THE CLEAN WATER ACT AND THE DEMISE OF THE FEDERAL COMMON LAW OF INTERSTATE NUISANCE

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Interstate water pollution has been a prominent source of tension in our federal system for more than a century.[1] Beginning in 1900, states brought transboundary pollution disputes directly to the U.S. Supreme Court, which heard them in the exercise of its original jurisdiction over controversies between states.[2] The Court recognized that it was the body uniquely capable of resolving disputes that, if they "arose between independent sovereignties, might lead to war."[3] In a series of cases that spanned seven decades,[4] the Court adjudicated interstate pollution disputes by fashioning a federal common law of interstate nuisance. On several occasions the Court used its equitable powers to issue injunctions restricting interstate pollution or requiring that states construct waste disposal facilities.[5] Yet the Court ultimately abandoned this role following the enactment of the Clean Water Act by holding that this legislation preempts the federal common law of interstate nuisance.[6]

This Article reviews the history of the federal common law of interstate nuisance and its ultimate demise following the enactment of the Clean Water Act. Part I discusses the long-running controversy over the Chicago drainage canal, which spawned the Court's first foray into an interstate pollution dispute in *Missouri v. Illinois*,[7] as well as the battle to prevent water

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1. *See* Richard B. Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 HARV. ENVTL. L. REV. 241 (1982).

2. U.S. CONST. art. III, § 2. Article III, Section 2 of the Constitution provides that the judicial power extends to controversies between two or more states and to controversies between a state and citizens of another state. It specifies that the Supreme Court has original jurisdiction over cases in which a state shall be a party.

3. Missouri v. Illinois, 200 U.S. 496, 518 (1906) (explaining the Court's prior decision in Missouri v. Illinois, 180 U.S. 208 (1901), upholding its jurisdiction to hear an interstate pollution dispute).

4. Vermont v. New York, 417 U.S. 270 (1974); Illinois v. City of Milwaukee, 406 U.S. 91 (1972); New Jersey v. City of New York, 284 U.S. 585 (1931); New York v. New Jersey, 256 U.S. 296 (1921); Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 200 U.S. at 518.

5. New Jersey v. City of New York, 284 U.S. at 585; Wisconsin v. Illinois, 281 U.S. 696 (1930); Georgia v. Tenn. Copper Co., 237 U.S. at 474.

6. The Supreme Court stopped developing the federal common law of nuisance after declaring in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), that the Clean Water Act's regulatory scheme was so comprehensive that it preempted federal common law for interstate pollution.

7. 200 U.S. 496 (1906).

diversions from harming the waterways of the Great Lakes. Part II examines water pollution disputes during the 1920s and 1930s between New York and New Jersey. Part III reviews the Court's decision in the 1970s to decline to exercise its original jurisdiction when an alternative forum was available to hear interstate nuisance claims. Part IV examines the Court's decisions during the 1980s that the Clean Water Act preempted the federal common law of interstate nuisance, but not the common law of states where transboundary pollution sources are located. Part V discusses the relevance of this history for current debates over federalism, separation of powers, and regulatory policy.

I. *MISSOURI V. ILLINOIS*

The first transboundary pollution dispute heard by the U.S. Supreme Court was generated by a massive public works project to rescue Chicago from horrendous sanitation problems caused by its sewage disposal practices.[8] A severe cholera outbreak in Chicago in the early 1850s killed between three and five percent of the city's population annually for six years.[9] The precise cause of the cholera outbreak was unknown,[10] but it was clear that Chicago's practice of dumping its raw sewage into Lake Michigan would have to change. In 1855, the Illinois Legislature created a Board of Sewerage Commissioners, which hired Boston engineer Ellis S. Chesbrough to design the first comprehensive, underground sewer system in the United States.[11] Chesbrough proposed raising the grade of the streets and existing buildings in order to facilitate the laying of sewer pipes, a plan the city ultimately adopted.[12] Of the four options recommended by Chesbrough for discharging the sewage the new system collected, the Commissioners chose the cheapest one, discharging it into the Chicago River, which flowed into Lake Michigan.[13]

Thus, like virtually all other cities in the nineteenth century, Chicago disposed of its municipal sewage by dumping it untreated into the nearest body of water. The sewage congregated in Lake Michigan, the source of Chicago's drinking water. To recover drinking water from a less polluted portion of the lake, city officials built a two mile-long water tunnel into Lake Michigan, which was completed on December 6, 1866.[14] A second water tunnel into the lake was built in 1874.[15] In 1892, an additional tunnel, four miles long, was completed.

8. See summary of argument for the complainant in *Missouri v. Illinois*, 200 U.S. at 497-510.
9. *Chicago's Quest for Pure Water*, CHI. TRIB., Jan. 2, 1900.
10. Missouri v. Illinois, 200 U.S. at 498.
11. *Chicago's Quest for Pure Water*, *supra* note 9.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

A. Construction of the Chicago Drainage Canal

As Chicago's population expanded, sewage contamination of Lake Michigan increased, threatening public health. After thousands of Chicagoans died of typhoid during the early 1880s, a radical new plan for sewage disposal was developed. Chicago would build a canal that would reverse the flow of the Chicago River so that sewage disposed in it would flow into the Illinois River and, ultimately, the Mississippi.[16] Despite the staggering cost of such a project, state officials deemed it a worthwhile investment because it would cost less than $5000 for each life it saved. In addition to benefiting public health, the canal also would open up a new shipping channel, fulfilling the dream of a canal linking the Great Lakes with the Mississippi River first articulated in 1674 by the explorer Pere Joliet.[17]

To finance construction, the Illinois Legislature created the Chicago Sanitary District in July 1889 and gave it power to issue bonds and to levy property taxes.[18] Voters residing within the new district approved its creation by referendum on November 5, 1889, by a vote of 70,958 to 242. At a special election a month later, they elected nine commissioners to govern the district.[19]

Disputes over the canal's route and the resignation of the Sanitary District's first chief engineer delayed the project's groundbreaking until September 3, 1892.[20] The twenty-eight mile-long canal was to run between the south branch of the Chicago River and the Desplaines River at Lockport, Illinois.[21] The Des Plaines River flows into the Illinois River, which joins the Mississippi River forty-three miles above St. Louis. The project was expected to take three and a half years to complete, but it ended up taking twice as long.[22] When it finally opened in 1900, $33 million had been spent on the project.[23]

Missouri officials worried that the drainage canal would pollute the Mississippi, the source of their drinking water. Wisconsin and Michigan officials were concerned that the project, by reversing the flow of the Chicago River, would lower the level of Lake Michigan and cause harm to their citizens. Chicago argued that raw sewage it discharged into the canal would be harmlessly diluted by natural forces given the increased volume of water flowing through the canal. While the level of Lake Michigan would lower,

16. *Engineer's Feat in Big Channel*, CHI. TRIB., Jan. 2, 1900, at 10.
17. *Id.*
18. The upper limit on the District's taxing power, which initially had been set at one-half of one percent of taxable property values, was increased to one and one-half percent in 1895 when it appeared that insufficient funds would be available to pay for the drainage canal. SANITARY DISTRICT OF CHICAGO, A CONCISE REPORT ON ITS ORGANIZATION, RESOURCES, CONSTRUCTIVE WORK, METHODS AND PROGRESS 28 (1899).
19. *Drainage Canal's Legal Work*, CHI. TRIB., Jan. 9, 1900.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Turn the River into Big Canal*, CHI. TRIB., Jan. 3, 1900, at A1.

it would not fall by more than three to six inches, as estimated by the Board of United States Engineers.[24]

As the project neared completion in December 1899, rumors abounded that Missouri officials would take legal action to block opening of the canal.[25] Fearful of legal action, the commissioners of the Chicago Sanitary District began unannounced to let water flow into the drainage canal at dawn on January 2, 1900.[26]

Infuriated by Chicago's action to open the canal in secrecy, Congressman Bartholdt of St. Louis protested to U.S. Secretary of War Root and U.S. Attorney General Griggs.[27] Secretary of War Root said he would not revoke the canal's permit unless the canal was shown to interfere with shipping interests or the health of citizens in St. Louis.[28] The Attorney General advised the Congressman that his only recourse was to seek relief in the courts.[29]

On January 4, 1900, Missouri Attorney General Edward C. Crow met with Missouri Governor Stephens, who agreed that the state should file suit against Illinois in the Supreme Court.[30] Arguing that "the health of the citizens of the great City of St. Louis is directly menaced," Attorney General Crow announced that the best course for resolving the controversy was for Missouri to bring an original action against Illinois in the Supreme Court.[31] This would permit the Court to settle the issue more speedily than would any proceeding brought in federal district court.[32] Crow argued that because Missouri had jurisdiction over the waters of the Mississippi from the Missouri shore to the middle of the river's main channel, "it is within the power of the State of Missouri to protect these waters from pollution, in order to preserve the health of our citizens."[33] Missouri Governor Stephens described Chicago's action as a "great wrong" and vowed that he would "not give up this fight for our lives until the canal is closed, and closed forever."[34]

Chicago argued that it was unfair for Missouri to take legal action after so much time and money had been invested in building the canal, which had become one of the most expensive public works projects to date. While expressing concern that the canal could threaten public health, William Kennett, president of the St. Louis Merchants Exchange, noted that "as busi-

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24. *Engineers' Feat in Big Channel*, *supra* note 16, at 10.
25. *Turn the River Into Big Canal*, *supra* note 23, at A1.
26. *Id.* ("Two belated newspaper reporters, who came rushing across the earth piles, caused a small panic until it was seen they carried no injunctions with them. It was with a feeling of relief that the water finally was seen pouring down the sluiceways without a legal halt having been called.").
27. *St. Louis Has Two Rebuffs*, CHI. TRIB., Jan. 4, 1900, at A4.
28. *Id.*
29. *Id.*
30. *Seeks to Enjoin Canal*, CHI. TRIB., Jan. 5, 1900, at A1.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*

nessmen, we must recognize the fact that Chicago should not have been allowed to go on without objection all these years, spending the money it has on this work without being allowed to reap some benefit from it."[35] William Marion Reedy, editor of the *St. Louis Mirror*, argued that Missouri should have filed an anticipatory nuisance action to block the project years before.[36] Alderman Goldzler of the Chicago Sanitary District argued that because Missouri waited to take legal action until after the opening of the canal, "it will be possible for Chicago to show the actual facts as they have resulted from the opening, instead of theories."[37]

Dr. Joseph Grindon, president of the St. Louis Medical Society, believed that "the introduction of the sewage of Chicago into the Mississippi River will injure the water supply of St. Louis."[38] However, he noted a larger problem, independent of the drainage canal.

> Eliminate Chicago entirely from the subject, and the fact remains that to the north of us on the banks of the Missouri, Mississippi, and Illinois Rivers are constantly growing cities, all emptying their sewage into the streams above us. As a result our water supply is already bad and will keep getting worse no matter what Chicago may do.[39]

The only long-term solution was to "abandon our present water supply and seek another one in some one of the now navigable rivers to the west of us."[40]

B. Missouri's Interstate Nuisance Action

On January 17, 1900, Illinois Governor John R. Tanner approved final opening of the drainage canal, allowing water previously released into it to flow into the Desplaines River.[41] The governor authorized the Lockport dam to be lowered, connecting canal waters with water flowing to the Mississippi.[42] Missouri immediately applied to the U.S. Supreme Court for leave to seek an injunction against Illinois.[43] In its complaint Missouri named both Illinois and the Sanitary District as defendants. It alleged that its citizens used water from the Mississippi River for drinking, agriculture, and manufacturing purposes and that the drainage canal would cause 1500 tons per day of "undefecated filth and sewage and poisonous and unhealthful and

35. *St. Louis Water Bad for Years*, CHI. TRIB., Jan. 9, 1900, at A3.
36. *Id.*
37. *Citizens Glad of Opening*, CHI. TRIB., Jan. 18, 1900, at A4.
38. *St. Louis Water Bad for Years*, *supra* note 35, at A3.
39. *Id.*
40. *Id.*
41. *River Starts to Gulf*, CHI. TRIB., Jan. 18, 1900, at A1.
42. *Id.*
43. *Canal Fight On in Washington*, CHI. TRIB., Jan. 18, 1900, at A4.

noxious matters" to flow into the river.[44] The complaint declared that this will create "a direct and continuing nuisance" by rendering the river "wholly unfit and unhealthful for drinking and domestic uses."[45] Missouri asked for both a temporary and a permanent injunction prohibiting the defendants from discharging any sewage into the drainage canal. It did not seek to block use of the canal as a waterway, but rather only to bar sewage discharges into it.

On January 22, 1900, the Court granted Missouri leave to file its complaint. In March 1900, Illinois filed a demurrer seeking dismissal of the action. Illinois argued that the Supreme Court had no jurisdiction over the case because it was not properly a dispute that involved either the states of Missouri or Illinois in their capacities as states. Illinois argued that the case concerned only certain Missouri cities, towns, and citizens and not any property rights of the state of Missouri.[46]

The Supreme Court heard oral argument on Illinois's demurrer on November 12-13, 1900. Eleven weeks later, on January 28, 1901, the Court announced its decision overruling the demurrer and allowing the case to proceed.[47] The Court rejected Illinois's arguments that Missouri's claim was not a dispute between states subject to the Court's original jurisdiction in an opinion written by Justice George Shiras, Jr.[48] and joined by five other justices—Justices Gray, Brewer, Brown, Peckham, and McKenna.

After reviewing the history of the Court's original jurisdiction,[49] which previously had been exercised only in boundary disputes and cases involving state property rights, Justice Shiras declared that "such cases manifestly do not cover the entire field in which such controversies may arise."[50] He noted that the injury Missouri alleged "is such that an adequate remedy can only be found in this court at the suit of the State of Missouri."[51] Shiras declared that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them."[52] Having given up the powers of an independent sovereign to make war and conduct

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44. Bill of Complaint in Missouri v. Illinois, No. 5 Original (1900), *reproduced at* 180 U.S. 209, 213.

45. *Id.*

46. Demurrer of Illinois in Missouri v. Illinois, No. 5 Original (1900), *reproduced at* 180 U.S. 216, 218.

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

48. Shiras has been described as "an avid fisherman" who loved wildlife. THE SUPREME COURT JUSTICES 263 (Clare Cushman ed., 1993).

49. Shiras noted that the Articles of Confederation had provided for Congress to appoint a thirteen-person tribunal of citizens to resolve disputes between states. The thirteen members of the tribunal were to be selected from a pool of thirty-nine formed by having each state nominate three persons. The parties to the dispute would then take turns striking members of the pool until it was down to thirteen. At the constitutional convention, early drafts of the constitution proposed having a special court formed by the Senate to resolve disputes between states over property or jurisdiction, while authorizing the Supreme Court to resolve all other disputes between states. The provision for a senate special court was dropped in favor of giving the Supreme Court jurisdiction over all disputes between states.

50. Missouri v. Illinois, 180 U.S. 208, 241 (1908).

51. *Id.*

52. *Id.*

diplomacy, Missouri should be able to seek a remedy from the federal government when transboundary pollution threatens the health of its inhabitants.[53] He dismissed any notion that private nuisance actions brought by individuals could be an adequate remedy in such circumstances.[54]

The Court rejected the notion that Illinois was not a proper party to the suit, noting that the Sanitary District was an agency of the state acting under state authority to do the very things alleged to create a nuisance.[55] It also dismissed the suggestion that Missouri had been guilty of laches by not seeking an injunction earlier, noting the difficulty of proving an anticipatory nuisance and the fact that Missouri was not seeking an injunction against use of the canal as a waterway, but rather only against discharges of sewage into it.[56]

Chief Justice Melville W. Fuller wrote a dissent joined by Justice John Marshall Harlan and future Chief Justice Edward Douglass White. Fuller, who was the first Chief Justice to have had formal legal training (having attended Harvard Law School for six months), had practiced law in Illinois where he was involved in Democratic politics at the time of his nomination to the Court.[57] He argued that this was not a dispute between states because the Illinois governor's only role was to authorize opening of the canal, which he had done, and that no official acts by the state remained to be performed.[58] The Chief Justice would have dismissed the Illinois as a defendant without prejudice to Missouri's right to proceed in a new suit against the Sanitary District alone.[59] Thus, while the three dissenters questioned Missouri's right to sue Illinois, none of the Justices questioned the propriety of the Court using its original jurisdiction to hear an action against the Sanitary District.

While the Court upheld Missouri's right to seek relief, it did not grant the state's request for a preliminary injunction. The Court noted that the claimed injuries were the product "of a public work, authorized by law" and that Illinois had denied that the canal would cause damage and irreparable injury.[60] The Court observed that before an injunction would issue, Missouri would have to prove the existence of a nuisance by "determinate and satisfactory evidence," with proofs that "must show such a state of facts as will manifest the danger to be real and immediate." [61]

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53. *Id.*
54. *Id.*
55. *Id.* at 242.
56. *Id.* at 245-46.
57. THE SUPREME COURT JUSTICES, *supra* note 48, at 247-48.
58. Missouri v. Illinois, 180 U.S. 208, 249-50 (1901).
59. *Id.*
60. *Id.* at 248.
61. *Id.*

C. *Presentation of Testimony and Oral Argument*

While Chicago's sewage flowed through the drainage canal, the parties gathered evidence to support their cases. Missouri eventually filed a supplemental bill of complaint alleging that the canal had produced "all the evils which were apprehended when the injunction first was asked."[62] On November 17, 1902, the Supreme Court appointed Frank S. Bright to serve as commissioner to supervise the taking of testimony. Testimony commenced on February 17, 1903. After two extensions of time for taking testimony were granted, the parties finished presenting their factual cases on May 28, 1904. More than 350 witnesses testified and more than 100 exhibits were presented before Commissioner Bright, producing a record that consumed 13,160 typewritten pages.[63] It took more than a year for Bright to prepare his report, which he presented to the Court on May 29, 1905.

The Court then heard oral argument for a period of three days on January 2-4, 1906. Missouri argued that connecting the drainage canal to the Illinois River had increased the population "sewering" into the Mississippi River watershed by 75%. While conceding that science was not capable of detecting directly the presence of typhoid *bacilli* in running water, Missouri sought to prove that Chicago's sewage had increased typhoid deaths in St. Louis. The state presented data indicating that there had been a 77.7% increase in typhoid deaths in St. Louis during the period 1900-1903 compared with the period from 1896-1899.[64] It argued that no other factor could account for this increase other than pollution from the drainage canal. Missouri argued that the economic damage alone caused by an extra 1200 cases of typhoid and eighty more deaths per year ran into the hundreds of thousands of dollars annually, applying a valuation of $5000 per death and $10 per day to treat the disease, without considering pain and suffering experienced by victims. If Chicago was allowed to continue dumping its sewage into the drainage canal, Missouri would have to spend millions of dollars to filter its drinking water. Counsel for Missouri argued that the problems would only get worse as Chicago's population increased from two million to five million people.[65]

Arguing in defense, counsel for Illinois maintained that the drainage canal actually had improved conditions in the Illinois River by increasing its water flow and diluting pollutants in the river. As a result, the Illinois River was now less polluted than the Missouri and Mississippi Rivers, which were contaminated largely due to sewage from Missouri's own cities. Counsel for Missouri agreed that the drainage canal had increased the volume and speed

62. Missouri v. Illinois, 200 U.S. 496, 517 (1906).
63. Transcript of Record, Missouri v. Illinois, No. 4 Original, at 14-29.
64. Reported deaths from typhoid fever had increased from 131 in 1899 to 281 in 1903, though far more dramatic year-to-year changes in typhoid deaths had occurred before the canal was opened (e.g., in 1892).
65. See summary of argument for the complainant in Missouri v. Illinois, 200 U.S. 496, 497-510.

of the river, but they maintained that this simply spread the pollutants over greater distances. Counsel for Illinois attributed any increase in typhoid deaths in St. Louis to changes in reporting practices that now attributed deaths to typhoid that previously had been classified as deaths from other causes. Illinois also charged that Missouri was guilty of laches by failing to seek an injunction during the seven years the drainage canal was under construction. Having then spent $42.5 million on the project, Illinois maintained that the balance of equities favored its interests and that it would suffer greater harm if an injunction was issued.

In an effort to determine whether water-borne bacteria that cause typhoid could survive the river journey from Chicago to St. Louis, the parties conducted a series of experiments. These involved placing floats, barrels, and permeable sacs at various points in the drainage canal and the rivers. The floats took between eight to eighteen and a half days to travel the full 357 miles between Chicago and St. Louis. Expert witnesses for Illinois interpreted the results as indicating that no bacteria would survive long enough to complete the journey, while Missouri's experts argued that the bacteria could survive for more than twenty-five days.

Counsel for Illinois argued that Missouri was not entitled to an injunction under the doctrine of "unclean hands" because Missouri's own cities discharged their raw sewage into the Mississippi and that these cities "are all agencies of the State" whose acts should be imputed to the state.[66] Responding to this argument, counsel for Missouri maintained that Chicago's discharges were different in character from those of Missouri's cities because they involved the use of artificial means to discharge waste into a different watershed. Missouri argued that its cities were simply exercising their right to discharge waste into riparian waters.

D. The Court's Decision

A month and a half after oral argument, the Supreme Court issued its decision on February 19, 1906.[67] In a unanimous decision authored by Justice Holmes, the Court denied Missouri's request for an injunction and dismissed the state's complaint.[68] Justice Holmes first addressed the question of what law the Court should apply.[69] He noted that the Constitution extends the judicial power to controversies between states and that it gives the Court original jurisdiction over cases in which a state is a party.[70] But the Court still "must determine whether there is any principle of law and, if any, what, on which the plaintiff can recover."[71] Holmes explained that the necessity to resolve disputes between states does not authorize the court to take "the

66. *Id.*
67. Missouri v. Illinois, 200 U.S. 496 (1906).
68. *See id.*
69. *Id.* at 517-18.
70. *Id.* at 519.
71. *Id.*

place of a legislature."[72] However, "[s]ome principles it must have power to declare."[73] But since these principles can hardly be found in "the words of the Constitution" and cannot lightly be reversed, the Court must approach them with "great and serious caution" in deciding whether a state has proved its case.[74] The Court should be more reluctant to use its equitable powers in disputes between states than lower courts are in responding to requests for equitable relief in suits involving parties within the same jurisdiction.[75] Holmes declared that when states are involved, "[b]efore 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."[76]

While imposing an enhanced burden of proof on plaintiffs suing states, Holmes acknowledged the importance of recognizing the special character of cases involving allegations of environmental harm:

> At the outset we cannot but be struck by the consideration that if this suit had been brought fifty years ago it almost necessarily would have failed. There is no pretence that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses—no visible increase of filth, no new smell. . . . The plaintiff's case depends upon an inference of the unseen. It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change and that other explanations have been disproved, and second, that the bacillus of typhoid can and does survive the journey and reach the intake of St. Louis in the Mississippi.[77]

While accepting "the now prevailing scientific explanation of typhoid fever to be correct," Holmes noted that beyond that assumption everything else in Missouri's case "is involved in doubt."[78] Experts for the two sides disagreed fundamentally on whether the typhoid bacillus could survive the journey to St. Louis.[79] Even assuming that St. Louis had demonstrated a real increase in the number of typhoid cases, there had not been evidence of an increase in the disease along the banks of the Illinois River which would be

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72. *Id.*
73. *Id.*
74. *Id.* at 520.
75. *See id.* at 520-21.
76. *Id.* at 521.
77. *Id.* at 522-23. Writing his friend Sir Frederick Pollock three years later, Holmes observed: "I learned in a great case that I wrote (between Missouri and Chicago) that the stagnant pool is the safe place, because then the harmless bacilli simply stifle and wipe out the typhoid fellers. Clear water is the thing to be afraid of!" Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock, Feb. 21, 1909, *in* OLIVER WENDELL HOLMES, JR. PAPERS, Harvard Law School Library, No. 9-951.
78. Missouri v. Illinois, 200 U.S. at 523.
79. *Id.*

expected if sewage in the drainage canal was the true cause of the increase.[80] There was very strong evidence that St. Louis ultimately would have to invest in an expensive filtration system in any event because of pollutants from Missouri's own cities.[81] Holmes cautioned Missouri that if its lawsuit succeeded, it would probably find itself a defendant in similar cases brought by downstream states.[82]

The Court rejected Missouri's attempt to distinguish Chicago's discharges as the product of a foreign watershed, noting that the natural features separating the two watersheds were very small and that Congress already had approved the construction of a shipping lane connecting them.[83] Thus, Holmes concluded that Missouri had not come close to making a sufficient case for an injunction based on the evidence it presented.[84]

Two factors seemed most important to the Court's decision to reject Missouri's nuisance claim: the weakness of the proof of injury and the fact that Missouri's own cities discharged untreated sewage into the Mississippi River. While Justice Holmes indicated that the latter need not necessarily preclude success on the nuisance claim, he suggested that it justified requiring a more rigorous showing that the harm was caused by Chicago's sewage rather than sewage from other Missouri cities.

A year later, Justice Holmes, writing to his friend Sir Frederick Pollock, referred to this decision as one in which "I gave a light touch to fundamentals."[85] Yet he clearly appreciated the significance of the Court's unique role in resolving transboundary disputes. Writing Pollock four years later about another dispute between states, Holmes observed that such decisions are "small enough from the point of view of legal theory, except as reemphasizing our peculiar position in the matter, to which I believe I was the first to call attention in the fight between Missouri and Illinois."[86] He noted that "our decision may embody principles that could be changed only by overruling it or a change in the Constitution or a compact between the States concerned with an assent by Congress."[87]

E. The Water Diversion Litigation

Although it succeeded in defeating Missouri's lawsuit, the legal problems caused by Illinois's operation of the drainage canal were far from over.

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80. *See id.* at 523-24.
81. *See id.*
82. *Id.* at 523.
83. *See id.* at 526.
84. *See id.*
85. Letter from Justice Oliver Wendell Holmes to Sir Frederick Pollock, Jan. 5, 1907, *in* OLIVER WENDELL HOLMES, JR. PAPERS, Harvard Law School Library, No. 11-923 ("I think I sent you a case I wrote last term in which Missouri tried to stop the drainage of Chicago—in which I gave a light touch to fundamentals.").
86. Letter from Justice Oliver Wendell Holmes to Sir Frederick Pollock, Mar. 12, 1911, *in* OLIVER WENDELL HOLMES, JR. PAPERS, Harvard Law School Library, No. 12-56-57.
87. *Id.* at 12-57.

As the quantities of sewage discharged into the Illinois River by the Sanitary District increased, the District sought to divert more water from Lake Michigan to flush out the greater volumes of sewage in the drainage canal.[88] But in both 1907 and 1913, the Secretary of War refused the District's requests to increase authorized diversions from the permit limit of 4167 cubic feet per second. In defiance of these limits, the Sanitary District increased its diversions from 2541 cubic feet a second in 1900 to 5751 in 1909 and ultimately to 8500.[89] The United States brought suit to enforce the permit limits against the District in federal district court in Chicago.[90] The trial judge delayed ruling on the merits of the federal enforcement action for nearly seven years, before ruling in favor of the United States.[91] The Sanitary District appealed the court's decision that it had violated the permit.

While the District's appeal was pending, in 1924 three states sought to invoke the Supreme Court's original jurisdiction to sue Illinois and the Sanitary District for diverting too much water from Lake Michigan.[92] Wisconsin, Michigan, and New York argued that Illinois had harmed navigation by diverting too much water from Lake Michigan in order to flush sewage out of the drainage canal.[93] The plaintiff states claimed that Illinois's diversions had lowered the levels of Lakes Michigan, Huron, Erie, and Ontario, their connecting waterways, and the St. Lawrence River more than six inches, causing serious injury to their citizens and property.[94] The states claimed that Illinois and the Sanitary District had acted in violation of their federal permit in order to flush out Chicago's sewage.[95] They asked for an injunction restraining the diversion of water from Lake Michigan and the dumping of Chicago sewage into the waterways.[96]

Ironically, Illinois was joined as a defendant by the state of Missouri, as well as Kentucky, Tennessee, Arkansas, Mississippi, and Louisiana, who intervened as defendants in support of Illinois because of their interest in keeping as much water as possible flowing through the drainage canal to the Mississippi River.[97] Wisconsin and the other plaintiffs asked the Court to prohibit Chicago from continuing to take 8500 cubic feet of water per second from Lake Michigan.[98]

In their defense, Illinois and the Sanitary District denied that their diversions of water from Lake Michigan had caused any injury.[99] They argued that the diversions were necessary to facilitate navigation and that they had

88. *See* Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925).
89. *Id.* at 413; *see also* Wisconsin v. Illinois, 278 U.S. 367, 417 (1929).
90. *See* Wisconsin v. Illinois, 278 U.S. at 406, 423.
91. *See id.* at 432.
92. *See id.* at 399.
93. *See id.* at 399-400.
94. *Id.*
95. *Id.*
96. *Id.* at 400.
97. *Id.*
98. *See id.*
99. *Id.* at 401.

been authorized by the Secretary of the Army.[100] Illinois and the Sanitary District also accused the plaintiff states of laches for not having complained previously about construction of the drainage canal.[101]

In January 1925, the Supreme Court upheld the federal district court decision holding that the Sanitary District had violated its federal permit and enjoined the District from diverting more than 4167 cubic feet of water per second from Lake Michigan.[102] While the Court decreed that its injunction would take effect in sixty days, it indicated its decision was without prejudice to the authority of the Secretary of War to issue a new permit to the Sanitary District.[103] On March 3, 1925, the Secretary of War amended the permit to authorize the diversion from Lake Michigan of 8500 cubic feet of water per second, conditioned on the District's agreement to commence immediately to use artificial processes to treat its sewage under the supervision of the United States District Engineer so that the sewage of at least one third of Chicago's population would be treated by the end of 1929.[104]

The Supreme Court agreed to hear the multistate original action against Illinois and the Sanitary District.[105] The Court appointed former Justice Charles Evans Hughes, who had just finished serving as Secretary of State in the Harding and Coolidge Administrations, to serve as special master.[106] The Court instructed Hughes to take evidence and to make findings of fact and conclusions of law in support of a recommended decree.[107]

After conducting extensive hearings, Hughes submitted his report to the Court on November 23, 1927.[108] He found that Chicago's diversion of water from Lake Michigan had lowered the levels of Lakes Michigan and Huron by six inches and Lakes Erie and Ontario by five inches, causing substantial damage "to navigation and commercial interests, to structures, to the convenience of summer resorts, to fishing and hunting grounds, to public parks and other enterprises, and to riparian property generally," though not to agriculture.[109] Hughes concluded that there was no question but that the primary purpose of the diversion was to dispose of Chicago's sewage, rather than to improve navigation.[110]

The Court heard oral argument on exceptions to the report on April 23-24, 1928.[111] However, it was not until the following term of the Court, on January 14, 1929, that the Court issued its decision.[112] The Court upheld the

100. *See id.* at 400-01.
101. *Id.* at 401.
102. *See* Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 432 (1925).
103. *Id.*
104. Wisconsin v. Illinois, 278 U.S. 367, 417-18 (1929).
105. *See id.* at 367.
106. *Id.* at 399.
107. *See id.*
108. *See id.*
109. *See id.* at 370-71, 408.
110. *Id.*
111. *Id.* at 367.
112. *Id.*

claim that Illinois and the Sanitary District had diverted too much water from Lake Michigan causing damage to the plaintiff states.[113] In an opinion by former President William Howard Taft, now serving as Chief Justice, the Court rejected Illinois's claim that it could not be held liable because the diversion was authorized by Congress.[114]

The Court noted that if the Secretary of Army had not granted a temporary increase in the permit limit, "the Port of Chicago almost immediately would have become practically unusable because of the deposit of sewage without a sufficient flow of water through the Canal to dilute the sewage and carry it away."[115] Thus,

> the validity of the Secretary's permit derives its support entirely from a situation produced by the Sanitary District in violation of the complainants' rights; and but for that support complainants might properly press for an immediate shutting down by injunction of the diversion, save any small part needed to maintain navigation in the river.[116]

The Court concluded that the plaintiff states were entitled to equitable relief, while noting that the need to avoid creating a hazard to sanitation in Chicago required that the Sanitary District be afforded reasonable time to develop other means of sewage disposal.[117] The Court referred the case back to the special master to hear evidence concerning what form the decree should take.[118]

Special master Charles Evans Hughes then heard evidence concerning the kind of sewage treatment works the Sanitary District could construct to reduce its diversions of water from Lake Michigan.[119] The special master recommended an ambitious plan requiring the District to construct sewage treatment works, as well as gates, that would prevent the Chicago River from reversing direction and spilling sewage into Lake Michigan during storms.[120] He prepared a new report recommending that the Sanitary District's diversions from Lake Michigan be reduced to 6500 cubic feet per second by July 1, 1930, to 5000 cubic feet per second by the end of 1935, and to 1500 cubic feet per second by the end of 1938.[121] After reargument on exceptions, the Court adopted the special master's recommendations on April 14, 1930.[122]

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113. *See id.* at 418-19.
114. *Id.* at 417-19. 33 U.S.C. § 403 required a permit from the Secretary of Army for such diversions.
115. *Id.* at 417.
116. *Id.* at 418.
117. *Id.* at 420-21.
118. *Id.* at 421.
119. Wisconsin v. Illinois, 281 U.S. 179, 181 (1930).
120. *See id.* at 181-82.
121. *Id.* at 198.
122. *Id.* at 181, 200. Because new Chief Justice Charles Evans Hughes, who had been confirmed by the Senate on February 13, 1930, had been the author of the special master's report, he took no part in

In an opinion for a unanimous Court, Justice Holmes explained the need for Illinois to take extraordinary measures to stop the harm it was causing by its diversion of water from Lake Michigan.[123] Holmes explained that the Court had

> only to consider what is possible if the State of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defences upon difficulties that it has itself created. If its constitution stands in the way of prompt action it must amend it or yield to an authority that is paramount to the State.[124]

Holmes declared:

> [T]here is a wrong to be righted, and the delays allowed are allowed only for the purpose of limiting, within fair possibility, the requirements of immediate justice pressed by the complaining States. These requirements as between the parties are the constitutional right of those States, subject to whatever modification they hereafter may be subjected to by Congress acting within its authority.[125]

The Court adopted the schedule recommended by the special master, rejecting an effort by the plaintiff states to require Chicago to close the drainage canal entirely, a demand Holmes described as "excessive upon the facts in this case."[126] Citing *Missouri v. Illinois*,[127] Holmes observed that "the claims of the complainants should not be pressed to a logical extreme without regard to relative suffering and the time during which the complainants have let the defendants go on without complaint."[128]

A decree ordering the defendants to comply with the Court's timetable was issued on April 21, 1930.[129] The decree also required Illinois and the Sanitary District to file semiannual reports beginning on July 1, 1930, so that the Court could monitor Chicago's progress in complying with the decree.[130] The plaintiff states soon returned to the Supreme Court when they learned that the Drainage District had postponed construction of the sewage treatment works and of the gates to regulate the flow of the Chicago River.[131] The Supreme Court appointed another special master in 1932 to

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the consideration or decision in the case. *See id.* at 202.

123. *Id.* at 197.
124. *Id.*
125. *Id.*
126. *Id.* at 199-200.
127. 200 U.S. 496 (1906).
128. Wisconsin v. Illinois, 281 U.S. at 200.
129. Wisconsin v. Illinois, 281 U.S. 696 (1930).
130. *Id.* at 697-98.
131. Wisconsin v. Illinois, 289 U.S. 395, 396-98 (1933).

determine the reasons for the delay.[132] The special master found that the delays were due to an inexcusable lack of effort on the part of the defendants.[133] While the Sanitary District maintained that it could no longer sell its bonds and now had no financial resources to proceed with the promised construction, the master asked the Court to require Illinois to provide funds so that the project could proceed.[134]

In an opinion for a unanimous Court by Chief Justice Charles Evans Hughes, who had joined the Court shortly after serving as special master in the earlier proceedings in the case, the Court excoriated the defendants for their delays.[135] The Court declared that it was the special responsibility of Illinois to provide funds for the construction:

> In deciding this controversy between States, the authority of the Court to enjoin the continued perpetration of the wrong inflicted upon complainants, necessarily embraces the authority to require measures to be taken to end conditions, within the control of defendant State, which may stand in the way of the execution of the decree.[136]

The Court ordered Illinois "to take all necessary steps" to ensure that funds were secured for prompt completion of the project.[137]

II. TRANSBOUNDARY WATER POLLUTION DECISIONS IN THE 1920S AND 1930S

A. New York v. New Jersey

1. New Jersey Designs a New Sewer System

As illustrated by the controversy over Chicago's drainage canal, sewage disposal was an urgent problem for rapidly growing communities in the late nineteenth and early twentieth centuries. The common practice of dumping raw sewage into the nearest waterbody created enormous public health problems in many communities. Sewage discharges from New Jersey cities turned the Passiac River into such a threat to public health that for three successive years, beginning in 1896, the New Jersey legislature directed the governor to appoint commissions to devise a better method of sewage disposal.[138] While three successive governor's commissions issued reports on the problem, it was not until 1902 that the legislature acted to create the

132. *See id.* at 398.
133. *Id.*
134. *See id.* at 399.
135. *Id.* at 397, 412.
136. *Id.* at 406.
137. *Id.* at 411.
138. New York v. New Jersey, 256 U.S. 296, 299 (1921).

Passaic Valley Sewerage District, whose boundaries covered virtually all the watershed of the Passaic River.[139] In an effort to force the district to develop a new method of sewage disposal, the legislature in 1907 adopted legislation requiring that sewage discharges into the Passaic eventually be eliminated.[140]

In April 1908, the Passaic Valley Sewerage Commissioners adopted a plan to construct a sewer system that would end discharges into the Passaic River.[141] A main intercepting sewer would be built that would run alongside the river from Patterson to Newark before connecting with a tunnel which would take the sewage under Newark Bay to Upper New York Bay.[142] The sewage would be discharged into the Bay just north of Robbins Reef Light at a point forty feet under water.[143] It was estimated that the entire sewer system would cost approximately $12.25 million dollars.[144]

The New Jersey Legislature then required that before construction could commence on the sewer and tunnel project, the Commissioners had to conduct a study and report to the governor whether the sewage discharges would pollute New York Bay so badly as to cause a nuisance.[145] The Commissioners prepared a report finding that no nuisance would be created and the governor approved the project.[146]

2. New York Sues New Jersey

Alarmed by the prospect of further pollution in New York Bay, the waters of which lie entirely within the jurisdiction of the State of New York, the New York Legislature created its own commission to investigate the project.[147] The New York commission held a series of conferences with the New Jersey commissioners, but they were unable to reach agreement on the project.[148] As a result, New York filed an action in the U.S. Supreme Court on October 17, 1908, seeking an injunction to stop construction of the project.[149] New York's complaint named both the state of New Jersey and the Passaic Valley Sewerage Commissioners as defendants.[150] It alleged that 120 million gallons of sewage would be discharged by the tunnel into New York Bay each day and that this would cause a public nuisance, offending

139. *Id.*
140. *Id.* at 299-300.
141. *Id.* at 300.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 301.
148. *Id.*
149. *Id.*
150. *Id.*

and harming those who use the river for bathing or commerce, damaging vessels, and poisoning fish and oysters.[151]

New Jersey filed its answer on January 24, 1909.[152] It denied that the project would create a nuisance.[153] New Jersey argued that it was as concerned as New York with keeping the Bay free of pollution because it also had several large cities bordering it.[154] New Jersey noted that the project would conform to the recommendations of sanitary engineers and that the volume of sewage discharges would be less than one seventh the amount that New York already was discharging into the Bay.[155]

3. Federal Intervention

After New Jersey's answer was filed, the federal government petitioned the Supreme Court for leave to intervene.[156] As grounds for intervention, the United States cited the federal government's responsibility for protecting navigation and interstate commerce and its inherent power to protect the health of government employees working at the Brooklyn Navy Yard.[157] The United States generally concurred in the allegations in New York's complaint.[158] It maintained that solids in the sewage discharges would obstruct navigation by filling up channels of the Bay, that the pollution would harm health, and that other, more advanced methods of sewage disposal should be used.[159]

In response to the petition for intervention, New Jersey commenced settlement negotiations with the federal government.[160] After lengthy negotiations, the state reached a settlement agreement with the United States.[161] New Jersey agreed to redesign the project to provide for primary treatment to removes solids and floating material from the sewage and to disperse the discharges through 150 outlets spread over a three and a half-acre area.[162] To ensure that these measures achieved their desired end, the settlement agreement included the following seven performance commitments:

> (1) There will be absence in the New York Bay of visible suspended particles coming from this sewage; (2) there will be absence of deposits caused by it objectionable to the Secretary of War of the United States; (3) there will be absence of odors due to the putrefac-

151. *Id.* at 302-03.
152. *See id.* at 303.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 303-04.
158. *See id.* at 304.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 305.

> tion of organic matter contained in the sewage; (4) there will be absence on the surface of the Bay of any grease or color due to the sewage; (5) there will be no injury to the public health due to the discharge of the sewage, and no public or private nuisance will be created thereby; (6) no injurious effect shall result to the property of the United States situation upon the Bay; (7) there shall not be a reduction in the dissolved oxygen content of the waters, due to this sewage, sufficient to interfere with major fish life.[163]

The agreement gave the federal government an unrestricted right to inspect the sewer system and made full compliance with the performance commitments an express condition of any permit issued for the project.[164]

The federal government agreed to dismiss its petition for intervention upon filing of the settlement agreement with the clerk of the Supreme Court.[165] In compliance with this provision, the petition for intervention was dismissed on May 16, 1910.[166] However, New York was not satisfied that the settlement reached between New Jersey and the United States would be adequate to protect its interests.[167] Thus, New York pressed ahead with its nuisance claim.

4. Taking of Testimony and Oral Argument

The parties began taking testimony on June 26, 1911, a process that lasted for more than two years.[168] New York presented expert witnesses who argued that the measures New Jersey agreed to employ to provide primary treatment and to disperse its sewage would not be sufficient to prevent a nuisance.[169] While New Jersey pointed to the performance commitments it had made to the federal government, New York argued that they were unenforceable. In addition to challenging whether the commitments actually could be made binding on either New Jersey or the United States, New York also argued that it would be impossible to determine if they had been fulfilled because New Jersey would blame any shortcomings on sewage discharged by New York.[170] New Jersey presented its own expert witnesses who argued that the sewage system would not cause a nuisance and that any pollution caused by its discharges could be traced to its origin.[171]

While the taking of testimony concluded on June 27, 1913, the case was not argued before the Supreme Court until November 1918, more than five

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163. *Id.* at 306.
164. *See id.*
165. *Id.* at 308.
166. *Id.*
167. *See id.*
168. *See id.*
169. *Id.*
170. *See id.* at 306-08.
171. *See id.* at 310.

years later.[172] New York was represented at the argument by one of the most distinguished advocates to appear before the Court—former New York governor and former Supreme Court Justice Charles Evans Hughes.[173] Hughes, the son of a Methodist preacher who had immigrated to the United States from Wales, was a graduate of Brown University and Columbia Law School.[174] Hughes had practiced law for twenty years before attaining notoriety as a member of a New York commission investigating gas and electric rates.[175] He was elected governor of New York in 1906 and was near the end of his second term as governor when President Taft nominated him to the Supreme Court on April 25, 1910.[176] After his nomination was confirmed a bare one week after it was made, Hughes served for six years on the Court until he was drafted to be the Republican presidential nominee in 1916.[177] He narrowly lost the presidency to Woodrow Wilson in one of the closest elections in U.S. history.[178] After his electoral defeat, Hughes returned to law practice.[179] He made frequent appearances before his old colleagues on the Court, arguing more than two dozen cases there.[180]

On November 8 and 11-12, 1918, the Supreme Court heard three days of oral argument on New York's complaint.[181] In the course of the argument, the Justices discovered the record had become rather dated. It had been more than five years since the taking of testimony had closed and in the interim, considerable improvements had been made in sewage disposal technology.[182] As a result, on March 10, 1919, the Court directed that additional testimony be taken on how the project and New York's own sewage disposal practices could be modified to reduce their polluting effects and the extent to which New York Harbor already was polluted.[183]

Both New York and New Jersey presented additional testimony from experts who disagreed over the present condition of the waters near the proposed discharge points and their probable future condition if the project went forward.[184] New Jersey presented data showing that New York's population had been growing so rapidly that the population contributing sewage discharged into the harbor from New York's 450 sewage discharge points had grown by more than 100,000 people per year between 1906 and

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172. *See id.* at 296.
173. *See* THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 158 (David J. Danelski & Joseph S. Tulchin eds., 1973).
174. *See id.* at 35-47, 54-56.
175. *See generally id.* at 119-27.
176. *See id.* at 158.
177. *See id.* at 178.
178. *Id.* at 181.
179. *Id.* at 186.
180. *Id.* at 195 n.34; Charles T. Fenn, *Supreme Court Justices: Arguing Before the Court After Resigning from the Bench*, 84 GEO. L.J. 2473, 2486 (1996).
181. New York v. New Jersey, 256 U.S. 296, 296 (1921).
182. *See id.* at 302-03, 312.
183. *Id.* at 312.
184. *Id.*

1919.[185] This was more than the entire population projected to be served by the Passaic Valley Sewerage District for the next two decades.[186]

On January 25, 1921, the case was reargued in the Supreme Court.[187] Arguing again for New York was former Justice Hughes. Hughes's busy Supreme Court docket at the time had included arguments in six other cases before the Court just during the period between October 14 and November 15, 1920.[188] At oral argument, Justice Mahlon Pitney of New Jersey, a friend of Hughes, interrupted him so frequently that Hughes thought he was purposefully trying to confuse him.[189] Shortly after the argument, incoming President Warren Harding nominated Hughes to become his Secretary of State.

5. The Court's Decision

On May 2, 1921, the Court ruled against New York.[190] In a unanimous decision authored by Justice John H. Clarke, who had been appointed to the Court by President Wilson, the Court held that New York had not presented sufficient evidence to warrant the issuance of an injunction.[191] Citing *Missouri v. Illinois*[192] and *Georgia v. Tennessee Copper*,[193] the Court noted that New York clearly had a right to pursue its complaint in the Supreme Court because it alleged that the "health, comfort and prosperity" of its citizens and their property values are "being gravely menaced" by the acts authorized and directed by the New Jersey legislature.[194] However, the Court noted the high burden of proof it had erected for such cases in *Missouri v. Illinois*, "[b]efore 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 serious magnitude and it must be established by clear and convincing evidence."[195] The Court found New York had not satisfied this burden.[196]

The Court noted that New Jersey's project was designed with the assistance of "the best obtainable sanitary engineers, chemists and bacteriologists" and the state had proceeded "with great caution and with a settled purpose to fully respect the rights of the people of the State of New York."[197] Because the waters of New York Bay are a combination of salt-

185. *Id.*
186. *Id.*
187. *Id.* at 296.
188. MERLO J. PUSEY, CHARLES EVANS HUGHES 195 n.34 (1951).
189. *Id.*
190. New York v. New Jersey, 256 U.S. at 296.
191. *Id.*
192. 180 U.S. 208 (1901).
193. 206 U.S. 230 (1907).
194. New York v. New Jersey, 256 U.S. at 301-02.
195. *Id.* at 309.
196. *Id.* at 309-10.
197. *Id.* at 301.

water and freshwater, New York's case turned not on harm to drinking water, but rather on predictions of offensive odors, unsightly deposits, damage to vessels,[198] and potential airborne diseases.[199] Evidence of harm to vessels or airborne diseases was "much too meager and indefinite to be seriously considered as ground for an injunction," particularly since 900 million gallons per day of untreated sewage already was discharged into the harbor by New York City and other cities in 1912.[200] While expert witnesses for both sides made diametrically opposed predictions concerning odors and unsightly deposits, the Court noted that the growth of New York's own sewage discharges had been so rapid that it had annually added more sewage to the bay than New Jersey's entire project without producing the dire consequences New York's witnesses forecast.[201] The Court also noted that the measures adopted by New Jersey in its settlement agreement with the United States were similar to, but even more extensive, than those included in New York City's own, most recent sewage disposal plans.[202] The Court rejected New York's argument that the settlement was unenforceable, noting that it expressly provided the United States with the right to inspect and monitor both the treatment plant and the effluent discharged into the Bay.[203] The Court also noted that the United States could halt further discharges by New Jersey if the performance commitments it made were not satisfied.[204]

While it can be argued that the Court failed to consider the cumulative impact of adding New Jersey's sewage on top of New York City's rapidly growing discharges, the Court's analysis seems similar to the kind of "unclean hands" rationale it employed in *Missouri v. Illinois*. If New York (like Missouri) did not require its own cities to treat their sewage as thoroughly as New Jersey, the state's case for Supreme Court intervention was diminished. Hughes ascribed his defeat to the settlement agreement between New Jersey and the United States, though he took some comfort from the Court's decision to dismiss New York's complaint without prejudice so that it could be renewed if the sewer did indeed prove to create a nuisance.[205]

Near the end of its opinion, the Court made an unusual observation that foreshadowed the future course of transboundary pollution disputes and the federal common law of nuisance when it observed:

> 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 cooperative study and

198. 206 U.S. 230 (1907).
199. *See* New York v. New Jersey, 256 U.S. at 302, 309.
200. *Id.* at 309-10.
201. *Id.* at 310.
202. *Id.* at 311.
203. *Id.* at 312-13.
204. *Id.*
205. THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES, *supra* note 173, at 194-95.

> by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.[206]

B. New Jersey v. New York City

1. New York's Ocean Dumping of Garbage

New York v. New Jersey was by no means the end of transboundary pollution battles between New York and New Jersey. A decade later the tables were turned when New Jersey sought relief in the Supreme Court to halt New York's dumping of garbage into New York Bay. As New York City grew, so too did its municipal waste stream, the composition of which also changed over time. Until 1860, New York City actually made a profit by selling its street sweepings for fertilizer since they contained substantial amounts of horse manure. In 1910, Manhattan alone generated 1.2 million tons of coal ash waste from the coal burned for residential heating.[207]

During the nineteenth century, New York City dumped much of its refuse into upper New York Bay, a practice that eventually was prohibited by Congress because it interfered with maintaining proper channel depth for navigation.[208] In 1888, Congress passed additional legislation banning unpermitted discharges into the harbor and adjacent waters of New York City[209] and creating the office of Supervisor of the Harbor, to be occupied by an officer of the U.S. Navy, who would specify where dumping legally could occur.[210]

In 1896, the city built an incinerator at Barren Island, which "was an unending source of complaint because of the offensive odors which arose from it."[211] Eventually the city relied on incinerators and landfills to dispose of its municipal waste, except for a brief period in 1906 when some of the city's waste was dumped at sea. A commission established by the mayor noted in 1907 that all of New York's waste could be dumped at sea, but it concluded that this would result in "fouling of beaches[,] . . . a nuisance that the public should not be asked to tolerate."[212] However, in 1917 the Barren Island incinerator burned down and a new incinerator on Staten Island operated by a contractor was shut down by the state Health Commissioner after considerable protests caused by offensive odors.[213] As a result, the city ap-

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206. New York v. New Jersey, 256 U.S. 296, 313 (1921).
207. *See id.*
208. Act of Aug. 5, 1886, § 3, 24 Stat. 310.
209. Act of June 29, 1888, ch. 496, § 1, 25 Stat. 209 (current version at 33 U.S.C. § 441 (1958)).
210. Act of June 29, 1888, ch. 496, § 5, 25 Stat. 210 (current version at 33 U.S.C. § 451 (1958)).
211. George A. Soper, *Court's Decision Forces City to Solve Its Refuse Problems*, N.Y. TIMES, May 24, 1931, at XX3.
212. New Jersey v. City of New York, 283 U.S. 473, 480 (1931).
213. *New Jersey Upheld in Garbage Charge*, N.Y. TIMES, Mar. 21, 1931, at 7.

plied to the Supervisor of New York Harbor for a permit to resume ocean dumping in 1918.[214]

While federal officials reportedly objected to ocean dumping, New York City Health Commissioner Copeland stated that the dumping was necessary as a temporary measure until the city could build more incinerators.[215] The Supervisor of the Harbor then designated a dumping site and granted a permit.[216]

In June 1921, a committee of New York City officials appointed to advise the mayor about sanitation options concluded that ocean dumping was not a viable, long-term alternative.[217]

> It is known that the Federal authorities quietly resent, if they do not openly object to it, and there is always the possibility of objections from other communities which have in the past claimed that they have been injured by the practice. When these objections become sufficiently strong it may be that New York will find itself so unprepared as to be unable to quickly introduce a more satisfactory form of disposal.[218]

Beginning in 1922, New Jersey officials began to complain to the Mayor of New York City and the U.S. Secretary of War that garbage dumped into the ocean by the city was fouling New Jersey's shoreline.[219] The Secretary of War directed the Supervisor of New York Harbor to bring these conditions to the attention of city officials and to urge them to complete their plans to build additional incinerators.[220] In 1924 and 1925, New York built additional incinerators, but they were not large enough to handle all of the city's garbage disposal needs. Both the ocean dumping and the complaints from New Jersey officials continued, even after the Supervisor moved the location of the dumping site. So much garbage reached New Jersey's beaches that at times, fifty truckloads of garbage would have to be hauled away from a single beach. [221] In 1929 the city dumped 493,000 tons of garbage and ash into the ocean even though it had twenty incinerators located within its boroughs (three in Manhattan, nine in Queens, five in Brooklyn, and three in Richmond).[222] The Supervisor of the Harbor had granted permits to New York to conduct the dumping at distances ten, twelve and a half, and twenty-two miles from the New Jersey shore.[223]

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214. *Id.*
215. *Id.*
216. *Id.*
217. New Jersey v. City of New York, 283 U.S. at 480.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 478.
222. *Id.*
223. *Id.* at 477.

2. New Jersey Sues New York City

In 1929, New Jersey asked the U.S. Supreme Court for leave to file a bill of complaint against New York City in order to seek an injunction to prohibit ocean dumping of the city's garbage.[224] On May 20, 1929, the Court granted New Jersey leave to file its bill of complaint.[225] New Jersey alleged that New York's garbage was polluting a fifty-mile stretch of its beaches, resulting in damage to twenty-nine communities with 160,000 permanent residents, $139 million in property values, and a $950,000 fishing industry.[226] On October 14, 1929, the Court appointed Edward K. Campbell as special master and instructed him to make findings of fact, conclusions of law, and recommendations for resolving the controversy.[227]

In its defense, New York City's counsel first argued that the Court had no jurisdiction to restrict the city's dumping because it occurred entirely outside of the three-mile limit then in effect for U.S. territorial waters.[228] Even though New York City was properly before the Court, the city maintained that not every case involving a state plaintiff and a citizen of another state was justiciable under the Court's Article III, Section 2, original jurisdiction.[229] The city's counsel also argued that New Jersey had failed to meet its elevated burden of proving by clear and convincing evidence that New York's dumping was the cause of the conditions on New Jersey's beaches.[230] The city argued that others, including the New Jersey cities of Asbury Park and Long Branch, had dumped large quantities of garbage in proximity to New Jersey's beaches.[231]

While contesting New Jersey's complaint in the Supreme Court, New York commenced efforts to reform its waste disposal practices, including both refuse and sewage disposal. To this end, the city created a Department of Sanitation. In December 1929, officials of the new department urged the mayor to build more incinerators.[232]

As New York City sought to point the finger at other sources of refuse dumped into New York Harbor, it was widely conceded that the four decade-old federal Refuse Act was not adequate to prevent illegal dumping. Congress considered legislation to increase the penalties for unauthorized dumping in January 1931. Testifying in support of a bill in Congress to impose greater penalties for such dumping, R. Drane White, supervisor of New York Harbor, argued that it was virtually impossible to convict persons dumping debris into the harbor under existing law.[233]

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224. New Jersey v. City of New York, 279 U.S. 823 (1929).
225. *Id.*
226. *New Jersey Upheld in Garbage Change*, *supra* note 213, at 7.
227. New Jersey v. City of New York, 280 U.S. 514 (1929).
228. New Jersey v. City of New York, 283 U.S. 473, 477 (1930).
229. *Id.* at 476.
230. *Id.* at 477.
231. *Id.*
232. *Id.* at 480.
233. *Fights Harbor Pollution*, N.Y. TIMES, Jan. 23, 1931, at 30.

On March 20, 1931, the special master filed his report with the Court. The special master concluded that New York City's ocean dumping had created a public nuisance by severely harming fishing and bathing in New Jersey waters.[234] The master found that refuse reaching New Jersey beaches from other sources was negligible in comparison with the amount coming from the city's dumping.[235] The city's compliance with a federal permit authorizing the dumping did not provide a defense against a public nuisance action, the master concluded.[236] Finding that New York had unreasonably delayed construction of new incinerators, the master recommended that the Court issue an injunction prohibiting the dumping after giving the city a "reasonable time" to build the incinerators.[237]

3. The Court's Decision

New York City filed exceptions to virtually every aspect of the master's reports; New Jersey filed none.[238] On April 30, 1931, the U.S. Supreme Court heard oral arguments on New York's exceptions to the special master's report.[239] On May 18, 1931, the Court issued its opinion unanimously rejecting the exceptions and granting New Jersey's request for an injunction.[240] In an opinion by Justice Butler, the Court found "no adequate reason for disturbing the findings" of the special master.[241] The Court summarized these findings as follows:

> Weather permitting, the City dumps garbage daily. . . . When dumped, the mass forms piles about a foot above the water, spreads over the surface and breaks into large areas. Some materials remain on the surface and others are held in suspension. These masses float for indefinite periods and have been found to move at the rate of more than a mile per hour. Areas of garbage have been seen between the dumping places and the New Jersey beaches, and some have been followed from the place where dumped to the shore.[242]

The Court described the results of this dumping in the following terms:

> Vast amounts of garbage are cast on the beaches by the waters of the ocean and extend in piles and windrows along them. These deposits are unsightly and noxious, constitute a menace to public

234. New Jersey v. City of New York, 283 U.S. at 481.
235. *Id.*
236. *Id.* at 482.
237. *Id.* at 483.
238. *Id.* at 481.
239. *Id.* at 473.
240. *Id.* at 473, 483.
241. *Id.* at 482.
242. *Id.* at 479.

> health and tend to reduce property values. . . . Floating garbage makes bathing impracticable, frequently tears and damages fish pound nets and injuriously affects the business of fishing.[243]

The heaviest of these deposits "occur four or five times in a season" and have to be hauled away by New Jersey authorities. [244]

The Court dismissed New York City's jurisdictional arguments, noting that the "situs of the acts creating the nuisance, whether within or without the United States, is of no importance" because the harm occurred in the United States and the defendant was properly before the Court and subject to its jurisdiction.[245] The fact that the dumping took place pursuant to a permit did not absolve New York of liability for damage it caused because the permit was not issued pursuant to a statute that purported to provide such immunity.[246]

The Court directed the special master to hear testimony from the parties and to report on what would be a reasonable amount of time to give the city to build incinerators before issuing an injunction to prohibit ocean dumping of garbage.[247] The city Sanitation Commission had recommended the construction of fifteen new incinerators at a cost of more than $17 million, but the mayor had taken no action on this proposal, guaranteeing that it would take considerable time to phase out ocean dumping.[248]

A week after the Court's decision in *New Jersey v. City of New York*, the Court decided a water rights case brought against New York City and State by New Jersey, joined by Pennsylvania.[249] The Court denied New Jersey's request for an injunction to prevent the diversion of 440 million gallons of water daily from the Delaware River to the New York City water supply.[250] However, it required New York to build a sewage treatment plant at Port Jervis, New York, and to stop discharges of untreated sewage into the Delaware and Neversink Rivers before the diversion could take place.[251] The Court also required New York City to release water from its reservoirs in times of low flow to satisfy a minimum flow requirement for the Delaware River.[252] Thus, the Court was fully cognizant of the interrelated nature of water quantity and water quality issues and was not hesitant to use its equitable powers in resolving disputes between states concerning interstate pollution.[253]

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243. *Id.* at 478.
244. *Id.* at 479.
245. *Id.* at 482.
246. *Id.* at 482-83.
247. *Id.* at 483.
248. *Water and Garbage*, N.Y. TIMES, May 20, 1931, at 24.
249. New Jersey v. New York, 283 U.S. 805 (1930).
250. *Id.*
251. *Id.* at 805-06.
252. *Id.* at 806.
253. This decree continued in force until 1954 when it was superceded by a new decree that adjusted the amount of water New York City could take from the Delaware River while requiring additional

4. Injunctive Relief

On November 23, 1931, the special master in *New Jersey v. City of New York* filed his report with the Supreme Court.[254] Pursuant to his recommendations, the Court gave the city eighteen months to stop ocean dumping.[255] On December 7, 1931, the Court issued an injunction ordering the city to stop dumping of "any garbage or refuse, or other noxious, offensive or injurious matter, into the ocean, or waters of the United States" by June 1, 1933.[256] In the meantime, the Court ordered the city to operate its existing incinerators at full capacity "to reduce to the lowest practicable limit the amount of garbage dumped at sea," and to file semi-annual reports on its progress in constructing new incinerators.[257]

While the Court had provided New Jersey with the relief it requested, the Justices soon discovered how hard it can be to fight city hall. The reports filed by the city in April and October 1932 indicated that the city was not making much progress in its effort to build additional incinerators. Frustrated by the delay, New Jersey returned to the Supreme Court again on May 8, 1933, to ask that the city be held in contempt.[258] The city responded that it had to delay construction of additional incinerators because it did not have sufficient funds to build them by the deadline set by the Court.[259] Noting that banks were reluctant to loan money to it, the city requested a ten-month extension of the deadline to April 1, 1934.[260] New Jersey argued that the "dignity of this court required more diligence and more respect for its decree," and that the city's financial problems were the product of the city's own "notorious extravagance."[261]

The Court responded on May 29, 1933, by directing the special master to review the time reasonably required for the city to stop ocean dumping and the city's progress toward that end through September 15, 1933.[262] The Court also directed the master to determine how much additional expense any delay would cause New Jersey as the state continued to have to remove garbage from its shores.[263] At a hearing before the special master on July 17, 1933, the city explained that its Department of Sanitation had no funds for incinerator construction and that it was unable to find buyers for bonds to finance the incinerators.[264] When asked if New Jersey would be willing to

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improvements to be made at the Port Jervis sewage treatment plant. The Court appointed a river master to monitor implementation of the decree. New Jersey v. New York, 347 U.S. 995 (1953).

254. New Jersey v. City of New York, 284 U.S. 585, 586 (1931).
255. *Id.*
256. *Id.* at 585-86.
257. *Id.* at 586.
258. New Jersey v. City of New York, 289 U.S. 712 (1933).
259. *Id.*
260. *Id.*
261. *Opposes Garbage Delay*, N.Y. TIMES, May 12, 1933, at 4.
262. New Jersey v. City of New York, 289 U.S. at 712.
263. *Id.*
264. *City Cannot Sell Incinerator Notes*, N.Y. TIMES, July 18, 1933, at 20.

buy the city's bonds, New Jersey's counsel responded: "I think New York should skin its own skunk."[265] The chief engineer of the city's Sanitation Department noted that funds for two additional incinerators might be provided by the Reconstruction Finance Corporation or the Industrial Recovery Board.[266]

The special master filed his report on October 19, 1933.[267] The master found that the city had two incinerators under construction which would be ready for operation on April 21 and June 30, 1934, respectively, but he questioned whether these would be sufficient to enable the city to end ocean dumping.[268] The master also found that two New Jersey cities had spent $2160.79 disposing of garbage that had appeared on their beaches since June 1, 1934, the date of the Court's original deadline.[269]

On November 6, 1933, the Court heard oral argument on New Jersey's motion to enforce the injunction and the special master's report.[270] Arthur J.W. Hilley, Corporation Counsel of New York, told the Court that incinerator construction had been delayed due to the city's financial problems.[271] He pledged that completion of two new incinerators, coupled with other measures the city was taking, would enable it to end ocean dumping by July 1, 1934.[272] Hilley asked the Court to extend its deadline to that date. He also explained that it was now shipping its garbage "thirty-five miles out to sea, instead of the usual twenty-five miles."[273]

Arguing for New Jersey, Assistant State's Attorney Duane E. Minard asked the Court to hold the city in contempt.[274] He argued that acting mayor Joseph V. McKee had "cheerfully accepted" the responsibility for blocking construction of the incinerators for nearly a year, while the city was able to raise funds to build new subways.[275] Chief Justice Charles Evan Hughes, who had represented New York before the Court during its prior litigation against New Jersey, asked Minard what kind of order the Court should issue to enforce its injunction.[276] "Nothing but violence will be understood, I would say, in the light of what has happened in the last two years."[277] Minard suggested that the Court impose a fine, though he could not specify whether any particular city officials should be fined.[278]

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265. *Id.*
266. *Id.*
267. New Jersey v. New York City, 290 U.S. 237, 239 (1933).
268. *Id.*
269. *Id.*
270. *Id.* at 237.
271. *Id.* at 238-39.
272. *Id.*
273. *Asks Court to Fine City for Dumping*, N.Y. TIMES, Nov. 7, 1933, at 24.
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*

On December 4, the Court issued a decree, which was announced by Justice Butler.[279] The Court granted New York's request to extend the deadline for ending ocean dumping to July 1, 1934.[280] To enforce this new deadline, the Court ordered the city to pay New Jersey $5000 per day for every day the deadline is missed.[281] The Court also directed the city to pay New Jersey $2160.79, the amount the master had found that two New Jersey cities already had spent disposing of beach debris since expiration of the Court's initial deadline.[282]

Although New York complied with the Court's order to stop ocean dumping of garbage, the city returned to the Supreme Court a year later to clarify that the Court's decree did not ban it from dumping sewage sludge within ten miles of shore.[283] The city was dumping 4000 tons of sludge per month.[284] The sludge was composed of ninety percent water and ten percent finely divided solids that did not float.[285] New York claimed that New Jersey's cities had been dumping sludge at the same site in much greater volumes.[286]

The Court granted New York City's motion.[287] The Court concluded that New York's actions did not violate the decree of December 7, 1933.[288] It denied a request by New Jersey to appoint a special master, noting that New Jersey had not raised any issue concerning New York's compliance with the decree that required renewed gathering of evidence.[289]

In his decision for the Court in *New Jersey v. New York City*, Justice Butler did not directly address the question of the source of the law he applied in accepting the recommendations of the special master to grant equitable relief to New Jersey.[290] Three months earlier, he had done so when writing for a unanimous Court in a water rights dispute between Connecticut and Massachusetts.[291] Justice Butler explained that in disputes between states, "federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require."[292] He explained that determination of the relative water rights of states is not based on the same considerations or the same legal principles as private disputes.[293] Instead, he emphasized the importance of the principle of equality

279. New Jersey v. City of New York, 290 U.S. 237 (1933).
280. *Id.* at 240.
281. *Id.*
282. *Id.*
283. New Jersey v. City of New York, 296 U.S. 259 (1935).
284. *Id.* at 260.
285. *Id.*
286. *Id.*
287. *Id.* at 261.
288. *Id.*
289. *Id.*
290. *Id.* at 259.
291. Connecticut v. Massachusetts, 282 U.S. 660 (1930).
292. *Id.* at 670.
293. *Id.* The distinctive nature of the Court's approach to disputes between states is illustrated by its handling of a private nuisance dispute in a diversity case. On the very day that New Jersey returned to

of rights between states, and he endorsed Justice Brewer's description of the Court's task as the development of "interstate common law."[294]

III. THE SUPREME COURT RECONSIDERS ITS ROLE

As environmental issues swept to the forefront of national attention in the late 1960s and early 1970s, the Supreme Court was confronted with several new efforts to get it involved in resolving transboundary pollution disputes using its original jurisdiction. Daunted by the complexity of these disputes, the Court for the first time declined to exercise its original jurisdiction to decide these cases.[295]

A. Ohio v. Wyandotte Chemicals Corp.

The first dispute presented to the Court during this period was a product of the discovery of mercury contamination in Lake Erie.[296] The contamination was brought to light in spring 1970 after the Canadian government closed commercial fishing on the Canadian side of a lake connected to Lake Erie due to the discovery of extraordinarily high levels of mercury in fish caught there.[297] A week later the U.S. Food and Drug Administration discovered that chemical plants in Ontario and Michigan were sources of mercury discharges into Lake Erie, which soon was closed to commercial fishing by Ohio and Michigan.[298] Several other sources of mercury discharges were located in ensuing months.[299]

In response to the discovery of mercury contamination, the State of Ohio filed suit in its own state courts against sources of mercury discharges located in Ohio.[300] To seek redress from out-of-state sources, the state also turned to the U.S. Supreme Court where it filed a motion for leave to file a bill of complaint against a Michigan corporation—the Wyandotte Chemical Corporation—and a Canadian company—Dow Chemical Company of Canada, Ltd.—and its American owner (Dow Chemical Company).[301] The complaint alleged that both Wyandotte and Dow Canada had discharged

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the Supreme Court to seek enforcement of the Court's injunction against New York City, the Court reversed an injunction a lower court had issued to require a municipality to stop polluting a stream running through private land. Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334 (1932). Applying Missouri nuisance law in the diversity case, the Court found that the balance of equities required reversal of an injunction giving the city six months to stop sewage pollution because the expense of installing sewage treatment equipment greatly exceeded the damage to plaintiff's land. *Id.* at 339-40. The Court instead ordered the city to pay damages. *Id.* at 341.

294. Connecticut v. Massachusetts, 282 U.S. 660, 671 (1930).

295. *See infra* text accompanying note 375.

296. Winton D. Woods, Jr. & Kenneth R. Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the* Wyandotte *Case*, 12 ARIZ. L. REV. 691, 692 (1970).

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 693.

mercury into streams that reach Lake Erie, creating a public nuisance.[302] Ohio asked the Supreme Court to exercise its original jurisdiction and issue an injunction prohibiting further discharges by the defendants, require them to remediate existing contamination, and award damages against them for harm caused to inhabitants of Ohio and to Lake Erie, its fish, wildlife, and vegetation.[303]

Concerned about the potential consequences of accepting such a complex case, the Court departed from its past practice in such interstate nuisance litigation.[304] Rather than simply granting the motion for leave to file a bill of complaint, the Court scheduled oral argument on the motion and asked the Solicitor General to participate as amicus curiae.[305] The papers of the late Justice Thurgood Marshall reveal that on the morning of oral argument, Chief Justice Burger distributed an unusual "Memorandum to the Conference" strongly cautioning his colleagues about the implications of agreeing to hear the *Wyandotte* case on the merits. "I have not resolved the issue in my mind except that it will take a large showing for me to get ourselves engaged in this kind of litigation. The 50 states and range of pollution problems give me pause." In light of the complexity of the issues involved in the case, the Chief Justice suggested that it was more than could be handled by the appointment of a single special master. "If we do grant leave to file, I believe we should consider appointing not one but three Special Masters, at least one of whom should be a scientist with background in the subject matter and without conflicting attachments or published positions on the subject matter."[306]

The oral argument was held on January 18, 1971. Attorneys for Ohio, the Solicitor General, and each of the three defendants argued before the Court. All parties agreed that the Court had original jurisdiction to hear the case under Article III, Section 2. The sole issue was whether the Court should decline to exercise that jurisdiction. Paul W. Brown, former Ohio Attorney General who argued on behalf of the state, maintained that the Court was required to take jurisdiction in light of *Georgia v. Tennessee Copper* and *New Jersey v. City of New York*. Brown maintained that the Court's original jurisdiction was the only source of federal jurisdiction to hear the case because the state could not sue in diversity and there was no federal question jurisdiction. While conceding that Wyandotte and Dow America could be sued in Ohio court, he questioned whether Ohio could effect personal service on them.[307]

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302. *Id.*
303. *Id.*
304. *See* Ohio v. Wyandotte Chem. Corp., 401 U.S. 493 (1971).
305. *Id.* at 494.
306. Memorandum from Chief Justice Warren E. Burger to the Conference (Jan. 18, 1971) (on file with the Library of Congress).
307. *Supreme Court Hears Argument on Ohio Suit to Ban Mercury from Lake Erie*, 1 Env't Rep. (BNA) 1010, 1011 (1971).

Arguing as an amicus, the Office of the Solicitor General took no position on the question whether the Court should hear the case on the merits, though it argued that the Court had discretion to decline the case because its jurisdiction was not exclusive. The Solicitor General's Office did not agree with Dow Canada's claim that asserting jurisdiction over a Canadian corporation could cause an international incident or violate a treaty, though it conceded that it might be difficult to enforce a decree in Canadian courts.[308]

The Wyandotte Chemical Corporation argued that if the Court agreed to hear the case on the merits, it would be inundated with a flood of litigation over interstate pollution. The company maintained that it would be impossible to determine how much mercury had been discharged by each source and that there was no practicable way of measuring damages.[309] The company announced that it had stopped mercury discharges on March 24, 1970, but that it would close its Wyandotte plant permanently on April 1, 1971, because it was too costly to comply with a consent decree that had been entered in a Michigan court.[310]

Representatives of Dow Canada argued that the case should be handled by the International Joint Commission ("IJC"), a body that had been established by the Boundary Waters Treaty of 1909. [311] Proceedings before the IJC could be initiated by the State Department.[312] Four days before oral argument, the IJC had issued a report finding that mercury was "omnipresent" and that only half of the mercury in Lake Erie was the product of discharges from industrial sources.[313] The report recommended that Canada and the United States spend $2 billion in a joint effort to remedy mercury contamination of Lake Erie.[314]

The Court ultimately decided to decline jurisdiction by a vote of eight to one.[315] The papers of the late Justice Thurgood Marshall suggest that the Court initially may have contemplated simply issuing an order declining to hear the case without explaining the reasons for its decision.[316] However, after Justice William O. Douglas prepared a draft dissent from the Court's decision, Justice Harlan drafted a proposed concurrence setting forth reasons for denying leave to Ohio to file a bill of complaint.[317] The other justices then agreed to join Harlan's draft concurrence, making it the opinion of the Court.[318]

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308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.* at 1011-12.
315. Ohio v. Wyandotte Chem. Corp., 401 U.S. 493 (1971).
316. *See* Memorandum from Justice Blackmun to Justice Harlan (Mar. 8, 1971) (on file with author).
317. *Id.*
318. *Id.* Justice Blackmun was the first to join, deeming it "highly desirable that the factors which led the Court to its conclusion be stated." *Id.*

In his opinion for the Court, Justice Harlan concluded that the Court clearly had jurisdiction to hear the case under its Article III, Section 2, power to hear controversies between a state and citizens of another state and between a state and foreign citizens.[319] Harlan noted that ordinarily the Court would hear the case in light of the "time-honored maxim of the Anglo-American common law tradition that a court possessed of jurisdiction generally must exercise it."[320] However, he declared:

> [C]hanges in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another, even though the dispute may be one over which this Court does have original jurisdiction.[321]

Citing frequent disputes between states and nonresidents over taxes, motor vehicles, business torts, and government contracts, and the development of "long-arm jurisdiction," Harlan concluded that "no necessity impels" the Court to serve as the "principal forum for settling such controversies."[322] He declared that the Court's "paramount responsibilities to the national system lie almost without exception in the domain of federal law" and that the Court had "no claim to special competence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issue of federal law."[323] Finally, Harlan noted that the Court is primarily "structured to perform as an appellate tribunal" and therefore is "ill-equipped for the task of factfinding" in original cases that force it "awkwardly to play the role of factfinder without actually presiding over the introduction of evidence."[324] Moreover, "for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers."[325]

Harlan then described the holding of the Court as follows:

> [W]e may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that per-

319. *Wyandotte*, 401 U.S. at 495-96.
320. *Id.* at 496-97.
321. *Id.* at 497.
322. *Id.*
323. *Id.* at 497-98.
324. *Id.* at 498.
325. *Id.*

> suade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's function attuned to its other responsibilities.[326]

Justice Harlan's majority opinion explained that the Court's original jurisdiction over suits between a state and citizens of another state was based on two principles: (1) "the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own;" and (2) "that a State, needing an alternative forum, of necessity had to resort to this Court in order to obtain a tribunal competent to exercise jurisdiction over the acts of nonresidents of the aggrieved State."[327] Neither of these principles was at stake in this case, the Court explained, because Ohio's courts would have jurisdiction to adjudicate the case and federal and Canadian courts could review whether Ohio courts had acted even-handedly in applying the same state common law the Supreme Court otherwise would have to apply.[328]

Any doubt concerning whether the Court's decision signaled a fundamental shift in attitude toward resolving interstate pollution disputes was removed by Justice Harlan's discussion of the history of the Court's handling of such cases. "History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth."[329] He noted that in *Missouri v. Illinois*, "Justice Holmes was at pains to underscore the great difficulty that the Court faced in attempting to pronounce a suitable general rule of law to govern such controversies. The solution finally grasped was to saddle the party seeking relief with an unusually high standard of proof" and to require the Court to apply "virtually unexceptionable legal principles."[330] Justice Harlan described Justice Clarke's closing plea in *New York v. New Jersey* for the states to work out these disputes through negotiation as illustrating "the sense of futility that has accompanied this Court's attempts to treat with the complex technical and political matters that inhere in all disputes of [this] kind."[331] These difficulties would have been compounded by the fact that other jurisdictions, including Michigan and Canada, were "already actively involved in regulating the conduct complained of here" and the case in-

326. *Id.* at 499.
327. *Id.* at 500.
328. *Id.* Justice Harlan apparently adopted a suggestion made by Justice Hugo Black, who had Harlan's draft opinion read to him over the telephone. Justice Black dictated a memorandum suggesting the addition of a "closing paragraph that leaves the case open for consideration by state courts." Memorandum from Justice Black to Justice Harlan (Mar. 17, 1971) (on file with author). In his final draft opinion, Justice Harlan added a final sentence noting that Ohio's motion was "denied without prejudice to its right to commence other appropriate judicial proceedings." *Wyandotte*, 401 U.S. at 505.
329. *Id.* at 501.
330. *Id.* at 501 n.4.
331. *Id.* at 502.

volved novel scientific questions "for which there is presently no firm answer."[332] He concluded that no matter how competent the judges or special master, it would be unrealistic to believe that these issues could be resolved appropriately even if an unusually high standard of proof was employed.[333]

The Court's decision refusing to hear Ohio's case on the merits came at a time of extraordinary public concern for the environment. Responding to this concern, Justice Harlan closed his opinion for the Court by explaining that it "cannot, of course, be taken as denigrating in the slightest the public importance of the underlying problem Ohio would have us tackle. Reversing the increasing contamination of our environment is manifestly a matter of fundamental import and utmost urgency."[334] Harlan maintained that the Court's decision was founded on its conclusion "that our competence is necessarily limited, not that our concern should be kept within narrow bounds."[335]

In his lone dissent, Justice Douglas reviewed the Court's previous transboundary pollution cases and argued that "this case presents basically a classic type of case congenial to our original jurisdiction."[336] He maintained that the litigation will "implicate much federal law" because of the federal government's dominion over navigable waters.[337] While not denying the complexity of the issues presented by the case, Douglas argued that they were no more difficult than the complex issues that arise in water rights disputes the Court routinely decides when exercising its original jurisdiction.[338] A better case could be made for abstention, Justice Douglas argued, if the Court were required to hear these cases with a jury.[339] But with the appointment of a special master, particularly one who could be authorized to retain a panel of scientific advisers, fact-finding would not be a burden on the Court.[340]

Less than a year after the Court declined to hear Ohio's complaint, on March 22, 1972, the State of Ohio filed suit in Ohio state court against Wyandotte Chemicals Corporation, the Dow Chemical Company, and Dow Canada seeking $35 million in damages ($25 million in compensatory damages and $10 million in punitive damages) for the defendants' discharges of mercury into the St. Clair River, the Detroit River, and Lake Erie.[341] The suit asked for an injunction prohibiting further discharges of mercury and

332. *Id.* at 502-03.
333. *Id.* at 504.
334. *Id.* at 493, 505.
335. *Id.* at 505.
336. *Id.* (Douglas, J., dissenting).
337. *Id.*
338. *Id.* at 510. Justice Douglas cited the long-running dispute between Wisconsin and Illinois over the drainage of waters from Lake Michigan for the Chicago sanitary canal, a case that continued on the Court's docket for decades, as well as disputes between Arizona and California over the waters of the Colorado River and between Colorado, Wyoming, and Nebraska over the waters of the North Platte. *Id.* at 511.
339. *Id.*
340. *Id.*
341. *Ohio Mercury Suit*, 2 Env't Rep. (BNA) 1454 (1972).

asking for an order requiring the companies to remediate the mercury already existing in Lake Erie.[342]

The most confusing aspect of the Court's *Wyandotte* decision is Justice Harlan's discussion of what law would apply to the controversy. In a footnote, Justice Harlan stated that because 28 U.S.C. § 1251(b) provides that the Court's jurisdiction over actions by a state against citizens of another state or against aliens is "original but not exclusive,"[343] the Court's jurisdiction is concurrent with the federal district courts.[344] However, he concluded that the case could not be transferred to a federal district court because the statute does not confer jurisdiction on them and there is no other statutory basis for such jurisdiction.[345] Harlan observed that diversity jurisdiction is not available in cases in which a state is a party and that federal question jurisdiction did not exist under 28 U.S.C. § 1331 because, citing *Erie*, "[s]o far as it appears from the present record, an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law."[346] This observation may be founded on the notion that no federal interest warrants application of federal common law in circumstances where the Court decides that the structural purposes of original jurisdiction do not warrant its exercise. Alternatively, it may suggest that *Erie* should be extended to transboundary pollution cases.

Harlan's observation stands in sharp contrast with a decision issued six weeks earlier by the Court of Appeals for the Tenth Circuit. In *Texas v. Pankey*,[347] the Tenth Circuit held that federal district courts had federal question jurisdiction over a transboundary nuisance action brought by a state against non-residents because federal common law should apply in such cases.[348] *Pankey* involved a lawsuit by the state of Texas to stop New Mexico ranchers from using a pesticide that allegedly contaminated water supplies flowing into Texas. While noting that the Supreme Court also would have original jurisdiction over the case, the court stated that "Texas' willingness to have the matter determined by a lower federal court . . . ought to be commended as an appropriate regard by it for not unnecessarily increasing the present burdens of the Supreme Court."[349] Although the Supreme Court's *Wyandotte* decision did not mention *Pankey*, a year later the Court cited it with approval while adopting its holding that federal district courts have federal question jurisdiction to hear interstate nuisance disputes founded on federal common law.[350]

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342. *Id.*
343. 28 U.S.C. § 1251(b).
344. 401 U.S. 498 n.3.
345. *Id.*
346. *Id.*
347. 441 F.2d 236 (10th Cir. 1971).
348. *Id.*
349. *Id.* at 239.
350. Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972).

B. The Leap Year Trilogy of 1972

When it decided *Wyandotte*, the Court had pending before it three additional motions for leave to file environmental complaints under its original jurisdiction. Six weeks after issuing its *Wyandotte* decision, the Court agreed to hear oral argument in each of the three cases on the question of whether it should exercise its original jurisdiction. Each of the cases—*Washington v. General Motors Corp.*,[351] *Vermont v. New York*,[352] and *Illinois v. City of Milwaukee, Wisconsin*[353]—was argued on Leap Year Day (February 29, 1972). On April 24, 1972, the Court announced its unanimous decisions in all three cases. The Court agreed to hear *Vermont v. New York*, but it declined to exercise its original jurisdiction in *General Motors* and *Milwaukee v. Illinois*.[354]

1. Washington v. General Motors Corp.

Washington v. General Motors Corp.[355] involved an effort by a group of eighteen states to sue the four principal automobile manufacturers for conspiring to restrain the development of pollution control equipment for automobiles. The bill of complaint the states sought to file asked the Court to order the automakers to accelerate their spending on research and development to produce devices to control auto pollution and to require retroactive installation on all vehicles made during the conspiracy.[356] The Court decided not to hear the case under its original jurisdiction.[357] The decision was unanimous.

In an opinion written by Justice Douglas, the Court concluded that although the case presented "important questions of vital national importance," it should be heard in federal district court.[358] The court noted that an appropriate alternative forum was available because multidistrict litigation involving the same claims already had been consolidated in federal district court in California.[359] "The breadth of the constitutional grant of this court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired."[360]

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351. 406 U.S. 109 (1972).
352. 406 U.S. 186 (1972).
353. 406 U.S. 91 (1972).
354. 406 U.S. 186; 406 U.S. 109; 406 U.S. 91.
355. 406 U.S. 109.
356. *Gen. Motors Corp.*, 406 U.S. at 112.
357. *Id.*
358. *Id.*
359. *Id.* at 114.
360. *Id.* at 113.

2. Vermont v. New York

Unlike *Wyandotte* and *General Motors*, another case before the Court, *Vermont v. New York*, involved a dispute between two states.[361] Since the mid-1960s Vermont had been concerned about pollution from a large paper mill located in Ticonderoga, New York.[362] Owned and operated by International Paper Company, the mill for decades had been dumping large quantities of sludge into Lake Champlain, located on the border between New York and Vermont.[363] On December 29, 1970, Vermont asked the Supreme Court for leave to file a bill of complaint against both the State of New York and International Paper Company.[364] Vermont alleged that pollution from the plant caused "noxious and nauseous odors" to cross the lake into Vermont, creating a public nuisance and that the sludge bed encroached on Vermont waters, interfering with navigation and creating a trespass.[365] Vermont asked the Court to issue an injunction prohibiting further discharges and requiring New York and International Paper to abate the nuisance, remove the sludge, and pay compensatory and punitive damages.[366]

In its brief responding to Vermont's motion, New York accused Vermont of having abandoned interstate cooperation as a method for dealing with the Lake Champlain sludge pile.[367] New York maintained that Vermont's claim against it was not justiciable because New York had neither committed any tortious conduct nor had it contributed to the paper mill's pollution in any manner.[368] New York argued that the case involved no more than "a difference of opinion between Vermont and New York as to New York's quasi-sovereign actions in permitting International Paper Company to continue its operations within New York State."[369] Arguing that the alleged maladministration of one state's laws cannot give rise to a justiciable controversy between states, New York asked the Court to dismiss Vermont's suit.[370]

International Paper informed the Court that it would be closing the old paper mill by April 24, 1971, and that it was spending $76 million to build a new and much cleaner mill nearby. The company argued that it was not the only source of the sludge bed dumped in the southern end of Lake Champlain and that dredging to remove the bed would do greater harm than good to water quality in the lake.[371]

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361. 417 U.S. 270 (1974).
362. *Id.*
363. Bruce W. Ficken, Wyandotte *and its Progeny: The Quest for Environmental Protection Through the Original Jurisdiction of the Supreme Court*, 78 DICK. L. REV. 429, 448 (1974).
364. *Id.*
365. *Id.*
366. *Id.* at 449.
367. *Id.*
368. *Id.* at 449-50.
369. Brief in Opposition to Leave to File Complaint, *quoted in* Ficken, *supra* note 363, at 449.
370. *Vermont Suit*, 1 Env't Rep. (BNA) 1357 (1971).
371. *Supreme Court Brief*, 1 Env't Rep. (BNA) 1324 (1971).

After deciding *Wyandotte*, the Court agreed to hear oral arguments on whether to grant Vermont leave to file its complaint. The case was argued on February 29, 1972, the same day as *General Motors* and *Illinois v. Milwaukee*. On April 24, 1972, two months after hearing oral argument, the Court issued an order granting Vermont leave to file its bill of complaint.[372]

While the Court's order did not provide any explanation of its reasons for agreeing to hear the case, the fact that it was styled as a dispute between states distinguishes it from the two cases the Court declined to hear. Vermont had named the state of New York as a defendant based on the premise that New York "[a]s the owner and exclusive regulator of [its] lands and waters" had failed "to use and manage them in such a manner as not to injure the property of others."[373] The same federal statute that purports to make the Court's original jurisdiction non-exclusive in cases between a state and citizens of another state, 28 U.S.C. § 1251(b), provides that the Court's jurisdiction is "original and exclusive" in controversies between two or more states.[374] The papers of the late Justice Thurgood Marshall show that in *Wyandotte*, Justice Stewart recommended that Justice Harlan add a footnote distinguishing that case from "cases invoking the Court's original and *exclusive* jurisdiction,"[375] a reference to cases where a state sues another state. While Justice Harlan did not adopt this suggestion, the Court made it clear in the companion case of *Illinois v. City of Milwaukee* that it would not have declined to exercise its original jurisdiction over a transboundary pollution dispute if it had been a dispute between states.[376]

New York and International Paper Company maintained that there were other viable alternative venues for hearing Vermont's claims. They noted that landowners living on the Vermont side of Lake Champlain had filed a class action in Vermont federal district court against International Paper seeking an injunction and compensatory and punitive damages,[377] and they maintained that it was pointless to relitigate the same issues before the Supreme Court. International Paper argued that it could be sued by Vermont in Vermont or New York state court.[378]

After the Court agreed to hear Vermont's complaint against New York under the Court's original jurisdiction, New York and International Paper

372. Vermont v. New York, 406 U.S. 186 (1972).
373. Ficken, *supra* note 363, at 448 (quoting Complaint of Vermont in Vermont v. New York).
374. 28 U.S.C. § 1251(b).
375. Memorandum from Justice Stewart to Justice Harlan (Mar. 8, 1971) (on file with author).
376. Illinois v. City of Milwaukee, 406 U.S. 91, 93-98 (1972).
377. Zahn v. Int'l Paper Co., 53 F.R.D. 430 (D. Vt. 1971). The plaintiffs in the *Zahn* litigation ultimately were assisted by witnesses who helped Vermont prepare its case in *Vermont v. New York*. *See* PETER LANGROCK, ADDISON COUNTY JUSTICE: TALES FROM A VERMONT COURTHOUSE 71 (1997). The *Zahn* class action was dismissed for failure of each plaintiff in the class to meet the $10,000 amount in controversy requirement then required for federal question jurisdiction under 28 U.S.C. § 1331. After plaintiffs lost on this jurisdictional issue in both the Second Circuit, Zahn v. Int'l Paper Co., 469 F.2d 1033 (2d Cir. 1972), and the U.S. Supreme Court, Zahn v. Int'l Paper Co., 414 U.S. 291 (1973), the case was refiled in the name of two individual plaintiffs who later recovered a substantial settlement, but not the injunctive relief they had sought to change the company's operations.
378. Ficken, *supra* note 363, at 452.

answered Vermont's complaint. The Supreme Court then appointed former Massachusetts Chief Justice R. Ammi Cutter to serve as special master in *Vermont v. New York*. In January 1973, six months after the special master was appointed, the United States filed a motion asking leave to intervene in the case, claiming numerous federal interests in the waters of Lake Champlain under federal statutes. The Court referred the motion to the special master,[379] who allowed the United States to intervene.

To establish its case, Vermont had scientists who worked for the state don scuba gear and dive into the lake to map the size and scope of the sludge bed.[380] After hearing seventy-five days of testimony in 1973, including nearly all of Vermont's direct case and approximately half of New York's, the special master encouraged the parties to negotiate a settlement. On April 24, 1974, the special master reported to the Court that a settlement had been reached. He asked the Court to approve a proposed consent decree that embodied the settlement. The parties had stipulated that the consent decree could be entered by the Court without further argument or hearing.[381] On June 3, 1974, the Court stunned the parties to the case by declining to approve the proposed consent decree.[382]

Under the terms of the proposed settlement, International Paper agreed to close its old paper mill and to reduce runoff from it, and to adopt new air and water pollution control measures at its new paper mill, which would be located four miles north of the old mill. A special lake master would be appointed to supervise implementation of the decree and to resolve all matters of controversy between the parties during the next nine years. The master could make recommendations for further relief if the measures adopted failed to prevent objectionable odors from reaching Vermont over a significant period of time.[383] These would take effect and become decisions of the Court automatically unless any party filed objections within thirty days or the Court disapproved. As a condition of the settlement, Vermont agreed to release International Paper from all claims for damages from the plant's past air or water discharges and that no findings or adjudication of any issue of fact or law would be made.[384]

Explaining its reasons for refusing to approve the consent decree, the Court noted that it long had disfavored continuing Court supervision of equitable apportionment decrees in water rights cases and that when it had appointed special masters after litigation was concluded, it generally gave them only ministerial tasks to perform.[385] Noting that no findings of fact or law had been made, the Court concluded that the procedure contemplated

379. Vermont v. New York, 409 U.S. 1103 (1973).
380. See LANGROCK, *supra* note 377, at 70-71 (describing this litigation).
381. Vermont v. New York, 417 U.S. 270, 271 (1974).
382. *Id.* at 270.
383. *Id.* at 271.
384. *Id.* at 271, 273.
385. *Id.* at 274-76.

by the proposed decree "would materially change the function of the Court in these interstate contests." The Court explained:

> Insofar as we would be supervising the execution of the Consent Decree, we would be acting more in an arbitral rather than a judicial manner. Our original jurisdiction heretofore has been deemed to extend to adjudications of controversies between States according to principles of law, some drawn from the international field, some expressing a "common law" formulated over the decades by this Court.[386]

The Court noted that the proposals the master would submit to it "might be proposals having no relation to law."[387] They could be "mere settlements by the parties acting under compulsions and motives that have no relation to performance of our Art. III functions."[388] Nothing in the decree nor in the proposed master's mandate speaks to "the 'judicial power' of this Court, which embraces application of principles of law or equity to facts, distilled by hearings or by stipulations."[389] The Court suggested that there were other means for achieving the parties' goals, such as an interstate compact or a contractual settlement by the parties that would be binding so long as it did not conflict with an interstate compact. The parties ultimately reached such a settlement, with a $500,000 trust fund being created to protect the south lake. On October 29, 1974, the Court dismissed Vermont's bill of complaint.[390]

3. Illinois v. City of Milwaukee (Milwaukee I)

The most important case decided by the Court as part of the Leap Year Trilogy was *Illinois v. City of Milwaukee*.[391] Illinois sought leave to file a bill of complaint against four Wisconsin cities and the sewerage commissions of Milwaukee city and county. Illinois alleged that these cities were discharging 200 million gallons of raw or inadequately treated sewage into Lake Michigan on a daily basis. Mindful of the unclean hands doctrine employed by the Court to thwart Missouri's claim in *Missouri v. Illinois*, Illinois alleged that it and its subdivisions prohibit such discharges. The state sought an order from the Supreme Court requiring that the nuisance created by the sewage be abated.

In an opinion by Justice Douglas, a unanimous Court declined to grant Illinois leave to file its bill of complaint. The Court noted that because Illinois failed to join the state of Wisconsin as a defendant, the Court's original

386. *Id.* at 277.
387. *Id.*
388. *Id.*
389. *Id.*
390. Vermont v. New York, 419 U.S. 961 (1974).
391. 406 U.S. 91 (1972).

jurisdiction was non-exclusive because this was a suit between a state and residents of another state. Arguing that its original jurisdiction "should be invoked sparingly" so that its appellate responsibilities do not suffer, the Court enumerated factors that it would consider in determining whether to exercise jurisdiction.[392] These included "the seriousness and dignity of the claim; . . . the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had."[393]

To determine whether an alternative forum was available, the Court examined 28 U.S.C. § 1331, which provided jurisdiction in federal district courts for actions arising "under the Constitution, laws, or treaties of the United States." The Court held that pollution of interstate or navigable waters creates actions arising under the laws of the United States and that states could bring such actions. Citing *Texas v. Pankey*[394]with approval,[395] the Court concluded that § 1331 jurisdiction could support claims founded on federal common law as well as federal statutes. In a footnote, the Court disavowed the suggestion in *Wyandotte Chemicals*[396] that state law should govern such disputes, describing the case as "based on the preoccupation of that litigation with public nuisance under Ohio law, not the federal common law which we now hold is ample basis for federal jurisdiction under 28 U.S.C. § 1331(a)."[397]

While noting several pieces of federal legislation that address environmental concerns, the Court found that "[t]he remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress."[398] Citing the reference in *Kansas v. Colorado* to the Court's development of "interstate common law," the Court in a footnote explained that "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." [399] The Court thus appeared to be striking a blow for federal common law, while at the same time creating a jurisdictional basis for letting lower courts hear lawsuits over transboundary pollution.

The Court then addressed the question of how to fashion federal common law. While observing that "[t]he applicable federal common law depends on the facts peculiar to the particular case,"[400] the Court noted that nuisance law had been influential in shaping the Court's transboundary pollution decisions. It also noted that state law may be relevant in fashioning

392. *Id.* at 93.
393. *Id.*
394. 441 F.2d 236 (10th Cir. 1971).
395. Illinois v. City of Milwaukee, 406 U.S. 91, 103, 107 n.9 (1972).
396. Ohio v. Wyandotte Chem. Corp., 401 U.S. 493 (1971).
397. Illinois v. City of Milwaukee, 406 U.S. at 102 n.3.
398. *Id.* at 103.
399. *Id.* at 105 n.6.
400. *Id.* at 106.

federal common law particularly to prevent a state that has chosen to adopt more stringent environmental standards from being at the mercy of other states with lower standards.[401] "There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern."[402]

The Court's decision appeared to empower federal district judges to exercise broad discretion in fashioning remedies for interstate pollution. However, the ultimate effect of the decision proved to be far more limited. An observation Justice Douglas made near the end of the Court's opinion proved remarkably prescient. He noted that "it may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."[403] As Congress erected a federal regulatory infrastructure to protect the environment, the Court soon embraced preemption.

IV. THE CLEAN WATER ACT AND THE PREEMPTION OF THE FEDERAL COMMON LAW OF INTERSTATE NUISANCE

A. Enactment of the Clean Water Act

When Congress enacted the Federal Water Pollution Control Act in 1972, it gave no indication that the statute would preempt the federal common law of interstate nuisance. Indeed, the language of section 505(e) of the Act provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief."[404] Referring to this statutory text, the Senate Public Works Committee stated in its 1971 report, "It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages."[405]

During hearings by the Air and Water Pollution Subcommittee, Senator Eagleton asked members of the environmental community if the Act should preempt the field of water pollution nuisances.[406] Both Mr. Richard Hall of the Natural Resources Defense Council and Mr. David Zwick, a Harvard law student, answered in the negative. Mr. Hall said, "But I think there are

401. *Id.* at 107.
402. *Id.* at 107-08.
403. *Id.*
404. 33 U.S.C. § 1365(e).
405. S. REP. NO. 92-414, at 81 (1971), *reprinted in* EPA, LEGAL COMPILATION, 1973, at 170.
406. *Water Pollution Control Legislation: Hearings on* S.75, S.192, S.280, S.281, S.523, S.573, S.601, S.679, S.927, S.1011, S.1012, S.1013, S.1014, S.1015 and S.1017 *Pending Before the Subcomm. on Air & Water Pollution, Senate Comm. on Public Works, Air & Water Pollution Subcomm.*, 92d Cong. (1971).

certain areas . . . where all environmental considerations have not been fed into the water quality standards . . . . So, you might want to have . . . broader catch-all provision."[407] No senators challenged such statements, nor did they debate the issue further. There is no indication that the Senate subcommittee believed that federal common law would interfere with the goals of the Act.

The Senate Report on the legislation states that the language of section 505(e) "provides that the right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected."[408] "Persons" under the Act include not just persons defined as "citizens" under the Act, but also any individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body.[409]

B. Illinois v. City of Milwaukee (Milwaukee II)

Shortly after the Supreme Court's decision in *Milwaukee I*, Illinois filed a new complaint against Milwaukee and other Wisconsin cities in federal district court for the Northern District of Illinois, charging that sewage discharges from them constituted an interstate nuisance in violation of federal common law. Five months after the complaint was filed, Congress adopted the Federal Water Pollution Control Act Amendments of 1972 (hereinafter "Clean Water Act"), which created a comprehensive national permit program to control discharges of water pollutants from point sources. Pursuant to this legislation, the defendant Wisconsin cities obtained permits from the Wisconsin Department of Natural Resources which had been authorized to operate the federal permit program under delegated authority from the U.S. Environmental Protection Agency.[410]

After three years of pretrial discovery, Illinois's complaint went to trial in federal district court. The trial extended over a six-month period and involved scores of expert witnesses and extensive factual finding by the district judge. Milwaukee argued that the issuance of its Clean Water Act permits barred Illinois's federal common law nuisance action. The federal district court rejected these and other defenses and ruled that Illinois had proved that the discharges constituted a federal common law nuisance. The trial judge ordered the defendants to construct facilities to eliminate combined sewer overflows within twelve years and to meet new and more stringent effluent limits on sewage discharges that went beyond the terms of their existing permits.

Milwaukee appealed the decision to the Court of Appeals for the Seventh Circuit. The Seventh Circuit upheld the trial court's finding that the 1972 Amendments had not preempted the federal common law of interstate

407. *Id.* at 724 (statement of Richard Hall, Staff Attorney, Natural Resources Defense Council).
408. S. REP. NO. 92-414, at 134 (1971), *reprinted in* EPA, LEGAL COMPILATION, 1973, at 338.
409. 33 U.S.C. § 1362(5).
410. City of Milwaukee v. Illinois, 451 U.S. 304, 310-11 (1981).

nuisance, but it reversed the imposition of more stringent effluent limits than those contained in the defendants' permits. However, the Seventh Circuit upheld the order directing the construction of facilities to prevent storm sewer overflows.[411] Milwaukee then sought review of the Seventh Circuit's decision by the Supreme Court.

The papers of the late Justice Thurgood Marshall reveal that the Supreme Court initially voted not to review the case. However, it reconsidered after Justice Byron White circulated a draft dissent from the decision to deny a writ of certiorari. In his draft dissent, Justice White noted that he did "not necessarily disagree with the decision below," but "that there is substantial doubt as to whether Congress intended that inexpert federal courts, guided by principles of common law nuisance and maxims of equity jurisprudence, could impose environmental duties stricter than those adopted through democratic processes and developed by supposedly expert federal and state agencies." Justice White expressed the fear that "many interstate bodies of water . . . could become the subject of federal common law nuisance actions."[412]

After the Court agreed to review the case, the United States appeared as an amicus in support of Illinois. In its brief, the United States relied on *Nader v. Alleghany Airlines, Inc.*[413] and other cases to support the judicial tradition of preserving common law remedies when "there is no 'irreconcilable conflict between the statutory scheme and the persistence of common law remedies.'"[414] The United States also argued that its interpretation of the Act is entitled to deference because the EPA is the agency charged with implementation and enforcement of the Act, and because the EPA possesses the requisite technical and legal expertise both Congress and the courts lack.[415] The United States noted that the EPA had initiated federal common law nuisance suits, which the agency would have no reason to initiate if the Act was so comprehensive that it addressed all water quality problems.[416] The Solicitor General's brief also noted that in 1977 the Department of Justice had sent a letter to Senator Muskie stating that "[t]he common law serves to give an injured party who may have been neglected by the statute or by an overburdened enforcing agency a form of redress. *There is no good argument for removing this opportunity for remedy.*"[417] Illinois and the

411. City of Milwaukee v. Illinois, 599 F.2d 151 (7th Cir. 1979).

412. Memorandum from Justice Byron R. White circulating Draft Dissent from Denial of Certiorari (Mar. 3, 1980) (on file with author).

413. 426 U.S. 290 (1978).

414. Brief for the United States as Amicus Curiae at 20, Milwaukee v. Illinois, 451 U.S. 304 (1981) (No. 79-408) (quoting *Nader*, 426 U.S. at 299).

415. City of Milwaukee v. Illinois, 451 U.S. 304, 346-47 (1981) (Blackmun, J., dissenting) (citing Udall v. Tallman, 380 U.S. 1 (1965)).

416. Brief for the Attorney General of the State of New York as Amicus Curiae at 5, Milwaukee v. Illinois, 451 U.S. 304 (1981) (No. 79-408) (citing United States v. Outboard Marine Corp., 12 ERC 1348 (N.D. Ill. 1978), United States v. Hooker Chem. & Plastics Corp., Civil Actions Nos. 79-987, 79-988, 79-989 and 79-990 (W.D.N.Y.)).

417. *Milwaukee*, 451 U.S. at 346, n.21 (Blackmun, J., dissenting) (quoting Letter to Senator Muskie from James Moorman, Assistant Attorney General Land and Natural Resources Division (Oct. 18,

United States also argued that a colloquy on the Senate floor regarding the then-pending *Reserve Mining* case demonstrated Congressional intent to preserve the federal common law. When Senator Griffin inquired whether this lawsuit, which included a federal common law nuisance claim, would be affected by the 1972 amendments, Senators Muskie and Hart each responded in the negative.

The case was argued in the Supreme Court on December 2, 1980. The oral argument focused largely on the question of whether the Clean Water Act had preempted the federal common law of nuisance. At the argument, Chief Justice Burger expressed doubt that Congress had intended to preempt federal common law because it had not said so expressly in any part of the statute.[418] Following oral argument, when the Court met in conference to decide the case, the Marshall papers reveal that the Chief Justice deemed the case too close to call. Thus, he asked Justice Brennan, the Justice with the most seniority voting in the majority, to assign the opinion of the Court.[419] Justice Brennan asked Justice Rehnquist to write the majority opinion.

On April 28, 1981, the Court issued its decision holding that the Clean Water Act had preempted the federal common law of nuisance in interstate water pollution cases. Three Justices dissented. In his opinion for the Court, Justice Rehnquist first cited *Erie Railroad Co. v. Tompkins* for the proposition that federal courts are not general common law courts with the power to develop their own rules of decision. While conceding that "the Court has found it necessary, in a 'few and restricted' instances . . . to develop federal common law,"[420] Justice Rehnquist argued that there is no reason to believe "that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas."[421] Citing separation of powers concerns, Justice Rehnquist argued that the judiciary should employ federal common law only when it is compelled to answer federal questions that cannot be answered by federal statutes alone.[422]

In order to determine whether federal common law has been displaced by a federal statute, the Court should undertake "an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law."[423] Justice Rehnquist stated that this is a different exercise from that undertaken in deciding whether federal law preempts state law. Concerns for preserving state sovereignty "are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not re-

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1977)).

418. *Water Act Preempts Common Law, Supreme Court Told in Argument*, 1 Env't Rep. (BNA) 1183 (1980).

419. Memorandum from Chief Justice Burger to the Conference (Apr. 22, 1981) (on file with author).

420. 451 U.S. at 313 (citing Wheldin v. Wheeler, 373 U.S. 647, 651 (1963)).

421. *Id.*

422. *Id.* at 313-14.

423. *Id.* at 315 n.8.

quired."[424] Because the Clean Water Act creates a comprehensive national permit scheme that addressed the very concerns raised by Illinois, courts should not be free to formulate different federal standards "through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence."[425]

Justice Rehnquist also cited the complexity of transboundary pollution cases as a reason why it would be "peculiarly inappropriate" for a court to invoke federal common law in the face of federal legislation supplanting it. He cited a statement by the district judge indicating that some of the expert testimony in the case was "over the heads of all of us."[426] "Not only are the technical problems difficult—doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise—but the general area is particularly unsuited to the approach inevitable under a regime of federal common law" that would generate the kind of "sporadic" and "ad hoc" approaches to water pollution control that Congress has deemed inadequate.[427]

Justice Rehnquist noted that even in the absence of federal common law, Congress had provided Illinois with a forum in which to protect its interests by requiring that neighboring states be given notice and an opportunity to participate in permit proceedings likely to affect their waters. Illinois had not availed itself of its opportunity to participate in Wisconsin's permit proceedings, and it should not be able to use the federal courts to rewrite defendants' discharge permits.

Writing in dissent, Justice Blackmun, joined by Justices Marshall and Stevens, challenged the relevance of *Erie*, noting that it did not disturb "a deeply rooted, more specialized federal common law" that the Court has fashioned "where the interstate nature of a controversy renders inappropriate the law of either State."[428] In such disputes, the laws of one state cannot impose upon the sovereign interests of another state, and the Constitution extends the judicial power to the resolution of such controversies.

Under Justice Blackmun's vision, federal statutes that speak to the importance of resolving interstate pollution problems can serve as an incentive, rather than an obstacle, to developing federal common law. Justice Blackmun noted that the savings clause contained in the citizen suit provision of the Clean Water Act provided that "[n]othing in this section shall restrict any right which *any person* (or class of persons) may have under *any statute or common law* to seek enforcement of any effluent standard or limitation *or to seek any other relief*."[429] Despite considerable legislative history supporting Justice Blackmun's view, Justice Rehnquist dismissed this his-

424. *Id.* at 316-17.
425. *Id.* at 305.
426. *Id.* at 325.
427. *Id.*
428. *Id.* at 334-35 (Blackmun, J., dissenting).
429. *Id.* at 339.

tory and the savings clause as providing only that nothing in the *citizen suit* provision of the Act preempted federal common law, while arguing that the balance of the statute did effect such preemption.[430] "[T]he fact that Congress *can* properly check the courts' exercise of federal common law does not mean that it has done so," Justice Blackmun argued. "This Court is no more free to disregard expressions of legislative desire to preserve federal common law than it is to overlook congressional intent to curtail it."[431]

Responding to the argument that the complexity of interstate nuisance cases warranted preemption of federal common law, Justice Blackmun conceded that such cases often require difficult judgments, but he maintained that "they do not require courts to perform functions beyond their traditional capacities or experience."[432] In any event, "[t]he complexity of a properly presented federal question is hardly a suitable basis for denying federal courts the power to adjudicate,"[433] particularly when the expert agency administering the Clean Water Act frequently has sought to invoke federal common law jurisdiction. Justice Blackmun concluded his dissent with an observation that the Court's decision was particularly unfortunate because it would undermine efforts to promote "a more uniform federal approach to the problem of alleviating interstate pollution."[434]

Two months after it decided *Milwaukee II*, the Supreme Court reiterated its holding that the Clean Water Act had entirely preempted the federal common law of nuisance for water pollution in *Middlesex County Sewerage Authority v. National Sea Clammers Association*.[435] The Court rejected a lawsuit by an association of shell fisherman seeking to recover damages for pollutant discharges that allegedly violated the Clean Water Act and other federal laws, by holding that Congress had not created an implied right of action for damages under the Clean Water Act.[436] The majority saw no reason to find that the preemptive effect of the Act on federal common law is any less when coastal or ocean waters are involved.[437]

C. International Paper Co. v. Ouellette

Left open by the Court's *Milwaukee II* decision was the question of whether *state* common law remedies had been preempted by the Clean Water Act. This issue was addressed by the Court in *International Paper Co. v.*

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430. *Id.* at 328-29.
431. *Id.* at 339 n.8 (Blackmun, J., dissenting).
432. *Id.* at 349.
433. *Id.* at 349 n.25.
434. *Id.* at 353.
435. 453 U.S. 1 (1981).
436. *Id.* at 11.
437. *Id.* at 22. Writing in partial dissent, Justice Stevens described the Court as having pursued *Milwaukee II*'s preemption rationale to its "inexorable conclusion" by holding that even noncompliance with the Clean Water Act "is a defense to a federal common-law nuisance claim." *Id.* at 31 (Stevens, J., concurring in the judgment in part and dissenting in part).

Ouellette.[438] The *Ouellette* litigation was spawned by pollution from the new International Paper mill on the shores of Lake Champlain that had replaced the old mill that was the focus of *Vermont v. New York*.[439] In 1978, a group of property owners living on the Vermont side of the lake filed a class action against International Paper in Vermont state court.[440] International Paper removed the case to federal court, which allowed the case to proceed as a class action on behalf of 150 owners of lakefront property.[441]

While the litigation was pending in federal district court, *Milwaukee II* was decided. Citing *Milwaukee II*, International Paper moved to dismiss the case on the ground that the Clean Water Act preempts state nuisance actions.[442] The district court then held the case in abeyance for three years while waiting to see how the Seventh Circuit would rule on the same issue, which had been raised by Illinois in renewed litigation against Milwaukee based on Illinois nuisance law.[443] Even though the Seventh Circuit ultimately ruled against Illinois,[444] the federal district judge in Vermont held that state nuisance actions had not been preempted by the Clean Water Act.[445] The court denied the motion to dismiss.[446] International Paper took an interlocutory appeal to the Second Circuit where it lost again.[447] The company then sought review in the Supreme Court, which agreed to hear the case to resolve the conflict between the Second and Seventh Circuits.[448]

In the Supreme Court, the United States appeared as an amicus in support of the plaintiffs' position that the Clean Water Act did not preempt state common law actions.[449] The papers of the late Justice Thurgood Marshall reveal that the Court itself had considerable uncertainty about how to decide the case.[450] Although Justice Powell was assigned the opinion, he initially was uncertain about how to arrive at a position that would command the votes of at least four other Justices.[451] In an unusual memorandum to the conference written before he had even started drafting the opinion, Justice Powell indicated that he would like to preserve a state common law remedy for interstate pollution while holding that the law of the source state must apply.[452] Justice Powell wanted advance confirmation that this position could command a majority of the Court.[453]

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438. 479 U.S. 481 (1987).
439. *See* LANGROCK, *supra* note 377, at 79.
440. *Ouellette*, 479 U.S. at 484.
441. *Id.*
442. *Id.*
443. *Id.* at 481.
444. Illinois v. Milwaukee, 731 F.2d 403 (1984).
445. Ouellette v. Int'l Paper Co., 602 F. Supp. 264 (D. Vt. 1985).
446. *Id.* at 266.
447. Ouellette v. Int'l Paper Co., 776 F.2d 55 (2d Cir. 1985).
448. Int'l Paper Co. v. Ouellete, 479 U.S. 481, 487 (1987).
449. *Id.* at 483.
450. *See* Memorandum to the Conference from Justice Powell (Nov. 17, 1986) (on file with author).
451. *See id.*
452. *See id.*
453. *Id.*

Several Justices expressed support for this view. Justice Scalia proposed the theory that *Milwaukee I* had preempted the application of state common law by recognizing that federal common law governs in cases of interstate pollution.[454] The Clean Water Act could be viewed as resuscitating the common law of the source state, Justice Scalia argued, while preserving preemption of the receiving state's common law.[455] Other Justices, who ultimately dissented, argued in favor of simply applying traditional choice-of-law principles.[456]

On January 31, 1987, the Court issued its decision holding that the Clean Water Act preempted state common law nuisance actions so long as the law applied was the law of the source state rather than the law of the receiving state.[457] Justice Powell's opinion for the Court conceded that the Clean Water Act does not directly address the question of preemption of state common law.[458] After reviewing the goals and policies of the Clean Water Act, Powell concluded that allowing affected states to impose their own separate discharge standards on source states inevitably would create a serious interference with achievement of the full purposes of Congress.[459] Holding a discharger in another state liable for violating more stringent requirements of state nuisance law in the receiving state would compel the *source* to adopt different control standards than those approved by the EPA and its home state.[460] The inevitable result would be to allow states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources."[461] This would undermine the predictability and efficiency of the Clean Water Act's permit scheme and could subject a source to a variety of "vague" and "indeterminate" common law rules adopted by downstream states.[462]

Thus, the Court found that state common law actions founded on the law of the receiving state were preempted.[463] However, the Court also held that "nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* state."[464] Since the Clean Water Act expressly preserves the right of states to impose more stringent standards on their own point sources, actions brought under the nuisance law of source states will not interfere with the balance of interests reflected in the Act.[465] Since federal courts sitting in diversity are competent to apply the law of

454. *See* Memorandum from Justice Scalia to Justice Powell (Nov. 18, 1986) (on file with author).
455. Memorandum to the Conference from Justice Scalia (Nov. 18, 1986) (on file with author).
456. Memorandum to the Conference from Justice Blackmun (Nov. 19, 1986) (on file with author); Memorandum to the Conference from Justice Stevens (Nov. 24, 1986) (on file with author).
457. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 500 (1987).
458. *Id.* at 493.
459. *Id.* at 493-94.
460. *Id.* at 495.
461. *Id.*
462. *Id.* at 496.
463. *Id.* at 500.
464. *Id.* at 497.
465. *Id.* at 498-99.

other states, the *Ouellette* plaintiffs were free to continue their action in Vermont's federal district court so long as it applied New York nuisance law to their claims.[466]

Four Justices dissented.[467] Justice Brennan, joined by Justices Marshall and Blackmun, argued that there was no need to decide whether a source state's nuisance law had been preempted because there was no difference between the law of Vermont and New York.[468] Brennan also argued that federal district courts hearing such actions should apply traditional choice-of-law principles to determine what law to apply.[469] In addition, Brennan criticized the majority for assuming erroneously that "Congress valued administrative efficiency more highly than effective elimination of water pollution."[470] In a separate dissent, Justice Stevens, joined by Justice Blackmun, questioned "what has happened to the once respected doctrine of judicial restraint."[471]

On remand, the plaintiffs continued to pursue their case against International Paper, but this time applying New York nuisance law, which was no less favorable to them than the law of Vermont.[472] After completing the discovery process, the *Ouellette* case went to trial. The plaintiffs presented evidence that International Paper had committed more than 1000 violations of its air and water discharge permits.[473] Shortly after the trial, International Paper agreed to settle the case. The settlement agreement provided monetary compensation to each member of the plaintiff class in amounts that represented approximately 25% of the assessed value of their property.[474] As part of the settlement, International Paper also agreed to create a $500,000 trust fund to be used for research to help protect the lake.[475] Thus, the Court's decision that common law claims for transboundary pollution must be adjudicated under the law of the source state ultimately did not prevent the plaintiffs from obtaining relief.

V. CONCLUSION

As a result of *Milwaukee II* and *Ouellette*, the federal common law of nuisance has been preempted in interstate water pollution disputes, while state common law nuisance actions remain viable so long as the law of the source state is applied.[476] Despite its demise, the history of the federal

466. *Id.* at 500.
467. *Id.* at 500, 508.
468. *Id.* at 501 (Brennan, J., dissenting).
469. *Id.*
470. *Id.* at 504.
471. *Id.* at 509 (Stevens, J., dissenting).
472. Ouellette v. Int'l Paper Co., 666 F. Supp. 58 (D. Vt. 1987).
473. *See* LANGROCK, *supra* note 377, at 86.
474. *Id.*
475. *Id.*
476. *Milwaukee II* and *Ouellette* dealt only with interstate water pollution disputes in which the federal Clean Water Act was held to preempt the federal common law of nuisance. Although the Su-

common law of nuisance can yield some useful insights relevant to contemporary debates over federalism, separation of powers, and regulatory policy.

A. Federalism and the Legitimacy of Federal Common Law

Concerns about the legitimacy of federal common law have centered on two issues—federalism and separation of powers.[477] As the Court noted in *City of Milwaukee v. Illinois*, "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."[478] Yet the Supreme Court has consistently recognized, both before and after *Erie*, that under some circumstances it is necessary and legitimate for courts to develop and to apply federal common law.[479] These circumstances include "cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States, or the resolution of interstate controversies."[480] The "uniquely federal concern" that warranted the development of the federal common law of interstate nuisance was the Court's constitutional authority under Article III, Section 2, to hear controversies between states.[481]

The Court's decisions to allow states to bring interstate nuisance disputes to protect their sovereign interests represented a substantial shift away from private law notions that prevailed throughout the nineteenth century.[482] Until the Court's decision in *Missouri v. Illinois*,[483] states generally were not allowed to sue in federal court to vindicate their sovereign interests unless they could demonstrate infringement on rights protected at common law. Thus, while states could sue in federal court to resolve boundary disputes because they resembled traditional property claims, they could not ask the federal courts to enforce state law against a state's own citizens,[484] nor could they sue to protect their citizens from nuisances unless they caused the state itself some particularized injury.[485] By recognizing that transboundary pollution could infringe on state sovereignty in a manner warranting a federal remedy, Justice Holmes's opinion in *Missouri v. Illinois* represented a significant shift toward opening the federal courts to public law

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preme Court has not directly addressed the question of whether the federal Clean Air Act preempts federal common law in disputes over transboundary air pollution, it is widely assumed to do so, particularly in light of the Clean Air Act Amendments of 1990, which created a comprehensive federal permit scheme similar to that established by the Clean Water Act. *See* Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403, 474 (1997).

477. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

478. City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981).

479. *See, e.g.*, Northwest Airlines v. Transp. Workers Union, 451 U.S. 77 (1981).

480. *Id.* at 95.

481. *Id.*

482. *See* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 392-94 (1995); *cf.* Akhil Amar, *Of Sovereignty & Federalism*, 96 YALE L.J. 1425 (1987) (arguing that true sovereignty lies in the people).

483. 180 U.S. 208 (1901).

484. *See generally* Cohens v. Virginia, 6 Wheat. 264 (1821).

485. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855).

claims in a manner that presaged subsequent developments in standing doctrine applicable to private litigants.

The Court's use of federal common law to resolve interstate nuisance disputes did not raise federalism concerns because the Court employed federal law to vindicate the interests of states in preventing transboundary pollution from infringing on their sovereignty.[486] As Justice Holmes noted, an interstate nuisance dispute involves "a suit by a State for an injury to it in its capacity of *quasi*-sovereign."[487] Thus, when it adjudicated disputes over interstate pollution, the Court was employing federal common law to decide matters beyond the legislative competence of the states in which it was necessary for the Court to develop federal rules to further the constitutional scheme.[488]

The history of the federal common law of interstate nuisance demonstrates that the Court was sensitive to federalism concerns in seeking to employ principles of federal common law that respect the equal footing of all states as members of the union. Thus, the Court repeatedly cautioned states that any rules it applied in their favor could later be used against them in other circumstances. By seeking to develop principles of federal common law that would treat states as equals, the Court acted to promote values of federalism embodied in the Constitution.

While representatives of the federal government were involved in many of the transboundary pollution disputes heard by the Court, their involvement generally was limited to the protection of well-recognized federal interests, such as the protection of interstate navigation. In *New York v. New Jersey*,[489] the federal government intervened to ensure that New Jersey's sewage disposal plans would not create obstructions to navigation in New York Harbor.[490] In *New Jersey v. New York*,[491] the Supervisor of New York Harbor had issued a permit to New York City authorizing the dumping of garbage that spawned the dispute, but the permit was based solely on a federal judgment that dumping at a certain location would not interfere with navigation. It did not deter the Court from finding that the dumping violated New Jersey's rights. In *Missouri v. Illinois*,[492] where the Court rejected Missouri's request to enjoin opening of the drainage canal that ultimately would send Chicago's sewage to the Mississippi River, the U.S. Secretary of War had approved the opening of the canal. However, once again this was based on a judgment concerning the canal's effect on navigation and it did not

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486. *See* Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).
487. *Id.*
488. *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1271, 1322 (1996) (proposing these as criteria for assessing the legitimacy of federal common law and concluding that interstate pollution disputes meet these criteria).
489. 256 U.S. 296 (1921).
490. The United States later reached a settlement with New Jersey that required the state to employ treatment technologies that later proved to be influential in the Court rejecting New York's interstate nuisance claim.
491. 1997 WL 291594 (1997).
492. 180 U.S. 208 (1901).

stand in the way of the Court in *Wisconsin v. Illinois*[493] requiring the Chicago Sanitary District to reduce its diversions of water into the canal to stop the harm they were causing to upstream interests.

In each of the cases decided by the Court through application of federal common law, the nature of the federal interest the Court sought to vindicate was its constitutional role as a neutral, yet authoritative, forum for resolving disputes between states. However, by the time of *Milwaukee II*, the nature of the federal interest involved in the case had changed dramatically due to the enactment of the Federal Water Pollution Control Act.[494] By enacting this legislation, Congress had established a direct federal interest in regulating all pollutant discharges to surface waters. A National Pollutant Discharge Elimination System ("NPDES") permit had been issued for the discharges challenged by Illinois, and the Court held that the federal legislation establishing the permit scheme preempted the federal common law of nuisance.[495]

The Court declared that preemption of federal common law promoted principles of separation of powers because "'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."[496] By making it easy to infer preemption of its own ability to fashion federal common law, the Court's decision promoted judicial restraint, even if it was not what the dissenters considered to be a faithful interpretation of the congressional intent behind the Clean Water Act's savings clause. The Court justified basing preemption of federal common law on a lesser showing of intent than would be required to preempt state law by noting that states are represented in Congress but not in federal courts.[497] Thus, it concluded that concerns about judicial displacement of state law that counsel against finding preemption in absence of clear congressional intent "actually suggest a willingness to find congressional displacement of *federal* common law."[498] As a result of *Milwaukee II*, the nature of the federal interest vindicated by courts hearing interstate nuisance litigation evolved from a concern for maintaining harmony between the states to a concern for avoiding conflicts with federal environmental programs established by Congress.

Due to the displacement of federal common law by the Clean Water Act, states that are the victims of interstate pollution now must depend upon decisions by the EPA or source state permitting officials to protect themselves from transboundary pollution. In *Arkansas v. Oklahoma*,[499] the Supreme Court ruled that the EPA has the authority to require permitting authorities in upstream states to ensure that dischargers located there will not

493. 278 U.S. 367 (1925).
494. City of Milwaukee v. Illinois, 451 U.S. at 310.
495. *Id.* at 312.
496. *Id.* at 317.
497. *Id.* at 316.
498. *Id.* at 316 n.9.
499. 503 U.S. 91 (1992).

cause "actual detectable violation[s]" of the water quality standards of downstream states. This decision, which was founded largely on *Chevron* deference to the EPA's exercise of discretion under the Clean Water Act, provides a potential avenue for downstream states with more stringent environmental standards to mitigate the impact of *Ouellette*'s exclusive focus on the law of source states.[500] The Court in *Arkansas v. Oklahoma* interpreted *Ouellette* not as a bar on consideration of the impacts of transboundary pollution on downstream states, but rather as a limit on the remedies available to downstream states.[501]

B. Separation of Powers and Legal Norms for Controlling Transboundary Pollution

The Supreme Court's decisions applying the federal common law of interstate nuisance have served as important precedents for the development of international legal norms applicable to transboundary pollution. Yet careful study of these cases reveals that there may be less law there than first meets the eye. Indeed, these cases may be better understood not as establishing universal norms for transboundary pollution, but rather as examples of fact-specific, equitable balancing by a Court struggling to formulate case-by-case remedies.[502] The Court's occasional use of the "unclean hands" doctrine of equity[503] can be read as articulating norms of reciprocity or nondiscrimination[504] that may be highly attractive for resolving certain interstate pollution disputes when disputants have reciprocal interests.

The difficulty of identifying legal norms generated by the federal common law of nuisance is in part a product of the Court's concern that it respect principles of separation of powers when fashioning rules of federal common law. From the very start in *Missouri v. Illinois*, Justice Holmes cautioned that in deciding interstate nuisance disputes "this court must determine whether there is any principle of law and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature."[505] Nearly seventy years

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500. *See* Katheryn Frierson, Arkansas v. Oklahoma: *Restoring the Notion of Partnership Under the Clean Water Act*, 1997 U. CHI. LEGAL F. 459.

501. *See generally* Arkansas v. Oklahoma, 503 U.S. at 91.

502. *See* Merrill, *supra* note 477, at 997-98 (describing the Court's decisions during the 1920s and 1930s as "rather sorry examples of 'equity' decisionmaking in the form of ad hoc intuitionism").

503. *See, e.g.*, Missouri v. Illinois, 200 U.S. 492, 522 (1905) ("Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result . . . .").

504. *See* Merrill, *supra* note 477. Thomas Merrill refers to these principles as "golden rules" or "reverse golden rules." *Id.* Merrill suggests, for example, that courts hearing transboundary pollution disputes could inquire whether the affected state has been exposed to pollution to a degree that would give rise to a regulatory response if the pollution had been introduced by a private citizen in its state. *Id.* He also would require source states to treat affected states as well as they treat their own citizens. *Id.*

505. Missouri v. Illinois, 200 U.S. 496, 519 (1906).

later, the Court described the enterprise of exercising its original jurisdiction as the "adjudications of controversies between States according to principles of law, some drawn from the international field, some expressing a 'common law' formulated over the decades by this Court."[506]

Separation of powers concerns, coupled with concerns over the judiciary's institutional competency to fashion environmental policy, help explain the Court's ultimate decision to embrace federal legislation as preemptive of federal common law in *City of Milwaukee v. Illinois*. As Justice Rehnquist explained in that case, when the Court previously had formulated "interstate common law" it did so "not because the usual separation-of-powers principles do not apply, but rather because interstate disputes frequently call for the application of a federal rule when Congress has not spoken."[507] Once Congress spoke by enacting legislation that regulated the same subject matter that generated interstate nuisance disputes, a Court weary of decades of struggle to resolve such controversies embraced that legislation as preemptive even though it neither directly nor effectively controlled transboundary pollution.[508]

C. The Common Law As an Instrument of Environmental Policy

The history of the Supreme Court's handling of interstate nuisance disputes illustrates both the advantages and disadvantages of using common law approaches to respond to environmental problems. When used to address large, individual sources that caused visible damage to the environment, successful nuisance suits were possible, but when environmental damage was less visible (and potentially attributable to other causes) common law causation requirements were hard for plaintiffs to meet. Initially, the common law of nuisance performed primarily a kind of "zoning" function by encouraging dischargers to relocate to areas where they would cause less damage. Eventually it came to be used to help stimulate the development and implementation of improved pollution control technologies. Injunctions issued by the Supreme Court at the behest of states affected by Chicago's sewage disposal and New York City's ocean dumping ultimately improved environmental conditions. Because courts using common law approaches can more readily engage in a balancing of equities on a case-by-case basis, they have certain distinct advantages over regulatory approaches that do not take into account the effects of pollution or the locations of sources and victims.[509]

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506. Vermont v. New York, 417 U.S. 270, 277 (1974).
507. City of Milwaukee v. Illinois, 451 U.S. 304, 316 n.8 (1981).
508. *See* Kay M. Crider, *Interstate Air Pollution: Over a Decade of Ineffective Regulation*, 64 CHI.-KENT L. REV. 619 (1989); Stewart, *supra* note 1, at 259-61 (explaining why federal regulatory programs have been ineffective in controlling the kinds of transboundary pollution problems formerly addressed by the now-preempted federal common law of nuisance).
509. *See* Heimert, *supra* note 476.

Some significant problems of using federal common law to respond to transboundary pollution problems are illustrated by the history of the interstate nuisance cases. These include the length and complexity of the litigation that must be undertaken to pursue them, and the Court's difficulties in formulating and enforcing remedial orders against government entities. The interstate nuisance cases brought before the Supreme Court were difficult and complex and took years to litigate even when handled through procedures designed to expedite the fact-finding process. As a result, even though the Supreme Court is uniquely invested with the authority to resolve disputes between states under our constitutional system, as a practical matter the Court could only hear a handful of such actions. Thus, when the Court in 1972 faced three applications to bring original cases raising transboundary pollution issues at the same time, it is not surprising that it developed a rationale for declining jurisdiction in favor of other venues. As Justice Harlan explained in *Wyandotte*:

> In our opinion, we may properly exercise such discretion, not simply to shield this Court from noisome, vexatious, or unfamiliar tasks, but also, and we believe principally, as a technique for promoting and furthering the assumptions and value choices that underlie the current role of this Court in the federal system. Protecting this Court *per se* is at best a secondary consideration. What gives rise to the necessity for recognizing such discretion is pre-eminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court.[510]

However, once *Milwaukee I* determined that the federal district courts could hear interstate nuisance cases applying federal common law, the specter of multiple federal judges using federal common law to issue pollution control directives caused some of the Justices sufficient anxiety to make preemption a most attractive option.

The history of the federal common law of nuisance illustrates the difficulties faced by the Supreme Court in serving as an umpire for interstate water pollution disputes. Thus, it is not surprising that the Court ultimately embraced federal regulatory legislation as a justification for retiring from the task of adjudicating interstate pollution controversies. However, despite its inherent drawbacks, the common law's flexibility and case-by-case approach and the Supreme Court's unique authority to resolve disputes between states made federal common law an important force in the history of environmental policy.

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510. Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 499 (1971).