controversies. The limitations of litigation—its episodic character, its necessarily restricted scope of inquiry, its confined regard for considerations of policy, its dependence on the contingencies of a particular record, and other circumscribing factors —often denature and even mutilate the actualities of a problem and thereby render the litigious process unsuited for its solution."[62]

Such considerations as these have led a minority of the court to advocate a much narrower range for the original jurisdiction of the Court, and to oppose assumption of jurisdiction where the circumstances are such that the Supreme Court, because of such factors as those noted above, would be unable to grant appropriate relief. In *Pennsylvania v. West Virginia*, Justice Brandeis, dissenting, contended that jurisdiction should be denied because it was not shown that there was, in a legal sense, danger of invasion of the alleged rights of the complaining state, and because there was a fatal lack of necessary parties, in that the companies exporting gas from West Virginia were not represented. But even if all the other obstacles could be overcome, he was of the opinion that the Court should still dismiss the bills, "because it would be unable to grant the only relief appropriate."[63] Where the matter involved was the right of West Virginia to restrict the exportation of natural gas produced within its borders, the most that the Court should do, he thought, would be to compel West Virginia to share its production equitably with the other states dependent upon it for a part of their gas supply. However, in order to determine what would be equitable, or what part of the West Virginia production that state might retain and what

interested in it than by proceedings in any court, however constituted." See also Washington v. Oregon (1908) 214 U. S. 205, 218; Minnesota v. Wisconsin (1920) 252 U. S. 273.

62. (1939) 306 U. S. 398, 428.

63. (1923) 262 U. S. 553, 618.

part it must allow to be exported, it would be necessary to explore the resources and needs of all the states concerned. Inquiry into the potential as well as actual production in each state, and the actual and potential demand in each state, would be essential. Moreover, no determination as to any of these matters could afford a stable basis for future action, for none of these factors would be constant. Only the informed judgment of a board of experts could make decisions of the character called for to achieve the continuous equitable division of the available gas production among consumers in the various states. Since the Supreme Court was unequipped to undertake the determinations required for a proper settlement of such a dispute, it should, in the opinion of Justice Brandeis, have refused to entertain the suit altogether.

Justice Frankfurter, in a dissenting opinion concurred in by Justice Black, expressed a similar view in opposing the assumption of jurisdiction in *Texas v. Florida,* involving the determination of domicile for inheritance tax purposes. The common law doctrine of a single domiciliary status, he argued, is inadequate to present circumstances. On the other hand, he continued,

> "it is not for this Court in these cases of multiple residences to evolve new taxing policies based on more equitable considerations than the all-or-nothing consequence of the old domiciliary rule. * * * merely because no other means than litigation have as yet been evolved to adjust the conflicting claims of several states in a single estate is not sufficient reason for utilizing as a basis of our jurisdiction oversimplified formulas of the past that have largely lost their relevance in the contemporary context."[64]

Whether the Supreme Court takes jurisdiction of a controversy between states and then declines to formulate a settlement, or refuses to maintain jurisdiction at all, makes relatively little difference insofar as the utility of this method of adjustment of conflicts of state powers is concerned. In either instance, a dispute between states of sufficient magnitude to induce one of them to seek a solution in the courts is left unsettled. The construction of the constitutional term "case" or "controversy" markedly narrowed resort to the original jurisdiction of the Supreme Court as a method of adjustment. The extra burden of proof im-

64. (1939) 306 U. S. 398, 430, 431.

posed as a prerequisite to the granting of the relief asked in a controversy between states diminished still further the usefulness of such suits for the adjustment of conflicts of state powers. If to these restrictions should be added the further condition, as is suggested by the opinions of Justices Brandeis and Frankfurter, that jurisdiction be refused by the Supreme Court if it conceives itself unprepared to formulate and effectuate a satisfactory solution, the availability of resort to a suit between states will be cut down still further.

Actually, the main concern of the justices dissenting in both *Pennsylvania v. West Virginia* and *Texas v. Florida* was not over the assumption of jurisdiction, but over the law applied by the majority after the jurisdiction of the court had been sustained. Their argument against the assumption of jurisdiction is really part of a wider protest against the principles followed by the majority in reaching the decision announced for the court. If the majority had merely assumed jurisdiction, and had then decided that the relief asked ought not to be granted, perhaps the protests registered against the maintenance of jurisdiction would have remained unwritten.

The intimations to the effect that the Supreme Court should refuse even to take jurisdiction in a controversy for which it would be unable to provide the desirable remedy, although a matter of an otherwise justiciable nature was presented, are open to question. The view of the dissenting justices is based upon the recognition that, in the handling of such a complex and shifting interstate problem as that involved in the *West Virginia* case, other preferable means of solution might be developed and used, and that any settlement attempted by the Supreme Court would prove inadequate in the long run. The hope is that, by slamming the door of its original jurisdiction to states seeking settlement of such problems, the Supreme Court may force them to experiment with other possible solutions until they evolve a thoroughly adequate means of adjustment. Experience has indicated, it is true, that the states will run to the Supreme Court to tell their troubles, if the court will listen, rather than work out an equitable settlement themselves, and this even when the process is costly both in time and money, and the results often not conclusive. It is more than likely, also, that a suit between states is not the most efficient means of adjusting such conflicts,

and that non-judicial arrangements would provide preferable results. Possibly the development of alternative methods of adjusting conflicts of state powers would actually be stimulated should the Supreme Court officially embrace such a doctrine as to the scope of its original jurisdiction.

Nevertheless, contrary considerations are persuasive. The device of a suit between states within the original jurisdiction of the Supreme Court was intended to provide a peaceful means for the authoritative settlement of disputes between states. The grant of jurisdiction is not, in its terms, restrictive. Limitations imposed by interpretation close this avenue of adjustment. Conflicts of state powers inadmissible to judicial consideration must be adjusted otherwise or not at all. A decision handed down by the Supreme Court is binding upon the states which are parties to the suit, but non-judicial adjustment depends upon the agreement of each of the states involved, and consequently is less easily achieved. Rather than close its original jurisdiction to contending states when the problem is such that litigation is not the best means of solution, the Supreme Court should be reluctant to restrict further the range of its jurisdiction over suits between states, even though by so doing it might in some degree expedite the use of other methods of adjustment.

The types of conflicts of state powers adjusted in suits between states have not been many. The impossibility of bringing many types of conflicts within the confines of the constitutional term "case" or "controversy" has excluded many problems from judicial consideration. Other types have come within the original jurisdiction of the Supreme Court but have gone unadjusted because the complainant state failed to adduce the incontrovertible proof required for the grant of judicial relief against another state.

Of the cases decided by the Supreme Court within its original jurisdiction, many concerned matters which might have been adjusted in a more satisfactory manner by the states acting in an extra-judicial way. Boundary disputes are probably as susceptible of judicial settlement as any other type, but often judicial decision proves an expensive, long drawn out, and inconclusive method of drawing a boundary line. In both of the instances in which one state has sued another to prevent the discharge of sewage into interstate waters, the Supreme Court

has found the evidence not conclusive enough to grant the injunction sought by the plaintiff state, although it recognized that such a problem as that of sewage disposal demanded some kind of agreement to reconcile the conflicting interests of the contending states. The equitable distribution of the limited supply of water available in many of the western states is a matter of vital concern to those states, and makes it imperative that a binding apportionment be made. Such division of water supply has been made by the Supreme Court in a few instances, not always with complete success.[65] The use of an interstate compact to apportion the water of the Colorado River suggests that this device may prove more satisfactory. When it forbade one state absolutely to preserve for its own citizens the preference in the use of its natural gas resources, the Supreme Court, although it assured the continued supply of gas for consumption in the complaining states until the fields were exhausted, failed to formulate a scheme which would have given due regard to the rights of each of the states concerned, by an equitable apportionment of the limited supply of gas remaining available for consumption. The decree of the Supreme Court ordering a sharp reduction in the amount of water allowed to be diverted from Lake Michigan by Chicago has not settled satisfactorily and probably not finally a problem of vital concern to all of the states bordering the Great Lakes and the states of the Mississippi basin.[66] The shortcomings of litigation for coping with these intricate and shifting problems has been amply demonstrated by the decisions, and has

65. On March 4, 1940, the Supreme Court permitted Wyoming to file a petition seeking to have Colorado held in contempt for the alleged excessive use of water from the Laramie River, and directed Colorado to show cause by March 25 why it should not be held in contempt for violation of the previous Supreme Court decree setting a limit to the use of water by Colorado. St. Louis Post-Dispatch, March 4, 1940, p. 4A: 4. The petition filed by Wyoming was denied by the Supreme Court on April 22, 1940. It was not controverted that Colorado had permitted diversion in excess of the amount allowed in 1939. Colorado insisted, however, that the excess diversion was with the acquiescence of Wyoming. Stating that it appeared that there was misunderstanding and uncertainty as to this point, the Supreme Court let Colorado off with a warning to stay within its allotment in the future. Wyoming v. Colorado (1940) 310 U. S. 656.

66. In March, 1940, the Supreme Court heard a plea by Illinois for a temporary modification of the Court's earlier order to permit an increase in diversion of water from Lake Michigan to 5,000 cubic feet per second from the existing flow of 1,500 cubic feet, until Dec. 31, 1942. Six states joined Illinois in asking for the modification. Six other states expressed opposition. St. Louis Post-Dispatch, March 26, 1940, p. 1B: 1.

been repeatedly admitted by members of the Supreme Court itself.

The lessons of experience may induce states to compose many of their differences by devices other than that of a suit between states within the original jurisdiction of the Supreme Court. Perhaps the interstate compact will prove to be the instrument of greatest aptitude for the non-judicial adjustment of conflicts of state powers. In a relatively few types of controversies, a suit before the Supreme Court may be the most suitable possible means of solution. In most instances, however, the settlement of conflicts of state powers by some form of interstate cooperation bears greater promise. Nevertheless, recognition of its shortcomings ought not to lead to withdrawal of the availability of the original jurisdiction of the Supreme Court for the adjustment of conflicts of state powers. At least, the construction of the meaning of "case" or "controversy" should not be narrowed so as to exclude all disputes between states which the Supreme Court may not be able to settle decisively. Desirable though it may be to adjust many types of conflicts of state powers without litigation, the constitutional provision for suits between states within the original jurisdiction of the Supreme Court presents a last resort for the adjustment of interstate controversies even when the process of litigation is ill-suited for their solution.