JESSE J. RICHARDSON, JR.*

Slaying the Minotaur: Navigating the Equitable Apportionment Labyrinth to Create an Equitable Policy to Guide Water Management

* Jesse J. Richardson, Jr., is the Hale and Roscoe Poston Professor of Law and the Lead Land Use Attorney for the Land Use and Sustainable Development Law Clinic at West Virginia University College of Law. He received his B.S. and M.S. in Agricultural and Applied Economics from Virginia Tech and his J.D. from the University of Virginia School of Law. The author completed this Article as part of a research leave from the West Virginia University College of Law and thanks the College of Law for that opportunity. Thanks also go to Anthony Schutz and Drew Kershen for their input and patience is listening to my thoughts on equitable apportionment. The author acknowledges Pat Dillon's ideas for the title of the Article. Finally, the hard work and outstanding edits by the staff of the Journal of Environmental Law and Litigation makes this Article much better. Any errors in the Article are those of the author.

I
INTRODUCTION

In a recent equitable apportionment case, Justice Thomas, in a dissenting opinion joined by Justices Alito, Kagan, and Gorsuch, described the majority opinion as "mush[ing] the requirements from our precedents together, merging cases and principles from one area

with cases and principles from another—sometimes in the same sentence."[1] Although the dissent went on to assert that the equitable apportionment precedents "articulate clear rules,"[2] the Court's equitable apportionment jurisprudence is best described as confusing and inconsistent.

Three avenues exist to divide (or "apportion") water between states. First, the states can reach an agreement and enter a compact to apportion waters. Second, one or more states may file suit in the United States Supreme Court and request an equitable apportionment. Third, and least common, Congress may apportion waters between two or more states.

The United States Supreme Court has equitably apportioned only three rivers since the first equitable apportionment case in 1907. The Court apportioned the waters between the states in three of the first six equitable apportionment cases it heard, the last being *Nebraska v. Wyoming* in 1945. No waters have been apportioned by the Court in the intervening seventy-nine years.

Those facts raise no concerns alone. However, only twenty-one compacts apportion water between states,[3] and the last compact to

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1 Florida v. Georgia, 138 S. Ct. 2502, 2535 (2018) (Thomas, J., dissenting).

2 *Id.*

3 Arkansas River Compact (Colorado and Kansas), ch. 155, 63 Stat. 145 (1949); Arkansas River Basin Compact of 1965 (Kansas and Oklahoma), Pub. L. No. 89-789, 80 Stat. 1409 (1966); Arkansas River Compact of 1970 (Oklahoma and Arkansas), Pub. L. No. 93-152, 87 Stat. 569 (1973); Amended Bear River Compact (Idaho, Utah, and Wyoming), Pub. L. No 96-189, 94 Stat. 4 (1980), Pub. L. No. 85-348, 72 Stat. 38 (1958); Belle Fourche River Compact (South Dakota and Wyoming), ch. 64, 58 Stat. 94 (1944); California-Nevada Interstate Compact (California and Nevada), Cal. Water Code § 5976; Canadian River Compact (New Mexico, Oklahoma, and Texas), Pub. L. No. 82-345, 66 Stat. 74 (1952); Colorado River Compact (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming), Pub. L. No. 70-642, 45 Stat. 1057, 1064 (1928); Amended Costilla Creek Compact (Colorado and New Mexico), Pub. L. No. 88-198, 77 Stat. 350 (1963), Pub. L. No. 408, 60 Stat. 246 (1946); Kansas-Nebraska Big Blue River Compact (Kansas and Nebraska), Pub. L. No. 92-308, 86 Stat. 193 (1972); La Plata River Basin Compact (Colorado and New Mexico), Pub. L. No. 68-346, 43 Stat. 796 (1925); Pecos River Compact (Texas and New Mexico), ch. 184, 63 Stat. 160 (1949); Red River Compact (Arkansas, Louisiana, Oklahoma, and Texas), Pub. L. No. 96-564, 94 Stat. 3305 (1980); Republican River Compact (Colorado, Kansas, and Nebraska), ch. 104, 57 Stat. 86 (1943); Rio Grande Compact (Colorado, New Mexico, and Texas), ch. 155, 53 Stat. 785 (1939); Sabine River Compact (Louisiana and Texas), Pub. L. No. 83-578, 68 Stat. 690 (1954); Snake River Compact (Idaho and Wyoming), Pub. L. No. 81-464, 64 Stat. 29 (1950); South Platte River Compact (Colorado and Nebraska), ch. 46, 44 Stat. 195 (1926); Upper Colorado River Basin Compact (Arizona, Colorado, New Mexico, Utah, and Wyoming), ch. 48, 63 Stat. 31 (1949); Upper

apportion waters occurred in 1980.[4] Meanwhile, the number of disputes between states over water has increased dramatically, and the Court has addressed a growing number of equitable apportionment claims and compact disputes over water allocation.

At most, two direct Congressional apportionments have occurred.[5] First, the 1928 Boulder Canyon Project Act provided that Arizona, California, and Nevada—the three Colorado River Lower Basin States—were "authorized to enter in an agreement" to divide the waters of the Lower Basin in defined quantities.[6] Second, Congress apportioned the Truckee and Carson Rivers and Lake Tahoe between California and Nevada in 1990.[7] The two states had reached an agreement on apportionment, but objections relating to tribal water rights complicated the issue.[8]

With Congressional apportionments and compacts to apportion water unlikely to increase in the near future, the United States Supreme Court likely faces an increase in petitions to apportion interstate waters. Given the Court's dismal track record and the lack of clarity in precedents, however, states may hesitate to seek relief through equitable apportionment. This Article offers recommendations to clarify the equitable apportionment process and to make the remedy more available to the states. By doing so, the author argues that equitable apportionment cases will decrease as states will have a clear framework on which to base compact negotiations.

This Article first offers a short primer on water rights in the United States, contrasting eastern riparian water rights and western prior appropriation rights.[9] Summaries of the Court's opinions on equitable

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Niobrara River Compact (Nebraska and Wyoming), Pub. L. No. 91-50, 83 Stat. 86 (1969); Yellowstone River Compact (Montana, North Dakota, and Wyoming), Pub. L. No. 231, 65 Stat. 663 (1951). *See* Noah D. Hall, *Interstate Water Compacts and Climate Change Adaption*, 5 ENV'T & ENERGY LAW & POL'Y 237, 265–320 (2010). 3 WATERS AND WATER RIGHTS § 46.01 (Amy K. Kelly, ed., 3rd ed. LexisNexis/Matthew Bender 2023).

4 Red River Compact, Pub. L. No. 96-564, 94. Stat. 3305 (1980) (the 1958 Bear River Compact was amended in 1980).

5 BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS, 960–61 (6th ed. 2018).

6 *Id.* at 958.

7 Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, § 204, 104 Stat. 3289 (1990).

8 THOMPSON ET AL., *supra* note 5, at 960.

9 These two water rights regimes apply to surface water. States use five different types of doctrines to define groundwater rights. This Article limits the discussion to surface water. Although the Court determined in Mississippi v. Tennessee, 595 U.S. 15 (2021), that equitable apportionment applies to groundwater, no case has considered equitable

apportionment provide a concise history of the doctrine. The summaries emphasize key points and inconsistencies. The Article then attempts to glean a coherent test for determining equitable apportionment from the case law. Given the dramatic differences between the riparian and prior appropriation doctrines, the cases are then categorized and discussed based on the water rights regimes used by the contesting states. This discussion provides the basis for the argument that the equitable apportionment doctrine should consider the different state water rights regimes. The biggest takeaway from the review of the case law is that the Court's latest equitable apportionment opinion, though unanimous, marks a sudden and dramatic change in the equitable apportionment doctrine. Finally, the Article draws conclusions from the cases and offers recommendations to improve the process. The recommendations seek both to improve water management in the country and to encourage states to enter voluntary water apportionment compacts while minimizing the burden on the United States Supreme Court.

II
A PRIMER ON SURFACE WATER RIGHTS

Two common law surface water rights regimes exist in the United States. In the eastern United States, riparian rights govern consumption of surface water,[10] while in the western United States the prior appropriation doctrine governs in eighteen states.[11]

Riparian rights give the owner of land abutting surface water the right to have the water continue to flow past their property, which is subject to the shared right of all riparian owners to make reasonable use of the water.[12] Two different theories evolved as to riparian rights.[13] The natural flow theory maintains that the riparian owner holds the

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apportionment of groundwater. Mississippi did not request equitable apportionment in that case.

10 Riparian rights consist of a "bundle" of rights, including rights to access the water, wharf out on the water, use the water, consume the water, assume ownership of accretions and own the subsoil of some waters. *See, e.g.*, 1 WATERS AND WATER RIGHTS § 6.01(b) (Amy K. Kelly, ed., LexisNexis/Matthew Bender 2023) [hereinafter WATERS AND WATER RIGHTS]. This Article focuses on the right to consume water.

11 *Id.* § 11.01.

12 *Id.* § 7.01(a.01).

13 ANTHONY DAN TARLOCK & JASON ANTHONY ROBINSON, LAW OF WATER RIGHTS AND RESOURCES §§ 3.54, 3.55, 3.60 (2023).

right to have the water flow past their property in its natural condition, undiminished in quantity or quality.[14] Early court opinions, however, created exceptions that almost completely enveloped the rule.[15]

The natural flow theory, with all its exceptions, eventually evolved into the reasonable use theory. Under this theory, riparian owners are entitled to make reasonable use of the waters flowing past their property so long as the use does not infringe upon the equal rights of other riparian owners to use the waters.[16] Uses by one riparian owner may not cause "substantial harm" or "unreasonable injury" to another riparian owner.[17] Additionally, the riparian doctrine distinguishes between uses of the waters on riparian versus nonriparian lands.[18] Early case law found that off-site use, or "lift," was per se unreasonable, but later courts require proof of actual injury.[19]

In contrast, the prior appropriation doctrine does not depend upon ownership of land or, initially, the location of the use of the water.[20] Instead, priority depends upon the time that use was established. In times of shortage, water is supplied to the senior users first, up to the limit of their right.[21] Once all the available water is allocated, users junior to the last appropriator, who satisfied all or a portion of its right, receive no water. Therefore, the supply of the most junior appropriator is cut off first.[22] A common shorthand summarizes the rule as "first in time, first in right."[23] The common law requirements for acquiring a priority right include "(1) unappropriated water; (2) a natural stream; (3) diversion; and (4) application to a beneficial use."[24] Nearly all prior appropriation states replaced the common law system with an administrative permitting system.[25]

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14 WATERS AND WATER RIGHTS, *supra* note 10, § 7.02(c).

15 *Id.*

16 *Id.* § 7.02(d)(1.01).

17 *Id.*

18 TARLOCK & ROBINSON, *supra* note 13, § 3.50.

19 *Id.*

20 CHARLES J. MEYERS, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION SYSTEM 4 (1971). Statutory provisions later restricted location of use, though never restricting use to the riparian land. 1 WATERS AND WATER RIGHTS § 12.02(f).

21 *Id.*

22 *Id.*

23 THOMPSON ET AL., *supra* note 5, at 20.

24 *Id.* at 216–17.

25 *Id.* at 177.

III
A BRIEF HISTORY OF EQUITABLE APPORTIONMENT

This section summarizes each of the equitable apportionment cases that the United States Supreme Court has considered. The case summaries are presented in chronological order.

A. Kansas v. Colorado

The Court established the doctrine of equitable apportionment in 1902 in *Kansas v. Colorado*.[26] Kansas filed a bill to enjoin Colorado from diverting water from the Arkansas River.[27] Kansas alleged that Colorado intended to divert all the water in the river, leaving none for Kansas,[28] and thus leaving the state an "arid desert."[29] The bill asked the Court to enjoin Colorado from issuing any permits to divert water from the Arkansas River, except for domestic uses, or from issuing any permits to add or expand canals or ditches.[30] Colorado filed a demurrer to the bill stating, *inter alia*, that the Court lacked jurisdiction and that the suit was on behalf of certain residents of Kansas.[31] The Court explained that Kansas represented itself and its citizens in filing the bill.[32] The Court held jurisdiction to, *inter alia*, determine whether Colorado threatened to "wholly exhaust the flow of the Arkansas River into Kansas."[33]

Five years later, the Court ruled on the merits of the case, dismissing the petition.[34] The opinion lays out the parameters of the equitable apportionment doctrine and provides insights into future applications. The Court first dismissed the motion to intervene filed by the United States, finding no federal authority to overrule state common law water rights for reclamation.[35] The question presented was whether Kansas held a right to river flow at the state line as the flow existed prior to human intervention, or whether Colorado could extract all the water in

26 Kansas v. Colorado, 185 U.S. 125 (1902).
27 *Id.*
28 *Id.* at 135.
29 *Id.* at 133.
30 *Id.* at 137.
31 *Id.* at 137–38.
32 *Id.* at 143.
33 *Id.* at 147.
34 Kansas v. Colorado, 206 U.S. 46, 117 (1907).
35 *Id.* at 85–94.

the river within the state.[36] A fundamental rule dictates that "[e]ach state stands on the same level with all the rest."[37] However, in resolving the conflict, the Court could not grant money damages, as that action would have amounted to imposing a contract on the states.[38]

Kansas uses the riparian rights rule for surface water, while Colorado uses the prior appropriation rule.[39] In addressing the question of when the actions of one state infringe on the sovereignty of another, the Court failed to address whether the difference in water rights regimes factored into the decision.[40]

To resolve the question, the Court engaged in an extensive analysis of charts and tables summarizing population, numbers of acres cultivated, and value of farm products at various points in time between 1880 and 1900 in various communities in the watershed.[41] Kansas lost population between 1890 and 1990, while Colorado gained population.[42] With little or no evidence, the population loss in Kansas was attributed to the opening up of Oklahoma and the concurrent increase in population in that state.[43] Agricultural production records displayed no "marked injury" from the reduced flow of the river.[44]

The key for the Court was that, though southwestern Kansas suffered damages from the reduced river flow, the much greater benefit resulting from the irrigation in Colorado outweighed those damages.[45] Therefore, "equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation."[46] The Court, however, conceded that

> it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that that there is no longer an equitable division of benefits, and may rightfully call for relief against the action of Colorado.[47]

Kansas's ability to make a successful claim at a later time appears doubtful from the language of the case. Whether the balancing of the

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36 *Id.* at 85.
37 *Id.* at 97–98.
38 *Id.* at 100.
39 *Id.* at 48.
40 *Id.*
41 *Id.* at 100.
42 *Id.* at 108–14.
43 *Id.* at 112.
44 *Id.* at 113.
45 *Id.* at 113–14 (referred to in later opinions as a balancing test).
46 *Id.* at 114.
47 *Id.* at 117.

damages to Kansas against the benefits to Colorado formed a prerequisite to an equitable apportionment or a factor in determining the apportionment itself remains unclear. Later cases conflict on this issue.

The Court's analysis in this case seems extraordinary. Although the tables span several pages in the opinion, the sophistication of the analysis pales in comparison to the complicated models used today. The Court's rather simplistic conclusion that access to lands in Oklahoma formed the reason for the decrease in population in Kansas during the same period lacks foundation and begs the question of whether this correlation, or lack thereof, should be dispositive. That the benefits in Colorado of pumping water outweighed the (comparatively speculative) losses in Kansas from the diminution of water flow hardly "forbids any interference with the present withdrawal of water in Colorado" in the name of "equality of right and equity."[48] This ruling set the stage for the equitable apportionment doctrine to disadvantage rural states that withdraw relatively small amounts of water, as compared to urban states that withdraw large amounts of water.

The dispute over the Arkansas River returned to the Court in 1928, when Colorado filed a suit against Kansas.[49] In the intervening twenty-one years, several lawsuits had been filed between Colorado users and Kansas users; some had been settled and at least one was still pending.[50] Colorado's suit against Kansas and a private user in Kansas sought to have the Court enforce the 1907 order and enjoin private litigation to apportion the waters of the river.[51] Kansas responded by alleging that Colorado's appropriations had increased since 1907, causing injury to Kansas users.[52]

The Court explained that the case must be of "serious magnitude" before an equitable apportionment will be entertained.[53] "[I]n determining whether one State is using . . . more than [an] equitable share of the [water], all the factors which create equities in favor of one State or the other must be weighed."[54] The Court found that Kansas

48 *Id.* at 114.

49 Colorado v. Kansas, 320 U.S. 383 (1943) (original filing was in 1928, but the decision was not released until 1943).

50 *Id.* at 386–88.

51 *Id.* at 388.

52 *Id.* at 388–89.

53 *Id.* at 393.

54 *Id.* at 393–94.

failed to show that Colorado's use had materially increased or that any increase had caused substantial injury in Kansas.[55]

The Court appeared to place importance on Kansas's failure to take any action between the 1907 decision and the filing of this action in 1928.[56] In addition, the Court noted that an apportionment would "inflict serious damage on existing agricultural interests in Colorado," and might result in Colorado abandoning significant investments in canals, reservoirs, and farms it made in the intervening years.[57] The fact that the riparian rights regime in Kansas might limit diversions from the river to nonriparian tracts also factored into the decision.[58]

B. Wyoming v. Colorado

After the initial *Kansas v. Colorado* proceeding, the Court next considered equitable apportionment in 1922 in a case that resulted in the apportionment of waters.[59] Wyoming filed suit against Colorado, objecting to withdrawals from the Laramie River, an interstate river, made in Colorado.[60] Specifically, the water withdrawn was taken to a different watershed, meaning that the water would not return to the river or to Wyoming.[61] In addition, Wyoming claimed that its citizens had priority, and the withdrawals would leave insufficient water to satisfy citizens' priority demands.[62] Colorado answered that (1) the state has the right to all water within its boundaries without regard to damages to Wyoming, (2) the withdrawals were an equitable share that would be apportioned to Colorado, and (3) adequate water remained in the river after the withdrawals to satisfy priority demands in Wyoming.[63]

Both states' arguments had flaws. The Court dismissed Colorado's contention that a state may do as it pleases with water within its boundaries.[64] Each state traversed by an interstate stream holds an interest that must be respected by the other states.[65] Furthermore,

55 *Id.* at 400.
56 *Id.* at 394–95.
57 *Id.* at 394.
58 *Id.* at 399–400.
59 Wyoming v. Colorado, 259 U.S. 419 (1922).
60 *Id.* at 456–57.
61 *Id.*
62 *Id.*
63 *Id.* at 457.
64 *Id.* at 466.
65 *Id.*

Wyoming's objection to the transfer of water to a different watershed had no basis in prior appropriation rules.[66] Both Colorado and Wyoming use the prior appropriation rule for surface water.[67] The result might have been different if a riparian rights state were involved, but under prior appropriation rules, neither state depended on where the water is used.[68] Lastly, the Court concluded that, consistent with the equality of right principle,[69] prior appropriation similarly forms the basis for dividing the waters between states that both use that rule.[70] In reaching that conclusion, the Court rejected an argument put forth by Colorado that likely would have proven more persuasive in future cases.[71] Namely, Colorado maintained that use of the water in Colorado would yield more economic benefits than use of the water in Wyoming.[72]

Although the Court concluded that the prior appropriation doctrine should apply, the inconsistent flow of the Laramie River, both seasonally and year-to-year, posed issues for allocating water between the states.[73] Similar to *Kansas v. Colorado*, the Court reviewed data of discharges and runoff from the river at various locations throughout a thirty-year period.[74] Colorado suggested the use of the average yearly flow,[75] but the data showed that the flow fell below the average in sixteen of the thirty years, including eight consecutive years.[76] Given this wild variability, storage could not be counted upon to equalize flow, and the average flow could not be used as a safe number for apportionment.[77]

The lowest flow was not used, however, as storage could help equalize the annual flow somewhat.[78] Although Wyoming had no legal duty to store water for Colorado's benefit, the doctrine of prior

66 *Id.*

67 *Id.* at 458–59.

68 *Id.*

69 Michael D. Tauer, *Evolution of the Doctrine of Equitable Apportionment—Mississippi v. Memphis*, 41 MEM. L. REV. 897, 910 (2011).

70 Wyoming v. Colorado, 259 U.S. 419, 470 (1922).

71 *Id.*

72 *Id.* at 468–69.

73 *Id.* at 471.

74 *Id.* at 474–90.

75 *Id.* at 471.

76 *Id.* at 475.

77 *Id.*

78 *Id.* at 484.

appropriation required, in both states, that users "exercise [their] right[s] reasonably and in a manner calculated to conserve the common supply."[79] After evaluating the expert testimony and the data, the Court found that "a fairly constant and dependable flow of 170,000 acre-feet per year" made up the available supply "after the recognized Colorado diversions [were] made."[80] The total available supply for all proposed and existing appropriations in both states amounted to 288,000 acre-feet per year.[81] The total senior appropriation rights in Wyoming equaled 272,500 acre-feet per year.[82] Therefore, Colorado could divert no more than 15,500 acre feet per year to ensure that senior appropriators in Wyoming received their shares.[83] The Court apportioned the available water accordingly.[84]

C. Connecticut v. Massachusetts

The next equitable apportionment case considered by the Court failed to result in an apportionment, and the Court considered the states' water rights doctrines[85] in a dramatically different way. Connecticut objected to a proposed diversion of water from a tributary of the Connecticut River to provide water for Boston and neighboring municipalities.[86] The complaint alleged the diversion would impair the navigability of the stream, take water out of the watershed, and take flood waters, all to the detriment of agricultural lands in Connecticut.[87] In addition, the complaint alleged that Massachusetts discharged pollutants into the river, and a reduction in flow would cause the pollution to be less diluted, amounting to a nuisance.[88] Massachusetts responded by denying that the withdrawals would cause any injury, alleging that the withdrawals would be relatively small, and asserting that an emergency existed that required the withdrawals.[89] The Special Master recommended the complaint be dismissed, as Connecticut failed to show substantial injury.[90] The alleged emergency formed a

79 *Id.*
80 *Id.* at 485.
81 *Id.* at 488.
82 *Id.* at 496.
83 *Id.*
84 *Id.*
85 Connecticut v. Massachusetts, 282 U.S. 660, 662 (1931).
86 *Id.*
87 *Id.* at 663.
88 *Id.*
89 *Id.*
90 *Id.* at 672.

focus of the Special Master's Report, which noted that the population involved was 2,860,000, and would grow to 4,572,000 within forty years.[91]

Connecticut based its claims on the riparian doctrine, which was used in both states. Instead of disregarding state borders and applying the water rights doctrine adopted in both states, as the Court did in *Wyoming v. Colorado*, the Court minimized the effect of the underlying state water rights doctrines. Oddly, the Court reasoned that, since not all states use the riparian doctrine, states can change their water rights doctrine, and the determination of water rights between states differs from the determination between individuals, the riparian doctrine should be "taken into account" but not given "controlling weight."[92] Although the Court declared "equality of right" as the standard for equitable apportionment, that standard appears to dictate use of the riparian doctrine disregarding borders.[93] Other factors seemed to weigh heavily in favor of Massachusetts. Citing no source, the Court declared that "[d]rinking and other domestic purposes are the highest uses of water."[94] The impending "serious water shortage" facing the Boston area[95] appeared to sway the Court to dismiss the bill of complaint without prejudice, with the usual platitude that the bill may be refiled if substantial injury results in the future.[96]

D. New Jersey v. New York

In the same year as *Connecticut v. Massachusetts*, the Court apportioned waters in a suit between the riparian states of New Jersey and New York, with Pennsylvania intervening.[97] New Jersey's bill objected to a large proposed diversion by New York to increase the water supply for the city of New York.[98] New Jersey, like Connecticut in the earlier case, argued that the riparian doctrine should apply.[99] Again, the Court rejected that notion, finding that "[t]he removal of water to a different watershed obviously must be allowed at times

91 *Id.* at 665.
92 *Id.* at 670.
93 *Id.* at 670–71.
94 *Id.* at 673.
95 *Id.* at 664.
96 *Id.* at 674.
97 New Jersey v. New York, 283 U.S. 336 (1931).
98 *Id.* at 342.
99 *Id.*

unless States are to be deprived of the most beneficial use on formal grounds."[100] The Court went on to say that "[t]he different traditions and practices in different parts of the country may lead to varying results," but the Court always seeks to "secure an equitable apportionment without quibbling over formulas."[101] The urgent need for drinking water by the city of New York appeared to be an important factor in the Court's ruling.[102]

Oft quoted from this case is the Court's declaration that "[a] river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."[103] Although the Court found no material effect from the proposed diversion on the river as a source of water supply or on the sanitary condition of the river, the withdrawal would substantially impair recreation.[104] Finding that the reduction of the diversion by 160 million gallons per day (mgd) to 440 mgd would eliminate the damage to recreational uses, the Court limited New York's withdrawal to that amount.[105] The decree also addressed sewage issues and explicitly stated that New York's diversion did not constitute a prior appropriation nor give New York any superiority of right over New Jersey or Pennsylvania.[106] Pennsylvania's request for an allocation of water from the river was denied, as was the request for a river master.[107]

E. Washington v. Oregon

In 1936, the Court addressed a petition by the state of Washington to limit diversions by the state of Oregon out of the Walla Walla

100 *Id.* at 343. The Court immediately followed that statement with the declaration that "[i]n fact it has been allowed repeatedly and has been practiced by the States concerned" (citing Missouri v. Illinois, 200 U.S. 496, 526 (1906); Wyoming v. Colorado, 259 U.S. 419, 466 (1922); Connecticut v. Massachusetts, 282 U.S. 660, 671 (1931)). Apparently those three cases amount to "repeatedly." The Court appears to have been referring not to New Jersey and New York, but to the six states involved in those disputes, most of which do not use the riparian doctrine.

101 *Id.* Since the Court ignores riparian rights for the most part, results are not likely to vary in different parts of the country.

102 *Id.* at 344–45.

103 *Id.* at 342.

104 *Id.* at 345–46.

105 *Id.*

106 *Id.* at 347.

107 *Id.* at 347–48; *see* New Jersey v. New York, 347 U.S. 995 (1954) (where a river master was appointed by the Court in 1954, and the decree modified in conjunction the construction of reservoirs).

River.[108] Both states use the doctrine of prior appropriation.[109] Washington complained about the shortage of water for a particular priority diversion, while Oregon contested the priority date of that diversion.[110]

The Court confirmed that Washington must establish substantial injury by clear and convincing evidence.[111] The Special Master found, and the Court confirmed, that limiting use in Oregon would not provide additional water for the Washington diversion.[112] In addition, the use of the water for irrigation in Oregon was reasonable.[113]

In prior appropriation parlance, Washington was making a "futile call." The futile call doctrine places an important limitation on the principle of priority.[114] A junior appropriator will not be curtailed if the senior appropriator will not gain any additional water as a result.[115] Therefore, the Court merely applied the prior appropriation doctrine. In addition, Washington failed to show that water wells tapping groundwater in Oregon decreased the amount of water available in Washington.[116] Lacking evidence of substantial damage, the complaint was dismissed.[117]

F. Nebraska v. Wyoming

The last equitable apportionment by the Court occurred in 1945. Nebraska alleged that Wyoming and Colorado were diverting water out of priority, the rule that applied in all three states.[118] Wyoming denied diverting water out of priority but joined in the prayer for an apportionment, while Colorado asked that the case be dismissed.[119]

The river at issue, the North Platte River, includes a complex set of reservoirs and canals, some administered by the federal government.[120]

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108 Washington v. Oregon, 297 U.S. 517 (1936).
109 *Id.* at 521.
110 *Id.*
111 *Id.* at 522.
112 *Id.* at 522–23.
113 *Id.* at 523–24.
114 WATERS AND WATER RIGHTS, *supra* note 10, § 12.02 (citation omitted).
115 *Id.* (citing *In re* Kearney Water & Elec. Powers Co., 149 N.W.2d 363, 367 (1914)).
116 Washington v. Oregon, 297 U.S. 517, 524–26 (1936).
117 *Id.* at 529–30.
118 Nebraska v. Wyoming, 325 U.S. 589, 591–92 (1945).
119 *Id.* at 592.
120 *Id.* at 592–99.

The Court identified six natural sections of the river basin, often demarcated by dams and reservoirs.[121] Each section required a separate analysis and apportionment method. Complicating matters, a severe drought had begun in 1931.[122] Since 1930, river flows reached the mean of the 1904–1930 flows only one time.[123]

Colorado asserted that no substantial injury existed attributable to itself, only a threat of potential injury.[124] Wyoming and Nebraska had increased acreage under irrigation much more than Colorado had since 1910, and they were continuing to build irrigation projects.[125] The Court concurred with the Special Master that dependable river flows during irrigation season have "long been over-appropriated,"[126] saying that "the areas involved are arid or semi-arid."[127] The Court itself, however, seems to concede that no evidence existed of actual damage: "The various statistics with which the record abounds are inconclusive in showing the existence or extent of actual damage to Nebraska. But we know that deprivation of water in arid or semiarid regions cannot help but be injurious."[128]

At least one commentator asserted that this case stands for the proposition that where the competing states all make substantial use of a river, no substantial injury need be shown.[129] This analysis suggests that for new use claims where an existing use conflicts, substantial injury from the conflicting uses is presumed.[130] The Court has never made any such distinction explicit.

The Court distinguished the case from *Kansas v. Colorado*,[131] noting that Kansas had "stood by for over twenty years without protest" while Colorado made improvements in irrigation.[132] The fact that Kansas uses the riparian rights doctrine while Colorado uses prior appropriation also

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121 *Id.* at 593.

122 *Id.* at 597–98.

123 *Id.* at 599.

124 *Id.* at 608–09.

125 *Id.*

126 *Id.* at 608; *see also id.* at 609 ("The additional demands on the river which those projects involve constitute a threat of further depletion."); *id.* at 610 ("[S]tates assert against [the] river . . . claims based on . . . projected additional uses as well.").

127 *Id.* at 608.

128 *Id.* at 610.

129 Bernadette R. Nelson, Note, *Muddy Water Blues: How the Murky Doctrine of Equitable Apportionment Should Be Refined*, 105 IOWA L. REV. 1827, 1843 (2020).

130 *Id.*

131 Kansas v. Colorado, 206 U.S. 46 (1907).

132 Nebraska v. Wyoming, 325 U.S. 589, 611 (1945).

makes a difference in the significant injury analysis as compared to a case where both states use appropriation.[133] However, the Court failed to explain further.

The Court also diverged from prior jurisprudence with respect to literal application of the prior appropriation doctrine, as was done in *Wyoming v. Colorado*.[134] The Court stated that although priority is the "guiding principle," a "just and equitable" apportionment between two prior appropriation states may require deviating from "strict adherence to the priority rule,"[135] and "all of the factors which create equities" must be considered.[136] The nonexclusive list of factors to be considered by the Court include

> physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extents of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to the upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.[137]

For one segment of the river, considerations involving futile call dictated the apportionment deviate from strict priority.[138] However, Wyoming's prayer for a mass allocation that disregarded priority failed to take into account the principle of dependable flow.[139] The Court also limited apportionment to natural flow, excluding storage.[140] Additionally, though the water might produce more in lower sections of the river, substantial junior appropriations in Colorado in established uses were allowed to continue.[141] The amount allowed was the average of 6,000 acre-feet per year over a period of ten years.[142] The restrictions in the decree did not apply to "ordinary and usual domestic and

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133 *Id.*

134 *Id.* at 617 (citing Wyoming v. Colorado, 259 U.S. 419, 470 (1922)).

135 *Id.* at 618.

136 *Id.* (citing Colorado v. Kansas, 320 U.S. 383, 394 (1943)).

137 *Id.*

138 *Id.* at 618–19.

139 *Id.* at 620 (citing Wyoming v. Colorado, 259 U.S. 419 (1922)).

140 *Id.* at 621.

141 *Id.* at 622–23.

142 *Id.* at 622.

municipal purposes."[143] In addition, withdrawals for stock-water purposes were exempt.[144]

Three Justices dissented, noting that no proof existed of existing or imminent substantial damages and stating that "beneficial use is what counts."[145] Nebraska failed to show a present need for beneficial use of the water used by Wyoming.[146] Similarly, the Special Master noted that any threat of future depletion "can hardly be said to be immediate."[147] The proposed decree's enjoining of the diversion of water that Colorado neither diverted nor contemplated diverting amounts to a "gratuitous interference with a quasi-sovereign State."[148] The Court wrote, "No state may play dog in the manger, and build up reserves for future use in the absence of present need and present damage."[149] The dissent warned that the majority had opened the floodgates for future equitable apportionment cases.[150]

G. Arizona v. California

The next equitable apportionment case was decided by the Court in 1963.[151] Arizona filed a complaint against California over respective rights to use water from the Colorado River and its tributaries.[152] Nevada, New Mexico, Utah, and the United States were later joined as parties.[153]

The Colorado River spans approximately 1,300 miles, flowing through the states of Colorado, Utah, and Arizona, along the Arizona-Nevada and Arizona-California borders, and then into Mexico.[154] The river receives water from tributaries in Wyoming, Colorado, Utah, Nevada, New Mexico, and Arizona.[155] The Colorado River Basin is very arid and has largely depended on the irrigation water from the Colorado River.[156] But as water demands increased, the "engineering

143 *Id.* at 656.
144 *Id.*
145 *Id.* at 657–58 (Roberts, J., dissenting); *id.* at 658.
146 *Id.*
147 *Id.* at 659.
148 *Id.* at 660.
149 *Id.* at 658.
150 *Id.* at 657–58.
151 Arizona v. California, 373 U.S. 546 (1963).
152 *Id.* at 550–51.
153 *Id.* at 551.
154 *Id.* at 552.
155 *Id.*
156 *Id.*

and economic hurdles" to converting the flow into a dependable water supply proved too great for the individual states.[157]

During the early 1900s, the United States Congress began to explore a federal solution.[158] In 1921, anticipating the possibility of conflicts between the states, Congress granted the states permission to negotiate and enter into a contract to apportion the waters of the river.[159] The resulting agreement, the Colorado River Compact, failed to apportion waters between the states, but apportioned water between the Upper Basin and Lower Basin of the Colorado River and provided a source for water required to be delivered to Mexico under international treaties.[160] However, due mainly to the inclusion of tributaries in the Compact, particularly the Gila River, Arizona refused to ratify the Compact.[161]

After several attempts, Congress passed the Boulder Canyon Project Act in 1928.[162] The bill authorized a series of federal projects to, *inter alia*, construct and operate dams and store and distribute water for beneficial uses.[163] Section 4(a) of the Act provided a mechanism to limit the water allocated to California, while allowing California, Arizona, and Nevada to apportion waters voluntarily with specified allotments.[164] The Gila River was reserved exclusively for Arizona.[165] Finally, Sections 5 and 8(b) of the Act authorized the sale of stored waters by the Secretary of the Interior.[166] While the California legislature consented to limits on the state's withdrawals, none of the states entered an apportionment compact.[167]

The Special Master found, and the Court agreed, that the Act apportioned the waters among the States of the Lower Basin through

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157 *Id.* at 553.

158 *Id.* at 554–62.

159 *Id.* at 556–57.

160 *Id.* at 557–58.

161 *Id.* at 558 (Arizona ratified the Compact in February 1944); Joe Gelt, *Sharing Colorado River Water: History, Public Policy and the Colorado River Compact*, WATER RES. RSCH. CTR. (Aug. 1, 1997), https://wrrc.arizona.edu/publication/sharing-colorado-river-water-history-public-policy-and-colorado-river-compact [https://perma.cc/8VQK-Z6M3].

162 43 U.S.C. § 617 (1928).

163 Arizona v. California, 373 U.S. 546, 559–60 (1963).

164 *Id.* at 560–61.

165 *Id.* at 561.

166 *Id.*

167 *Id.* at 561–62.

the contracts entered into by the Secretary of the Interior.[168] Congress intended to enact a "comprehensive scheme" to apportion the Lower Basin's share of water between California, Arizona, and Nevada.[169] The first 7,500,000 acre-feet of mainstem waters were divided as follows: 4,400,000 acre-feet to California, 2,800,000 acre-feet to Arizona, and 300,000 acre-feet to Nevada.[170] Arizona and California evenly split surplus above that amount.[171] Each state retained control of its tributaries.[172] The states did not have to agree on a compact because Congress's grant of contracting authority to the Secretary of the Interior granted authority to apportion.[173] Congress may not have realized that it was apportioning water under the Act, believing that the Act gave preapproval to a later agreed-upon compact, if one occurred.[174]

H. Colorado v. New Mexico

1. Colorado v. New Mexico I

In 1982, the Court addressed a river where users in New Mexico had fully appropriated the waters, but Colorado businesses wanted to withdraw water.[175] Both states used the prior appropriation doctrine for surface water.[176] The river, the Vermejo River, is located mainly in New Mexico, and farmers and others have diverted from the river for many years.[177] A New Mexico state court adjudicated the rights to the river in 1941.[178] A Colorado state court issued a Colorado corporation a conditional right to divert waters in 1975.[179] The four major users of the river in New Mexico countered by obtaining an order from the United States District Court for the District of New Mexico finding the doctrine of prior appropriation gave the New Mexico users priority.[180]

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168 *Id.* at 560, 562.

169 *Id.* at 564–65.

170 *Id.* at 565.

171 *Id.*

172 *Id.*

173 *Id.*

174 THOMPSON ET AL., *supra* note 5, at 958.

175 Colorado v. New Mexico, 459 U.S. 176 (1982).

176 *Id.* at 179.

177 *Id.* at 178.

178 *Id.*

179 *Id.* (citing *In re* the Application for Water Rights of C.F. & I. Corp, No. W-3961 (Dist. Ct., W. Div. No. 2, 1975)).

180 *Id.* at 179 (citing Kaiser Steel Corp. v. C.F. & I. Steel Corp., No. 76 Civ. 244 (D.N.M. 1978)).

Colorado then filed for leave to file a complaint for equitable apportionment.[181]

The Court reviewed the principles of equitable apportionment, referring to the doctrine as "flexible" and considering many factors to come to a "just and equitable" result, "without quibbling over formulas."[182] The nonexclusive factors listed by the Court in *Nebraska v. Wyoming*[183] were repeated:

> [P]hysical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former. . . .[184]

State law was an "important consideration" but not controlling.[185] When both states use the prior appropriation doctrine, "priority becomes the 'guiding principle.'"[186] The Court must consider "pertinent laws of the contending States and *all other relevant facts*."[187]

New Mexico argued that rule of priority should apply, with the only exception being "protect[ion] [of] an existing economy built [on] junior appropriations."[188] However, that exception does not apply here.[189] The Court rejected that argument, noting equitable apportionment does not protect wasteful or inefficient uses.[190] Equitable apportionment places an affirmative duty on states to "take reasonable steps to conserve and augment the water supply of an interstate stream."[191] Both New Mexico and Colorado must take reasonable steps to conserve water.[192]

In addition, the weighing of harms and benefits is appropriate in an equitable apportionment proceeding.[193] The Court recognized this

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181 *Id.*

182 *Id.* at 183 (citations omitted).

183 Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

184 *Id.* at 618.

185 Colorado v. New Mexico, 459 U.S. 176, 183–84 (1982).

186 *Id.* (citations omitted).

187 *Id.* at 184 (emphasis in original) (citations omitted).

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.* at 185.

192 *Id.* at 186.

193 *Id.*

balance tilts in favor of existing uses, with certain and immediate impacts.[194] Effects of proposed uses "may be speculative and remote."[195]

The Special Master recommended that Colorado be allocated 4,000 acre-feet of water per year from the river, reasoning the appropriation in that amount would not "materially affect" the appropriations granted to New Mexico downstream.[196] Specifically, any injury would be limited to the Vermejo Conservancy District, which "has never been an economically feasible operation."[197] The Special Master's recommendation relied on a conclusion New Mexico could mitigate any impact of the Colorado diversion through conservation and any injury to New Mexico would be outweighed by the benefits to Colorado.[198] Although the Court found these reasons to be appropriate for equitable apportionment, the Special Master failed to lay out factual findings to support the reasoning.[199] The Court remanded the matter for additional factual findings in the following areas:

(1) Existing uses of water from the Vermejo River;

(2) Available supply of water from the River;

(3) Extent to which reasonable conservation in both states might eliminate waste and inefficiency;

(4) Nature and benefits of future Colorado uses of the river; and

(5) Injury that New Mexico would likely suffer from such diversion.[200]

In a footnote, the Court laid out a novel burden of proof standard that would be implemented in *Colorado v. New Mexico II*. The Court asserted the case law establishes that the state seeking to prevent a diversion by another state bears the initial burden of showing substantial injury.[201] In every case but one, that state has been the plaintiff. In *Colorado v. Kansas II*, Kansas was the defendant, and the Court required Kansas to show substantial harm.[202]

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194 *Id.* at 187.

195 *Id.*

196 *Id.* at 180.

197 *Id.* at 180–81 (citing Report of the Special Master, 23).

198 *Id.* at 181.

199 *Id.* at 189.

200 *Id.* at 189–90.

201 *Id.* at 187 n.13.

202 Colorado v. Kansas, 320 U.S. 383, 393–94 (1943).

Colorado v. Kansas II, however, was notably different from the case at hand. Colorado did not seek equitable apportionment in that case.[203] Colorado sought to enjoin Kansas and private parties in Kansas from violating the earlier court ruling. Kansas, however, responded by requesting an equitable apportionment.[204] Additionally, in other cases where defendant states requested equitable apportionment, the Court did not explicitly impose the initial burden on that defendant state nor express the initial burden lay with a state wishing to prevent a diversion, as opposed to with a plaintiff state invoking the jurisdiction of the Court. Finally, as opposed to *Colorado v. Kansas II*, New Mexico did not request equitable apportionment.

However, imposing the initial burden of proof mattered little since the Court summarily found New Mexico had met the burden "since any diversion by Colorado, unless offset by New Mexico at its own expense, will necessarily reduce the amount of water available to New Mexico users."[205] The burden then shifted to Colorado to show its claim is of "serious magnitude," that reasonable conservation measures by New Mexico would offset any diversions by Colorado, and the benefits to Colorado from the diversion would exceed the harm to New Mexico.[206] This burden of proof was also unprecedented, particularly in requiring Colorado to analyze withdrawals in New Mexico and determine whether conservation measures could reduce the withdrawals without harm to New Mexico.

Two concurring opinions, each joined by two Justices, emphasized different aspects of the dispute. Justice Burger, joined by Justice Stevens, concurred to emphasize the states are on equal footing.[207] Colorado had no special priority because the headwaters are in that state, and New Mexico had no priority because of first use.[208] Justice O'Connor, joined by Justice Powell, concurred to take issue with the Special Master's conclusion that the Vermejo Conservancy District's use of the water involved waste or unreasonableness.[209] The Justices asserted that large losses due to seepage and evaporation

203 *Id.* at 388.

204 *Id.* at 388–90.

205 Colorado v. New Mexico, 459 U.S. 167, 187 n.13. (1982).

206 *Id.*

207 *Id.* at 191 (Burger, J., concurring).

208 *Id.*

209 *Id.* at 191–92 (O'Connor, J., concurring).

did not necessarily equate to waste or unreasonable use.[210] The duty to conserve was limited to "financially and physically feasible" measures.[211] Justice O'Connor opined that comparing the Conservancy's efficiency (or lack thereof) of water use with the benefits of the uses proposed in Colorado contradicts precedent.[212]

The Court had never, according to the concurring opinion, engaged in such a balancing in equitable apportionment litigation between two prior appropriation states involving a fully appropriated river, except in cases between two established economies in the competing states, and in cases in which a proposed diversion would satisfy a "demonstrable need for a potable supply of drinking water."[213] Justice O'Connor feared that apportioning water to one state for a new use based on allegations that the second state's use is wasteful or that the new use is "better" would invite litigation.[214] The Court should equitably apportion only where the challenging state shows by "*clear and convincing evidence*" that the other state's use is "unreasonably wasteful."[215]

2. Colorado v. New Mexico II

The case returned to the Court in 1984, with Justice O'Connor now writing for the majority.[216] The Special Master developed additional factual findings and again recommended Colorado be allowed to divert 4,000 acre-feet per year from the river.[217] After summarizing the factual and procedural background of the case, Justice O'Connor explained the

210 *Id.*

211 *Id.* at 192 (O'Connor, J., concurring) (quoting Wyoming v. Colorado 259 U.S. 419, 484 (1922)).

212 *Id.* at 192–93 (O'Connor, J., concurring).

213 *Id.* at 193 (O'Connor, J., concurring). Note that Justice O'Connor is incorrect in this assessment. The only cases involving potable drinking water involved riparian rights states. *See, e.g.*, Connecticut v. Massachusetts, 282 U.S. 660 (1931); New Jersey v. New York, 283 U.S. 336 (1931). In addition, neither the term "balance" nor "balancing" appeared in either case. Justice O'Connor herself stated that it was "significant to note that these disputes occurred between two Riparian states," although she did not specify the significance. Colorado v. New Mexico, 459 U.S. 176, 193 n.4. (1982) (O'Connor, J., concurring).

214 *Id.* at 195 (O'Connor, J., concurring).

215 *Id.* (emphasis in original). Giving the challenging state the burden of proof in this situation poses a difficult challenge. The challenging state presumably has no access to data that could show the unreasonableness or inefficiency of the other state's use.

216 Colorado v. New Mexico, 467 U.S. 310 (1984).

217 *Id.* at 313.

standard of proof in equitable apportionment cases. Colorado had to prove its case using the clear and convincing evidence standard.[218]

In contrast to the preponderance of the evidence standard, clear and convincing evidence requires convincing the factfinder that the factual assertions are "highly probable."[219] This heightened standard is justified in water rights disputes between states because "[t]he harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote."[220] In addition, this standard of proof appropriately balances the competing interests in stability of property rights and in putting resources to their most efficient uses.[221] Priority would be disrupted only if Colorado could show New Mexico's uses were being implemented inefficiently or the benefits of the proposed use in Colorado were "highly probable."[222]

The initial burden of proof for showing "real or substantial injury" was on the defendant, New Mexico.[223] Since any withdrawals by Colorado would reduce the amount of water available to New Mexico from the fully appropriated river, that burden was met.[224] This presumption of substantial injury resembles the presumption of substantial injury in arid and semiarid areas in *Nebraska v. Colorado*.[225]

The burden then shifted to Colorado to show by clear and convincing evidence that "reasonable conservation measures could compensate for . . . the diversion" and "that injur[ies] . . . to New Mexico would be outweighed by the benefits to Colorado."[226] The Court afforded the findings of the Special Master "respect and a tacit presumption of correctness," but the Court bore the final responsibility of deciding the correct findings of fact.[227] Although equitable apportionment includes

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218 *Id.* at 316.

219 *Id.*

220 *Id.* (citations omitted) (quoting Colorado v. New Mexico, 459 U.S. 176, 187 (1982)).

221 *Id.*

222 *Id.* at 317.

223 *Id.*

224 *Id.* (contradicting prior appropriation doctrine). Impairment as a matter of law or per se impairment contravenes clear precedent in New Mexico. Bounds v. State *ex rel.* D'Antonio, 306 P.3d 457, 462 (N.M. 2013) (citing Mathers v. Texaco, Inc., 421 P.2d 771, 776–77 (N.M. 1966)).

225 Nebraska v. Wyoming, 325 U.S. 589, 610 (1945).

226 Colorado v. New Mexico, 467 U.S. 310, 317 (1984); *see also id.*

227 *Colorado*, 467 U.S. at 317 (citations omitted).

a state's claim to use previously appropriated water for future use, a state laying that claim bears a heavy evidentiary burden.[228] The state must show how reasonable conservation measures can mitigate the impact of the reduced supply and the benefits of the diversion will outweigh the harms.[229] Colorado failed to meet this burden.[230]

The Court shared the Special Master's concerns that New Mexico's explanations of harm might be overstated.[231] Colorado's general assertions failed to meet the burden of showing, with clear and convincing evidence, that specific conservation measures would appropriately preserve the disputed water supply.[232] In addition, no evidence showed Colorado "[undertook] reasonable steps to minimize the amount of the diversion that will be required."[233] Although it recognized the difficulty in meeting this standard of proof, the Court held it "irresponsible . . . to apportion water to uses that have not been, at a minimum, carefully studied and objectively evaluated, not to mention decided upon."[234] The Court held Colorado's assertions that measures could be taken to balance out the potential benefits and alleged harms that may result from Colorado's diversion similarly lacked specificity.[235] Although the Special Master acknowledged Colorado's reluctance to spend large amounts of money to develop plans that may not come to fruition was understandable, the Court simply declared the evidence was lacking.[236]

The Special Master also felt the fact that three-fourths of the water in the river originated in Colorado tilted the equities enough to entitle Colorado to a portion of that water.[237] However, the Court rejected the notion that the "mere fact" the river originates in Colorado "automatically" entitled Colorado to a share of the water.[238] Since both states use the prior appropriation doctrine, where the waters originate proved "essentially irrelevant" to equitable apportionment.[239]

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228 *Id.* at 323.

229 *Id.* at 323–24.

230 *Id.* at 324.

231 *Id.* at 318.

232 *Id.*

233 *Id.* at 320 (quoting Colorado v. New Mexico, 459 U.S. 176, 186 (1982)).

234 *Id.*

235 *Id.* at 321–23.

236 *Id.* at 321.

237 *Id.* at 323.

238 *Id.* (citing Colorado v. New Mexico, 459 U.S. 181 n.8).

239 *Id.* (suggesting that the area where the water originates may be relevant where the competing states use the riparian doctrine).

The appropriate considerations include "the benefits, harms, and efficiencies of competing uses."[240]

Justice Stevens filed a dissenting opinion opining that the Special Master's factual findings should be accorded "considerable deference."[241] He explained that the record in equitable apportionment cases is "typically lengthy, technical, and complex," so testimony and exhibits are extremely difficult to analyze from the "cold record" as opposed to the "living trial."[242] Justice Stevens claimed the majority failed to give due deference to the Special Master's findings of fact, which the substantial evidence supported.[243]

The Special Master's findings supported Colorado's claims. For example, Colorado asserted the "essentially undisputed" "fact" that "a closed stock and domestic water system could eliminate the waste of over 2,000 acre-feet annually," proving waste.[244] The Special Master's findings showed additional conservation measures available to New Mexico, specifically at the Vermejo Conservancy District, and Colorado exercised a higher level of regulation and control over water resources.[245] According to the Court, New Mexico's "manifestly lax, indeed virtually nonexistent, administration of the Vermejo" negatively affected its right to the waters.[246] The evidence cited by the Special Master also indicates the benefits resulting from the proposed uses in Colorado, "if even half" of the proposals are implemented, far outweigh the injuries to New Mexico.[247] The losses to New Mexico could be mitigated by reasonable conservation efforts, and New Mexico had historically used less than the fully allocated share of water.[248] The Special Master did not need to "draw up blueprints for New Mexico to eliminate its waste."[249] According to the dissent, the testimony supported the Special Master's conclusion that New Mexico

240 *Id.*
241 *Id.* at 325–26 (Stevens, J., dissenting).
242 *Id.* at 326.
243 *Id.*
244 *Id.* at 327.
245 *Id.* at 331.
246 *Id.* at 335.
247 *Id.* at 337.
248 *Id.* at 338–39.
249 *Id.* at 339.

could reasonably mitigate the effects of 4,000 acre-feet per year withdrawals by Colorado.[250]

I. South Carolina v. North Carolina

In 2007, the United States Supreme Court granted South Carolina leave to file a bill of complaint against North Carolina for equitable apportionment.[251] South Carolina's complaint focused on North Carolina's issuance of permits to withdraw large amounts of water from the Catawba River Basin to various municipalities (a grandfathered withdrawal of five mgd) and an unknown number of withdrawals of less than two mgd that did not require users to obtain a permit under the state regime.[252] South Carolina alleged these withdrawals exceeded North Carolina's equitable share.[253]

Duke Energy (which generated hydroelectric energy from a series of reservoirs on the river), the Catawba River Water Supply Project ("CRWSP") (whose five mgd withdrawals were grandfathered), and the city of Charlotte (a permitted withdrawer of up to thirty-three mgd), filed motions to intervene.[254] South Carolina opposed all three motions.[255]

After a hearing, and examining both interventions and instances in which nonstate entities had been named parties of original actions, the Special Master distilled a "broad rule" and granted all three motions to intervene.[256] This rule derived from precedents from all original actions.[257] The Court rejected this standard, choosing instead to use the test set out in an equitable apportionment action, *New Jersey v. New York*.[258] In that case, Philadelphia's motion to intervene was rejected, as Pennsylvania was already a party.[259] A state represents its citizens *parens patriae* in suits involving a matter of sovereign interest.[260] As stated by the Court in *New Jersey v. New York*, ruling on a motion to intervene, "An intervenor whose state is already a party should have

250 *Id.*

251 South Carolina v. North Carolina, 552 U.S. 804 (2007).

252 South Carolina v. North Carolina, 558 U.S. 256, 259–60 (2010).

253 *Id.* at 260.

254 *Id.* at 261–62.

255 *Id.* at 262.

256 *Id.* at 263–64.

257 *Id.* at 265.

258 345 U.S. 369 (1953) (ruling on motion to intervene by the City of Philadelphia); *South Carolina*, 558 U.S. at 265–68 (2010).

259 *South Carolina*, 558 U.S. at 266 (citing *New Jersey*, 345 U.S. at 372–73).

260 *Id.*

the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state."[261]

Applying this standard to the CRWSP, the Court granted its motion to intervene. The CRWSP supplies water to consumers in both North Carolina and South Carolina, making the CRWSP a uniquely bistate entity.[262] Neither state could adequately represent CRWSP's unique interests in an equitable apportionment suit.[263]

The Court also granted Duke Energy's motion to intervene, as neither state adequately represents the interests of Duke Energy.[264] Duke Energy operates dams and reservoirs along the river in both states.[265] Duke Energy's Federal Energy Regulatory Commission (FERC) license and the Comprehensive Relicensing Agreement (CRA), among Duke Energy and sixty-nine other entities operating in both states, regulate the minimum flows of the river.[266]

In contrast, the city of Charlotte failed to show a sufficient interest to warrant intervention as a party.[267] South Carolina sought no relief against Charlotte because the water used by the city formed part of the equitable share of North Carolina, and North Carolina vowed to protect the interests of Charlotte in the litigation.[268] The Court denied Charlotte's motion to intervene.[269]

Chief Justice Roberts, joined by Justices Thomas, Ginsburg, and Sotomayor, concurred in part and dissented in part. Noting the Court has never allowed a nonsovereign to intervene in an equitable distribution action, these four Justices have denied all three motions to intervene.[270] The opinion stated equitable apportionment "is a sovereign dispute," and sovereignty is "the key to intervention."[271]

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261 *Id.* (quoting *New Jersey*, 345 U.S. at 373).
262 *Id.* at 269.
263 *Id.* at 270.
264 *Id.* at 273.
265 *Id.* at 272.
266 *Id.* at 272–73.
267 *Id.* at 274.
268 *Id.* at 274–75.
269 *Id.* at 276.
270 *Id.* at 276–77 (Roberts, C.J., concurring in part and dissenting in part).
271 *Id.* at 277.

Two guiding principles form the basis of original jurisdiction.[272] First, original jurisdiction constitutes a "delicate and grave" matter.[273] Original jurisdiction should not be used to resolve private claims.[274] Second, the United States Supreme Court is unsuited to the role of a trial judge.[275] Although special masters provide "vitally important" assistance, the Court alone remains responsible for the exercise of original jurisdiction.[276]

The dissenters also expressed concerns about the practical impacts of allowing private parties to intervene. Liberal intervention rules inevitably prolong an already lengthy process.[277] A more efficient mechanism to allow private party participation already existed—*amici curiae* briefs.[278] In addition, under the majority's decision, "no practical limitation [existed] on the number of citizens, as such, who would be entitled to be made parties."[279]

The dispute between South Carolina and North Carolina settled before the Court made any substantive rulings.[280] The CRA served as the foundation for the agreement, in conjunction with a new license from FERC.[281] Interbasin transfers formed a key part of the dispute, and proposed license articles addressed that issue, among others.[282] The parties agreed to cooperate in developing a consistent policy for approving interbasin transfers, including notice, an environmental impact statement, and written findings of fact.[283] Applicants for interbasin transfers will bear the burden of showing justification, and each state will provide an annual report showing average daily transfers for each entity.[284]

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272 *Id.*

273 *Id.* (quoting Louisiana v. Texas, 176 U.S. 1, 15 (1900)).

274 *Id.* at 277–78.

275 *Id.* at 278 (citation omitted).

276 *Id.*

277 *Id.* at 287–88.

278 *Id.* at 288.

279 *Id.* at 287 (quoting New Jersey v. New York, 345 U.S. 369, 373 (1953)).

280 *Settlement Agreement, South Carolina v. North Carolina, No. 138*, CIRCLE OF BLUE (Dec. 3, 2010), https://www.circleofblue.org/wp-content/uploads/2010/12/Catawba-River-settlement.pdf [https://perma.cc/YB5D-5QEN].

281 *Id.* at 2.

282 *Id.*

283 *Id.* at 3–4.

284 *Id.* at 4.

The parties also agreed to share data and regulate the river to encourage conservation[285] and to implement drought plans. The Catawba-Wateree River Basin Water Supply Study will be updated every ten years, with cooperation from the Catawba-Wateree Water Management Group, using an agreed-upon simulation model to calculate the impact of consumptive withdrawals from the river.[286] During drought, all owners of water withdrawal intakes relying on storage in CRWSP reservoirs must implement drought response plans.[287] North Carolina and South Carolina agreed to develop a Memorandum of Agreement to coordinate state permitting and approval processes for water providers supplying users in both states.[288]

The parties agreed to dismiss the action pending before the Supreme Court of the United States.[289] Further, they agreed neither state would file an equitable apportionment action against the other relating to the Catawba River, so long as each state abides by the agreement, unless material future changes in water use or water demand occur.[290] In the event of material changes, the states must make a good faith effort to resolve the dispute prior to filing suit.[291]

J. Florida v. Georgia

1. Florida v. Georgia I

The latest equitable apportionment dispute to reach the Supreme Court of the United States involves Florida's allegation that Georgia's overuse of the waters of the Apalachicola-Chattahoochee-Flint River Basin deprived Florida of its equitable share of the waters.[292] Both states use the riparian rights doctrine for surface water.[293]

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285 *Id.* at 3.

286 *Id.*

287 *Id.* at 4.

288 *Id.*

289 *Id.*

290 *Id.* at 5.

291 *Id.*

292 Florida v. Georgia, 138 S. Ct. 2502, 2508 (2018). This Article does not include *Mississippi v. Tennessee*, 142 S. Ct. 31 (2021), as an equitable apportionment case. Although the Court held that groundwater is subject to equitable apportionment, Mississippi did not request that remedy.

293 Florida v. Georgia, 141 S. Ct. 1175, 1180 (2021). In *Florida v. Georgia I*, the Court mentions "riparian" only once, at 2530, referring to the COE project. The Court merely says "[g]iven the laws of the States. . . ." 138 S. Ct. at 2513.

The Special Master recommended the Court dismiss the Complaint because Florida failed to prove the Court can redress its alleged injuries through equitable apportionment.[294] Consequently, the majority framed the opinion as addressing only the threshold issue of redressability.[295]

Four principles guided the Court in making an equitable apportionment of waters. First, Florida and Georgia's equal right to make reasonable use of the waters provided the "guiding principle."[296] Reasonableness precludes wasteful uses and requires that states take reasonable steps to conserve and augment water for the benefit of other states.[297] Second, the Court makes equitable apportionment determinations "without quibbling over formulas."[298] Uncertainties about the future dictate that the Court rely on reasonable predictions.[299] Third, given the status of the parties as sovereign states, the Court imposes a significantly greater burden of proof on the complaining state than a private party would bear.[300] The complaining state bears the initial burden of showing "real and substantial injury" by "clear and convincing evidence" to invoke the original jurisdiction of the Court in equitable apportionment cases.[301] The complaining state must have either suffered a wrong as a result of the actions of the other state, or must be asserting a right against the other state that may be judicially enforced.[302] Fourth, once the complaining state shows real or substantial injury, the Court must consider "all relevant factors" in a "flexible" way to arrive at a "just and equitable" apportionment.[303] The factors include, but are not limited to,

> physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the

294 *Florida*, 138 S. Ct. at 2508.

295 *Id.* at 2512.

296 *Id.* at 2513. The Court prefaced the statement with "[g]iven the laws of the States. . . ." The opinion failed to clarify whether the Court was referring to the riparian doctrine. The Court also never mentioned priority, a principle that would guide if both states followed the prior appropriation doctrine.

297 *Id.* (citations omitted).

298 *Id.* (quoting New Jersey v. New York, 283 U.S. 336, 342–43(1931)).

299 *Id.* at 2513–14 (citations omitted).

300 *Id.* at 2514 (citations omitted).

301 *Id.* (citations omitted).

302 *Id.*

303 *Id.* at 2515.

> damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.[304]

The Court found the Special Master applied a stricter standard than the law requires with respect to redressability, requiring Florida show the specifics of a workable decree by clear and convincing evidence.[305] Instead, Florida needed to show, taking into account the "flexibility" and "approximation" inherent in equitable apportionment, that "it is likely to prove possible to fashion such a decree."[306] The stricter standard should be applied only after "finding of fact necessary to determine the nature and scope of [the] likely harm caused by the absence of water and the amount of additional water necessary to ameliorate that harm significantly."[307]

Justice Thomas filed a dissenting opinion, joined by Justices Alito, Kagan, and Gorsuch. The dissent accuses the majority of "mush[ing] the requirements from our precedents together, merging cases and principles from one area with cases and principles from another—sometimes in the same sentence. But our precedents are not so convoluted. They articulate clear rules. . . ."[308]

According to the dissent, the complaining state must show the following: First, it must show standing by demonstrating the action of the other state had enacted a wrong upon the complaining state that can be remedied by judicial enforcement.[309] Second, the complaining state must show substantial harm by clear and convincing evidence.[310] Third, the complaining state must show the benefits of apportionment outweigh the harm that may result from apportionment.[311] Justice Thomas asserted that since the first equitable apportionment case, the balancing test has been "the basic merits inquiry that decides whether a State is entitled to an equitable apportionment."[312]

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304 *Id.* (quoting Nebraska v. Wyoming, 325 U.S. 589, 618 (1945)).

305 *Id.* at 2516.

306 *Id.*

307 *Id.*

308 *Id.* at 2535 (Thomas, J., dissenting).

309 *Id.* at 2534 (Thomas, J., dissenting).

310 *Id.* at 2535 (Thomas, J., dissenting).

311 *Id.*

312 *Id.*

2. Florida v. Georgia II

Upon remand, the Special Master again recommended the case be dismissed for several reasons, including Florida's failure to prove serious injury caused by Georgia's overuse of water.[313] In this iteration, a unanimous Court focused on causation, as the Special Master found Florida failed to prove Georgia's alleged overconsumption had caused harm to Florida's oyster fisheries or river wildlife and plant life.[314]

The Court outlined the elements of equitable apportionment, explaining Florida had to make two showings to obtain an equitable apportionment.[315] They wrote, "First, Florida must prove a threatened or actual injury 'of serious magnitude' caused by Georgia's upstream water consumption.[316] Second, Florida must show that 'the benefits of the [apportionment] substantially outweigh the harm that might result.'"[317] Thus, the Court unanimously adopted the equitable apportionment test outlined by Justice Thomas in his dissent in *Florida v. Georgia I*. Given the factual findings, the Court needed to address only injury and causation.[318]

Florida was unable to make the required showings. For example, while no doubt existed the oyster population in the Apalachicola Bay collapsed in 2012, the cause is contested.[319] Georgia argues that Florida's mismanagement of the oyster fisheries caused the collapse, while Florida points to Georgia's overconsumption of water.[320] The actual cause may never be known, as scientists debate that point, but the Court found Florida failed to carry its burden of proof on the issue.[321] With respect to the harm to river wildlife and plant life, Florida failed to show that the "harm metrics" its expert witness relied on predicted actual harm to the species.[322] Therefore, Florida's evidence

313 Florida v. Georgia, 141 S. Ct. 1175, 1178 (2021) (noting original Special Master retired soon after remand and was replaced with Judge Paul Kelly).

314 *Id.* (citation omitted).

315 *Id.* at 1180.

316 *Id.* (citations omitted).

317 *Id.* (quoting Colorado v. New Mexico, 459 U.S. 176, 187 (1982)) (the step is an additional prerequisite to equitable apportionment compared to test laid out in *Florida v. Georgia I*).

318 *Id.* (Court acknowledged that causation standard applicable to equitable apportionment cases had not yet been identified. Florida failed to meet any standard advanced by parties).

319 *Id.*

320 *Id.*

321 *Id.* at 1181.

322 *Id.* at 1183.

failed to show actual past harm or threatened harm to the species.[323] Consequently, the Court dismissed the case.[324]

IV
WHAT IS THE TEST FOR EQUITABLE APPORTIONMENT?

In the wake of a unanimous decision in *Florida v. Georgia II*, one may question whether any further doubt exists as to the test for equitable apportionment. Just three years earlier, in *Florida v. Georgia I*, Justice Thomas authored a scathing dissent accusing the majority of "mushing" together different principles of equitable apportionment and creating confusion in light of clear precedent.[325] Justices Alito, Kagan, and Gorsuch joined the dissent, giving Justice Thomas an ideologically diverse alliance. Despite Justice Thomas's declaration that apportionment precedents "articulate clear rules,"[326] the history of equitable apportionment reveals a confusing line of cases where the Court seems to change the test, add elements, and reverse it on a regular basis. The shift over time may reflect a need to remain flexible in light of complex factual circumstances and changing natural resource needs.[327] However, a more subjective application in recent cases suggests the Court may be imposing its own judgment as opposed to adhering to the doctrine.[328]

Florida v. Georgia II provides the latest, and perhaps the most dramatic, shift in the test for equitable apportionment. Just three years after a five-justice majority in *Florida v. Georgia I* outlined four principles that conformed with the general understanding of equitable apportionment doctrine, a unanimous Court presented a different test. In the intervening three years, Justices Kennedy and Ginsburg, both in the majority in *Florida v. Georgia I*, were replaced by Justices Kavanaugh and Barrett. Justice Thomas apparently persuaded the other justices in the *Florida v. Georgia I* majority to his point of view. The difference in the tests articulated by the majority and dissent in *Florida v. Georgia I* centers on the role of balancing the benefits to the complaining state and the harms to the defendant state from an

323 *Id.*

324 *Id.*

325 Florida v. Georgia, 138 S. Ct. 2502, 2535 (2018) (Thomas, J., dissenting).

326 *Id.*

327 Nelson, *supra* note 129, at 1849.

328 *Id.*

equitable apportionment. Justice Thomas declared in *Florida v. Georgia I* that the balancing of equities test has been "the basic merits inquiry that decides whether a State is entitled to an equitable apportionment" since the first equitable apportionment case.[329]

Although the balancing test appeared in the first equitable apportionment case,[330] later cases diverge on whether the balancing is a prerequisite to an equitable apportionment or one of the many factors to consider in the actual apportionment. The common understanding of the test for equitable apportionment posits that the prerequisite for an equitable apportionment is the complaining state must show, by clear and convincing evidence, a "threatened invasion of rights . . . of serious magnitude."[331] Once that extremely difficult standard is met, the Court balances the relevant factors. These factors include, but are not limited to, state law, harms and benefits to competing states, conservation and efficiency, and availability of substitute supplies.[332] Miscellaneous factors include "the character and rate of return flows" and "the availability of storage water."[333] This test comports with the test set forth by the majority in *Florida v. Georgia I*.

Depending upon the case, the balancing of harms and benefits has appeared both as a prerequisite to equitable apportionment and as a factor in the apportionment. Indeed, the case law creates much confusion as to whether the "factors" are prerequisites to apportionment or factors to weigh in the actual apportionment of waters. The latest decision of the Court, *Florida v. Georgia II*, seems to create a set of two prerequisites to an equitable apportionment.[334] First, the standard substantial actual or threatened injury caused by the defendant state must be proven.[335] Second, the benefits of apportionment must "substantially outweigh the harms."[336] Not only has the balancing of harms and benefits been added to the prerequisite substantial harm, but a new standard—"substantially outweigh"—has been added.

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329 *Florida*, 138 S. Ct. at 2535 (Thomas, J., dissenting).

330 Kansas v. Colorado, 206 U.S. 46, 113–14 (1907).

331 WATERS AND WATER RIGHTS, *supra* note 10, § 45.04.

332 *Id.* at § 45.06(b)–(c).

333 *Id.* at § 45.06(d) (citations omitted).

334 Florida v. Georgia, 141 S. Ct. 1175, 1180 (2021).

335 *Id.* (citations omitted).

336 WATERS AND WATER RIGHTS, *supra* note 10, § 45.06(c).

However, the Court had muddied the waters before *Florida v. Georgia I*.[337] The Court explicitly rejected a balancing test in *Wyoming v. Colorado*, the second equitable apportionment case considered by the Court.[338] In the next three cases,[339] one of which resulted in an apportionment,[340] balancing was not mentioned at all. The two riparian cases heard by the Court in 1931 both purported to focus on substantial injury as a prerequisite to equitable apportionment, and neither explicitly mentioned a balancing test.[341] However, both involved proposed withdrawals for public water supply, and both the nature of the use and the urgency of the need seemed to influence the decisions.

Nor did the Court engage in balancing in *Washington v. Oregon*. The decision introduced the clear and convincing evidentiary standard for the first time and focused on the lack of evidence of substantial injury.[342] The Court found that limiting use in Oregon would not increase the water available in Washington, so no substantial injury existed.[343]

The balancing test reappears in *Nebraska v. Wyoming*.[344] The balancing, however, is listed as one of several nonexclusive factors to be considered when conducting the apportionment.[345] "Balancing the equities" came into play in two instances—first, when taking into account return flows in one section of the river[346] and second, when considering the "accidental water" that sometimes passes into Nebraska above the amount allocated to it.[347] The Special Master considered the latter a "minor factor" in balancing the equities because the quantity was too uncertain.[348]

At issue in *Nebraska v. Wyoming* was whether substantial injury, the one prerequisite to obtaining an apportionment, had been proven, with

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337 Nelson, *supra* note 129.

338 Wyoming v. Colorado, 259 U.S. 419, 468–69 (1922).

339 Connecticut v. Massachusetts, 282 U.S. 660 (1931); New Jersey v. New York, 283 U.S. 336 (1931); Washington v. Oregon, 297 U.S. 517 (1936).

340 New Jersey v. New York, 283 U.S. 336 (1931).

341 Connecticut v. Massachusetts, 282 U.S. 660 (1931).

342 Washington v. Oregon, 297 U.S. 517 (1936).

343 *Id.* at 522–23.

344 Nebraska v. Wyoming, 325 U.S. 589 (1945).

345 *Id.* at 618.

346 *Id.* at 645.

347 *Id.* at 663.

348 *Id.*

the majority presuming substantial injury without any evidence.[349] Three dissenting justices argued that no substantial injury had been proven, and therefore equitable apportionment was precluded.[350] The substantial injury analysis revealed some odd findings from the Special Master, and those findings were confirmed by the Court. The majority conceded no substantial injuries were proven but presumed injury, stating that "deprivation of water in arid or semiarid regions cannot help but be injurious."[351] The three dissenting justices opined that no evidence of substantial damages existed, and the focus of the inquiry into substantial damages should be beneficial use.[352]

The Court in *Nebraska v. Wyoming* considered the balancing test in a manner similar to the Court in *Kansas v. Colorado*, the first inequitable apportionment case.[353] In *Kansas v. Colorado*, the Court explained that although the Court found that users in Kansas were injured, the benefits to Colorado outweighed the harm to Kansas, and no apportionment was made.[354] Similarly, in making the apportionment in *Nebraska v. Wyoming*, the Court engaged in balancing when holding that junior water rights used in established economies created countervailing equities that outweighed senior water rights. The Court wrote that strict application of priority "'would work more hardship' on the junior user 'than it would bestow benefits' on the senior user"[355] and that "[t]he same principle is applicable in balancing the benefits of a diversion for *proposed* uses against the possible harms to existing uses."[356] The Court used *Wyoming v. Colorado*, *Connecticut v. Massachusetts*, and *New Jersey v. New York* as examples of where balancing had occurred in this context—all in the apportionment process, not as a prerequisite to an apportionment.[357]

The *Colorado v. New Mexico I* majority clearly considered the balancing test as one of several factors in making an equitable apportionment. The majority stated that although the rule of priority is a criterion, "it is also appropriate to consider additional factors relevant

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349 *Id.* at 619.

350 *Id.* at 657 (Jackson, J., dissenting).

351 *Id.* at 610.

352 *Id.* at 657–58 (Roberts, J., dissenting).

353 Kansas v. Colorado, 206 U.S. 46 (1907).

354 Colorado v. New Mexico, 459 U.S. 176, 186 (1982).

355 *Id.* (citing Nebraska v. Wyoming, 325 U.S. 589, 619 (1945)).

356 *Id.* at 186–87 (emphasis in original) (citing Wyoming v. Colorado, 259 U.S. 419 (1922), Connecticut v. Massachusetts, 282 U.S. 660 (1931), New Jersey v. New York, 283 U.S. 336 (1931)).

357 *Id.*

to a just apportionment, such as the conservation measures available to both states and the balance of harm and benefit that might result from the diversion."[358] A footnote appears to confirm that substantial injury, once shown, means the Court moves to the apportionment stage.[359] The balancing forms one factor in making the apportionment "equitable."[360] The Court then muddied the waters by stating Colorado must also show its claim is of a "serious magnitude" *and* that "its position is supported by 'clear and convincing evidence.'"[361]

Colorado v. New Mexico II[362] provided a pivot point for the Court.[363] The majority opinion laid out a unique burden of proof process adopted in *Colorado v. New Mexico I*. The burden first lay with New Mexico, the defendant, to show substantial injury would occur if the waters were apportioned.[364] The burden of proof then shifted to Colorado to show that conservation measures by New Mexico could compensate for the diversion and the injuries to New Mexico would be outweighed by the benefits to Colorado.[365]

In *South Carolina v. North Carolina*, the Court referred to the balancing test to explain why Duke Energy should be allowed to intervene in the equitable apportionment litigation.[366] The Court, citing *Colorado v. New Mexico I*, explained the amount of water Duke needed would be a factor in the balancing of harms and benefits in any equitable apportionment.[367]

The Court laid out the equitable apportionment test in only one other case since *Colorado v. New Mexico—Florida v. Georgia*. Although this allocation of the burden of proof is unique to *Colorado v. New Mexico*, the test closely resembles that set out by the majority opinion in *Florida v. Georgia I*. The differences consisted of shifting the burden of showing substantial injury to the defendant (explained by the Court as the state that objects to the new withdrawal) instead of the complainant and explicitly adding the factor the complainant show that

358 *Id.* at 188.
359 *Id.* at 187 n.13.
360 *Id.*
361 *Id.*
362 Colorado v. New Mexico, 467 U.S. 310 (1984).
363 Nelson, *supra* note 129, at 1845–46.
364 *Colorado*, 467 U.S. at 317.
365 *Id.*
366 South Carolina v. North Carolina, 558 U.S. 256, 272 (2010).
367 *Id.* (citing Colorado v. New Mexico, 459 U.S. 176, 188 (1982)).

conservation measures could compensate for the loss. This unique burden of proof allocation may be limited to the facts of *Colorado v. New Mexico*, but subsequent cases fail to clarify that issue.

Although the Court was far from clear in *Colorado v. New Mexico I* or *Colorado v. New Mexico II*, the best explanation posits that a showing of substantial injury is a prerequisite to an equitable apportionment, and the balancing test is one factor in the apportionment (presumably to make the apportionment equitable). The Court appears to have combined (or "mushed") all the factors into the balancing test, except for the conservation measures explicitly addressed in *Colorado v. New Mexico II*. When considering all the factors, including the balancing test, sometimes the Court maintained the status quo as the most "equitable" apportionment, as was done in *Colorado v. New Mexico II*. Therefore, the majority in *Florida v. Georgia I* was correct in laying out the principles of equitable apportionment as including only substantial injury as a prerequisite. The unanimous Court in *Florida v. Georgia II* erred in adding the balancing test as a prerequisite when the balancing should be one of the factors in the apportionment.

V
DOES THE STATE WATER RIGHTS REGIME MATTER? SHOULD IT?

Although the Court has addressed cases involving all prior appropriation states, all riparian states, and states that use different water rights regimes, opinions only tangentially address whether those differences make a difference in the apportionment. The basic framework seems to apply regardless of water rights regimes, but whether the factors may be different or applied differently remains unclear.

A. Cases Between States That Use the Prior Appropriation Doctrine

The Court has addressed four cases that involve states that use the prior appropriation doctrine.[368] In the first, the Court resolved a conflict between Wyoming and Colorado by applying the prior appropriation doctrine as if the state lines did not exist.[369]

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368 Wyoming v. Colorado, 259 U.S. 419 (1922); Washington v. Oregon, 297 U.S. 517 (1936); Nebraska v. Wyoming, 325 U.S. 589 (1945); Colorado v. New Mexico, 467 U.S. 310 (1984). Arizona v. California, 375 U.S. 542 (1962), is not included in this count as some of the states had some form of riparian rights and, more importantly, the Court found that Congress had apportioned the waters, so they did not address the merits.

369 Wyoming v. Colorado, 259 U.S. at 468–70.

The next prior appropriation case addressed by the Court, involving a petition by Washington State against Oregon, failed to directly implicate the prior appropriation doctrine. The Court decided the case on the threshold issue of whether the action complained of imposed a serious invasion of rights upon the complaining state.[370] Although the Court discussed laches and abandonment, declaring the concepts as "[t]he essence . . . of prior appropriation," even had abandonment not existed, no injury was proven.[371] More directly relevant to prior appropriation, the lack of injury described by the Court constitutes the doctrine of futile call. Namely, even if the complained-of withdrawals ceased, the senior appropriators in Washington State would not have benefited.[372] If the Court had wished, the decision could have been based solely on prior appropriation principles.

Nine years later, in 1945, the Court retreated from a literal application of priority in apportioning waters between Nebraska and Wyoming. The Court stated that though both states use prior appropriation, "[t]hat does not mean that there must be a literal application of the priority rule"[373] and that prior appropriation is a "guiding principle."[374] The Court then laid out the nonexhaustive list of factors to consider in equitable apportionment:

> [P]hysical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former . . . .[375]

The Court's main concern in invoking the factors appeared to have been the protection of established economies that rely on junior appropriations.[376] However, these junior appropriations almost always would have been protected under the futile call doctrine. Each time the Court has invoked the "established economies" concern, the futile call doctrine would have applied. The Court apportioned the waters based on priority, with exceptions for established economies relying on junior

370 *Washington*, 297 U.S. at 522.

371 *Id.* at 527–29.

372 *Id.* at 522–23.

373 Nebraska v. Wyoming, 325 U.S. at 618.

374 *Id.*

375 *Id.*

376 *Id.*

appropriations, all of which appear to involve futile calls. Notably, three justices dissented, noting that no proof existed of existing substantial damages or "substantial damage[s] in the near future."[377]

The final case involving states that use prior appropriation involved Colorado's request to appropriate water from a river that was fully appropriated by users in New Mexico.[378] The case could have easily been decided by simply applying priority. However, the Court rejected that approach and insisted that the factors set out in *Nebraska v. Wyoming* apply.[379] However, the discussion focused more on the "affirmative duty" of states to conserve water in interstate streams for use by downstream states.[380] The Court also focused on weighing harms and benefits to competing states and requiring the benefits of an equitable apportionment outweigh the harms prior to engaging in equitable apportionment.[381]

A concurring opinion opined that the balancing test in cases where the states use prior appropriation applies only in the case of two established economies competing for waters or a "demonstrable need for a potable supply of drinking water."[382] Justice O'Connor warned that allowing one state to divert water based on alleged wasteful or inefficient use of water by another state invites litigation.[383] After a remand to the Special Master to make specific factual findings as to the factors,[384] the Court, Justice O'Connor now writing for the majority, rejected the Special Master's findings and held Colorado had failed to show specific reasonable conservation measures that could compensate for its use of water.[385]

The Court again rejected the proposition that a river's origin in a particular state "automatically entitles [that state] to a share of the . . . water."[386] However, the Court seemed to limit that finding to prior appropriation states, where water rights depend on use, as opposed to

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377 *Id.* at 657 (Roberts, J., dissenting).

378 Colorado v. New Mexico, 459 U.S. 176 (1982); Colorado v. New Mexico, 467 U.S. 310 (1984).

379 Colorado v. New Mexico, 459 U.S. at 182–83.

380 *Id.* at 185.

381 *Id.* at 186.

382 *Id.* at 193 (O'Connor, J., concurring). Note that the dissent cited riparian states for the potable water issue and acknowledged as much.

383 *Id.* at 195.

384 *Id.* at 189–90.

385 Colorado v. New Mexico, 467 U.S. 310, 324 (1984).

386 *Id.* at 323.

riparian states, which depend on land ownership.[387] The Court wrote, "It follows, therefore, that the equitable apportionment of appropriated rights should turn on the benefits, harms, and efficiencies of competing uses."[388] Does that mean that in riparian states the test should consider where the waters originate? Subsequent case law seems to indicate otherwise.

B. Cases Between States Using the Riparian Rights Doctrine

The Court has considered four equitable apportionment cases where all the states use the riparian rights doctrine.[389] One case, *South Carolina v. North Carolina*, was settled prior to any substantive ruling on equitable apportionment.[390] In another, the Court found no substantial injury.[391] In yet another, the complaining state failed to show causation.[392] Only one of the riparian cases resulted in an equitable apportionment.[393] Furthermore, in only the most recent case[394] has the Court pronounced an overarching standard for those cases, declaring that in cases where all states use the riparian doctrine, each state holds "an equal right to make a reasonable use of the waters of the stream."[395]

The first two cases, *Connecticut v. Massachusetts* and *New Jersey v. New York*, were decided in 1931, and both summarily deferred to the use of water needed for public water supply and did not mention balancing.[396] In *Connecticut v. Massachusetts*, communities in the

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387 *Id.*

388 *Id.*

389 Connecticut v. Massachusetts, 282 U.S. 660 (1931); New Jersey v. New York, 283 U.S. 336 (1931); South Carolina v. North Carolina, 552 U.S. 804 (2007); Florida v. Georgia, 138 S. Ct. 2502 (2018); Florida v. Georgia, 141 S. Ct. 1175 (2021).

390 Lyle Denniston, *The Key to Settling a Big Fight*, SCOTUSBLOG (Dec. 27, 2010, 7:40 PM), https://www.scotusblog.com/2010/12/the-key-to-settling-a-big-fight/ [https://perma.cc/8L9D-4TH6]. South Carolina v. North Carolina, 562 U.S. 1126 (2010) (dismissal order).

391 *Connecticut*, 282 U.S. at 672–73.

392 Florida v. Georgia, 141 S. Ct. at 1182.

393 New Jersey v. New York, 283 U.S. 336 (1931).

394 Florida v. Georgia, 138 S. Ct. 2502, 2513 (2018); Florida v. Georgia, 141 S. Ct. 1175, 1180 (2021).

395 Florida v. Georgia, 138 S. Ct. at 2513 (emphasis removed) (citations omitted); 141 S. Ct. at 1180 (citations omitted).

396 Connecticut v. Massachusetts, 282 U.S. 660 (1931), New Jersey v. New York, 283 U.S. 336 (1931).

Boston area faced "a serious water shortage in the near future."[397] The Court explained that while the state water law doctrine was "taken into account," equality of right between the states controlled.[398] The Court declared "[d]rinking and other domestic purposes are the highest uses of water[s]" and found no substantial injury.[399]

Similarly, in *New Jersey v. New York*, public water supply was at issue, and the Court minimized the role of the state water law regime.[400] New York sought to increase withdrawals for public water supply in New York City, and New Jersey countered by urging strict adherence to the riparian rights doctrine.[401] The Court rejected outright the riparian prohibition on interbasin transfers and apportioned the waters.[402]

The next time the Court opined on a riparian dispute came seventy-nine years later but focused on whether private parties should be allowed to intervene in equitable apportionment cases.[403] The Court rejected the motion of a municipality to intervene,[404] but allowed a private energy company and a water supply project to join the case.[405]

Finally, the Court's most recent equitable apportionment case involved the riparian states of Florida and Georgia.[406] For the first time, the Court declared a standard for resolution of equitable apportionment between riparian states. In cases where all states use the riparian doctrine, each state holds "an equal right to make a reasonable use of the waters of the stream."[407] For the first time in a case involving riparian states, the Court also opined the balancing test applied.[408] Ultimately, the Court found Florida failed to find causation. Before that finding, however, the Court in *Florida v. Georgia II* laid out the two

397 *Connecticut*, 282 U.S at 660–65.

398 *Id.* at 670.

399 *Id.* at 673–74. If no substantial injury exists, the declaration that domestic uses are the highest uses appears to be dicta. However, the fact that the water would be used for public water supply appeared to be a key to the Court's decision.

400 New Jersey v. New York, 283 U.S. 336 (1931).

401 *Id.* at 341–42.

402 *Id.* at 345–46.

403 South Carolina v. North Carolina, 558 U.S. 256 (2010).

404 *Id.* at 276.

405 *Id.* at 270, 272.

406 Florida v. Georgia, 138 S. Ct. 2502 (2018); Florida v. Georgia, 141 S. Ct. 1175 (2021).

407 Florida v. Georgia, 138 S. Ct. at 2513 (emphasis removed) (citations omitted); *see also* Florida v. Georgia, 141 S. Ct. at 1180 (citations omitted).

408 Florida v. Georgia, 141 S. Ct. at 1180 (2021).

prerequisites to obtaining an equitable apportionment.[409] The complaining state must show a threatened or existing substantial injury and "must show that the benefits of the [apportionment] substantially outweigh the harm[s] that [may] result."[410] No case has applied the "reasonable use" standard in equitable apportionment.

When the Court initially laid out an illustrative list of factors to guide equitable apportionment, the Court appeared to intend these general considerations to apply regardless of what water rights regimes the litigant states used.[411] However, the riparian doctrine is flexible enough to address these concerns without resort to external factors. Why should the Court overlay an additional layer of unnecessary factors?

C. Case Where States Use Different Water Rights Regimes

Only one equitable apportionment case, the first case heard by the Court, involved states with different water rights regimes.[412] The first decision on the dispute between Kansas, a riparian state, and Colorado, a prior appropriation state, established that the United States Supreme Court can apportion interstate waters between states.[413] The next opinion[414] began to outline the application of the doctrine.

Importantly, the Court conceded that common law water doctrine was the province of the states.[415] The test for whether to invoke the doctrine sounded much like the test for nuisance. While states are equal to one another, some actions by one state may infringe on the sovereignty of the other state.[416] While some appropriations of water are reasonable and do not unreasonably intrude upon the sovereignty of the other state, other appropriations may cross the line.[417]

Introducing the balancing test, the Court found the benefits to Colorado outweighed the harms to Kansas.[418] However, the Court acknowledged that at some point withdrawals by Colorado may

409 *Id.* (citing *Colorado v. New Mexico I*. Note that the majority in *Florida v. Georgia I* did not refer to the balancing as a threshold issue.)

410 *Id.* (alteration in original) (citation omitted) (citing *Colorado v. New Mexico I*).

411 Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

412 *See* Kansas v. Colorado, 185 U.S. 125 (1902).

413 *Id.*

414 Kansas v. Colorado, 206 U.S. 46 (1907).

415 *Id.* at 94.

416 *Id.* at 97–98.

417 *Id.* at 102–03.

418 *Id.* at 113–14.

become inequitable, presumably even in instances in which the balancing of the benefits and harms continues to weigh in Colorado's favor.[419] The decision neither gave guidance on how to determine this tipping point nor delineated whether this test was limited to cases involving states with different common law water doctrines.

D. Does the State Water Law Regime Matter?

1. The Court's Respect Toward the State Law Regime Varies and Is More Favorable Toward Prior Appropriation

In the first case involving states with identical state common law water doctrines, prior appropriation,[420] the Court appeared to respect the states' authority to determine common law water policy. The Court applied prior appropriation while ignoring state boundaries, and the water was apportioned based on priority. This decision confirmed that state common law water doctrine would be respected. The Court expressly rejected a balancing approach.

The pair of cases that followed in 1931, both involving riparian doctrine cases, severely eroded any expectation of respect for state common law doctrine. After deciding the first case between two prior appropriators based on prior appropriation with no boundaries, the Court minimized the impact of the riparian doctrine in the two 1931 cases, contrary to what that precedent would suggest.[421] The Court found the pertinent law of the two states should be considered along with "all other relevant facts."[422]

In the first 1931 case, *Connecticut v. Massachusetts*, the resolution of Connecticut's challenge to withdrawals from the Connecticut River to provide public water supply for Boston and the surrounding area seemed to turn on an impending "serious water shortage" in the Boston area.[423] The Court also declared, without citation, that "[d]rinking and other domestic purposes are the highest uses of water."[424] Ultimately, the Court found Connecticut failed to show substantial injury and dismissed the case.[425]

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419 *Id.* at 117–18.

420 Wyoming v. Colorado, 259 U.S. 419, 468–70 (1922).

421 Nelson, *supra* note 129, at 1841.

422 Connecticut v. Massachusetts, 282 U.S. 660, 670–71 (1931).

423 *Id.* at 664–65.

424 *Id.* at 672–73.

425 *Id.* at 672–74.

If local governments wish to withdraw water for public supply, the power of eminent domain allows the condemnation of water rights.[426] Riparian landowners are then compensated for the taking of the rights. Although the Court has expressed hesitancy to compensate one state for use of shared waters,[427] this use of condemnation within a state suggests a compensation scheme may be appropriate between states. However, the fact two sovereigns are involved limits that remedy to cases where the sovereigns reach agreement.

In the second 1931 case, *New Jersey v. New York*, the Court apportioned the waters[428] but seemed dismissive of the riparian rights doctrine. New York sought to divert water from the tributaries of the Delaware River to provide water supply for New York City.[429] The riparian rule that prohibits the removal of water to a different watershed was dismissed out of hand; the Court held that removals "obviously must be allowed at times unless States are to be deprived of the most beneficial use on formal grounds."[430]

2. The Court Misinterprets or Disregards Riparian Rights

In contrast to the Court's rulings in prior appropriation cases, which mainly comport with the basic principles of the doctrine, the equitable apportionment decisions misinterpret and disregard riparian rights. The Court referred to the domestic use preference in *Connecticut v. Massachusetts* to shield public water supply from scrutiny. The domestic use preference provides an exception to the prohibition against consumptive uses under the riparian doctrine.[431] However, the Court erred in applying the exception. The domestic use preference does not apply to public water supply.[432] The exception arose during the settlement of the American frontier and applies to self-supplied

426 *Id.* at 99.

427 Kansas v. Colorado, 206 U.S. 46, 100 (1907) (reasoning that awarding damages would equate to "making a contract between the two states," an authority that the Court lacks).

428 New Jersey v. New York, 283 U.S. 336, 346 (1931).

429 *Id.* at 342.

430 *Id.* at 343.

431 TARLOCK & ROBINSON, *supra* note 13, § 3.57.

432 *Id.* § 3.59.

water sources.[433] The law considers the water supplier, not the consumer, as the riparian.[434]

The watershed rule, referenced in *New Jersey v. New York*, derives from the natural flow theory, which has been modified in most or all states to reasonable use.[435] Some commentators question the rule based on efficiency concerns.[436] However, other commentators note the rule seems appropriate, from a scientific standpoint, to limit the land area that may benefit from withdrawals.[437] Fairness concerns also support the rule.[438] In any case, a number of states still use the rule.[439] The Supreme Court of the United States should not substitute its judgment for that of the states in apportioning waters between states that share water law doctrines.

VI
ANALYSIS OF THE CASE LAW

A. The Court Oversteps Its Authority and Disregards State Common Law Water Rights

When the Court established the equitable apportionment process, the equality and individual sovereignty of the states were the focus. The Court stressed that each state holds equal authority.[440] When the actions of one state infringe on the sovereignty of another, equitable apportionment is appropriate.[441] Further, the federal government lacks authority to overrule state common law water rights outside of navigable waters.[442]

Although the Court discussed individual rights extensively in equitable apportionment cases, apportionment seeks to divide water between states, "not within them."[443] The water rights of individual

433 *Id.* § 3.58.

434 THOMPSON ET AL., *supra* note 5, at 98.

435 Joseph W. Dellapenna, *Changing State Water Allocation Laws to Protect the Great Lakes*, 24 IND. INT'L & COMPAR. L. REV. 9, 18–19 (2014).

436 *Id.* at 19.

437 Lynda L. Butler, *Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Interests*, 47 U. PITT. L. REV. 95, 111–12 (1985).

438 *Id.* at 112.

439 Dellapenna, *supra* note 435, at 19–20.

440 Kansas v. Colorado, 206 U.S. 46, 97–98 (1907).

441 *Id.*

442 *Id.* at 85–94.

443 South Carolina v. North Carolina, 558 U.S. 256, 281 (2010) (Roberts, C.J., concurring in part and dissenting in part).

citizens are not at issue.[444] Although equal apportionment decrees sometimes refer to particular uses, "those individual uses could vary from the terms set out in the decree, so long as the total diversion of water . . . was no greater than the decree allowed."[445]

B. Equitable Apportionment Favors Large Withdrawers and Rapidly Growing Areas and Should Be Modified to Be Equitable

In the early 1900s, as Congress contemplated a federal project to store and distribute water from the Colorado River, the upper basin states feared that the "faster growing" lower basin states may claim all or most of the water "in perpetuity" before the upper basin states "could appropriate what they believed to be their fair share."[446] In particular, they feared that California, with its "phenomenal growth," would appropriate large quantities of water before other states had a chance.[447] Nevada and Arizona shared the fear that California's immediate growth would "deprive them of their just share of basin water."[448] Although the United States Supreme Court found the prior appropriation doctrine justified these fears, the jurisprudence of equal apportionment closely mirrors the prior appropriation doctrine and shares the weaknesses of "first in time, first in right."[449]

The Court's decision in *Wyoming v. Colorado*[450] "intensified fears of Upper Basin States that they would not get their fair share of Colorado River water."[451] The allocation of water in the Colorado River Compact divided the waters between the lower and upper basins but failed to alleviate the concerns California would claim more than a fair share of the water.[452] Although the Court identified the prior appropriation doctrine as the "menace" stoking these fears,[453] equitable apportionment jurisprudence shares the blame. California argued that the Boulder Canyon Project Act failed to apportion the Colorado River water and that the Secretary of the Interior lacked authority under the

444 *Id.* at 280.
445 *Id.* at 281 (quoting Wyoming v. Colorado, 298 U.S. 573, 584–85 (1936)).
446 Arizona v. California, 373 U.S. 546, 555 (1963).
447 *Id.* at 556.
448 *Id.*
449 *Id.* at 555–56.
450 Wyoming v. Colorado, 259 U.S. 419 (1922).
451 Arizona v. California, 373 U.S. 546, 556 (1963).
452 *Id.* at 558.
453 *Id.*

Act to apportion the waters,[454] so equitable apportionment should govern.[455] Even if the Act generally apportioned the waters, California asserted that in times of shortage the United States Supreme Court should apportion the waters using equitable apportionment or prior appropriation.[456] Either doctrine protects California's priority.[457]

The balancing test also seems to favor large withdrawers and rapidly growing areas. In *Florida v. Georgia I*, Justice Thomas placed great weight on balancing the "*de minimus* benefits" ($32.5 million per year) that Florida could receive from limiting Georgia's withdrawals with the "massive harms" ($191 million to $2 billion) "that Georgia would suffer."[458] Additionally, the limits would reduce Georgia's gross regional product by $322 million, far exceeding the gross annual revenues of $11.7 million generated by the Florida fishing industry.[459] This imbalance appeared to be determinative to Justice Thomas. Justice Thomas concluded that "the Florida portion of the Basin is significantly less populated and productive."[460] While the Georgia portion of the basin includes more than five million people and generates $283 billion a year in gross regional production, the Florida portion includes "fewer than 100,000 people and generates around $2 billion in gross regional product."[461]

C. Substantial Injury Is a Significant Barrier, Except in Certain Cases

A total of five cases out of eight have advanced beyond the substantial injury stage. In three instances, the United States Supreme Court apportioned waters.[462] In at least two other cases, the Court found no substantial injury.[463] In another case, the complaining state failed to prove causation.[464] An additional two cases fail to make clear whether the equitable apportionment failed at the substantial injury threshold or

454 *Id.* at 563.

455 *Id.*

456 *Id.* at 563–64.

457 *Id.* at 564.

458 Florida v. Georgia, 138 S. Ct. 2502, 2547–48 (2018) (Thomas, J., dissenting).

459 *Id.*

460 *Id.* at 2529.

461 *Id.*

462 Wyoming v. Colorado, 259 U.S. 419 (1922); New Jersey v. New York, 283 U.S. 336 (1931); Nebraska v. Wyoming, 325 U.S. 589 (1945).

463 Connecticut v. Massachusetts, 282 U.S. 660 (1931); Washington v. Oregon, 297 U.S. 517 (1936).

464 Florida v. Georgia, 141 S. Ct. 1175 (2021).

at the balancing stage.[465] However, both of those cases are best described as overcoming the substantial injury hurdle and failing at the balancing stage. But the number of cases that have advanced beyond the substantial injury stage proves misleading upon examination.

Of the five cases that advanced past the substantial injury stage, three involved presumptions of injury. In *Nebraska v. Wyoming*,[466] the majority opinion seemed to concede that no evidence existed of actual damage. The Court wrote, "The various statistics with which the record abounds are inconclusive in showing the existence or extent of actual damage to Nebraska. But we know that deprivation of water in arid or semiarid regions cannot help but be injurious."[467] The other two cases involve fully appropriated or over-appropriated basins. In *Wyoming v. Colorado*, substantial injury never entered the discussion. Instead, the Court appeared to presume an apportionment was warranted because the river was over-appropriated.[468] Similarly, in *Colorado v. New Mexico II* the Court presumed substantial injury because the basin was fully appropriated, but no apportionment was made.[469]

Two cases actually showed damages. *Kansas v. Colorado* involved intensive review of voluminous evidence by the Court.[470] The Court found southwestern Kansas suffered somewhat from Colorado's diversions, but the benefits in Colorado outweighed Kansas's damages.[471] In addition, the Court attributed some of the damage in Kansas to Oklahoma opening for settlement.[472] In *New Jersey v. New York*, the Court found that though withdrawals for public water supply would not "materially affect" the river for most purposes,[473] they would materially affect recreational uses and oyster fisheries. The Court apportioned the waters by limiting New York to 440 million gallons per day.[474]

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465 Kansas v. Colorado, 206 U.S. 46 (1907); Colorado v. New Mexico, 467 U.S. 310 (1984).

466 Nebraska v. Wyoming, 325 U.S. 589, 610 (1945).

467 *Id.*

468 Wyoming v. Colorado, 259 U.S. 419, 485, 488, 496 (1922).

469 Colorado v. New Mexico II, 467 U.S. at 317 (1984).

470 Kansas v. Colorado, 206 U.S. at 108–12.

471 *Id.* at 113–14.

472 *Id.* at 112.

473 New Jersey v. New York, 283 U.S. 336, 345 (1931).

474 *Id.*

In practice, showing substantial damages proves extremely difficult unless a state falls into one of the categories that the Court has determined shows injury on its face. This barrier means that many, if not most, complaining states will not have their day in court.

D. The Balancing Test Gives Preference to Priority

In addition to the difficult barrier presented by showing substantial damages, the balancing test entrenches the status quo, making the test one of priority. Balancing tests must start from a baseline. The baseline for this balancing test defaults to the status quo. When the status quo forms the baseline, the test maintains the status quo. The status quo is not necessarily equitable.

The Court set out the balancing test in *Nebraska v. Wyoming*, stating, "[A]ll of the factors which create equities" must be considered.[475] The nonexclusive list of factors to be considered by the Court include

> physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to the downstream areas if a limitation is imposed on the former.[476]

Later, the Court reiterated that the weighing of harms and benefits is appropriate in an equitable apportionment proceeding.[477] The Court recognized this balancing test tilts in favor of existing uses because its impacts are often certain and immediate.[478] Effects on proposed uses prove to be more "speculative and remote."[479]

Although priority seems to be a reasonable guide in cases between prior appropriation states, riparianism does not consider temporal priority. The Restatement (Second) of Torts considers "temporal priority as a controlling factor in determining which of competing uses is most reasonable."[480] However, "virtually all authority . . . rejects temporal authority as relevant" except in a handful of special circumstances.[481]

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475 Nebraska v. Wyoming, 325 U.S. 589, 618 (1945) (citing Colorado v. Kansas, 320 U.S. 383, 394).

476 *Id.* (alteration in original).

477 Colorado v. New Mexico, 459 U.S. 176, 186 (1982).

478 *Id.* at 187.

479 *Id.*

480 WATERS AND WATER RIGHTS, *supra* note 10, § 7.03(d).

481 *Id.*

E. States Lack Incentives to Enter into Compacts

The combination of a difficult substantial injury threshold, a balancing test, and other factors that almost guarantee that temporal priority will be confirmed gives states little or no incentive to enter into compacts. At present, the test itself remains unclear, as does the difference, if any, between the application of equitable apportionment in suits between riparian states and in suits between prior appropriation states.

However, states know that at least two principles emerge from the equitable apportionment case law. First, temporal priority almost always prevails. Drinking water supplies and established economies appear to be the only exceptions. Established economies prove synonymous with the futile call doctrine in these cases. Second, complaining states, if overcoming the substantial injury hurdle, almost always lose. States therefore have an incentive to allow and encourage as much water consumption as possible as soon as possible to establish the water rights.

Although this policy to use the resource may have made sense in the early 1900s, the policy exacerbates the concerns posed by climate change, increasing drought and water shortages.[482] States should be able to defer or forego water withdrawals without losing the opportunity to use water in the future, at least in riparian states.

VII
RECOMMENDATIONS

A. The Court Should Defer to State Common Law

The cases before the Court should be decided based upon the common law water rights of the contesting States. Application of this principle would have simplified each of the prior appropriation cases considered by the Court. With respect to riparian cases, the Court has infringed upon the sovereignty of the States by ignoring or misinterpreting riparian doctrine.

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482 *See Droughts and Climate Change*, U.S. GEOLOGIC SURVEY, https://www.usgs.gov/science/science-explorer/climate/droughts-and-climate-change [https://perma.cc/KE83-EF7U] (last visited Dec. 27, 2023).

B. The Substantial Injury Standard and Nature of the Proceeding Should Be Changed

Although the Court is understandably reluctant to take on suits between States, the present standards make it difficult, if not impossible, for States to obtain relief in water disputes and should be changed. The Court should accept equitable apportionment actions as a type of declaratory judgment action. Therefore, where a case or controversy exists, the Court should provide a remedy.[483]

State adjudications of water rights "partake[] of the nature of a declaratory judgment in many of its aspects."[484] The difference lies in the fact that an adjudication involves many claims, as opposed to an individual lawsuit.[485] An adjudication seeks to fix each user's right to withdrawals so that a user can avoid injuring another user.[486] An apportionment should be similar to an adjudication between states, reducing the scope of the Court's inquiry and leaving more responsibility to the states in parsing individual rights.

If the Court and Congress offer incentives for the states to enter into compacts, a lowered standard should not open the floodgates. By setting out clear guidelines (adhering to state water rights law when the states share that regime), the Court encourages states to enter into compacts.

C. The Balancing Test Should Be Limited to Cases Between States with Different Water Rights Regimes

While the Court should adhere to state water rights where states share the same doctrine, balancing proves appropriate where apportionment occurs between states with different water rights regimes. For example, Nebraska uses the riparian doctrine for surface water but still recognizes some early riparian rights.[487] When those rights conflict, Nebraska courts use a balancing test very similar to the test used in equitable apportionment cases.[488]

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483 *See, e.g.*, 28 U.S.C.A. § 2201.

484 WATERS AND WATER RIGHTS, *supra* note 10, § 16.02(a.01) (quoting Spanish Fork Westfield Irrig. Co. v. District Ct., 104 P.2d 353, 364 (1940)).

485 *Id.*

486 *Id.*

487 Wasserburger v. Coffee, 141 N.W.2d 738, 743 (1966).

488 *Id.* at 745.

D. The Special Master Should Receive More Deference

The great deference the Court generally gives to Special Masters seemed to decline beginning with *Colorado v. New Mexico*.[489] The majority stated that the Court affords the findings of the Special Master "respect and a tacit presumption of correctness" but that the Court bears the final responsibility of deciding the correct findings of fact.[490] Justice Stevens filed a dissenting opinion. The dissent opines the Special Master's factual findings should be "accord[ed] considerable deference."[491] The record in equitable apportionment cases is "typically lengthy, technical, and complex."[492] The testimony and exhibits prove to be extremely difficult to analyze from the "cold record" as opposed to the "living trial."[493] Justice Stevens opined the majority failed to give due deference to the Special Master's findings of fact, which are supported by substantial evidence.[494]

In early equitable apportionment cases, the Court itself reviewed large amounts of data, and the reported cases included tables of information. Today, the demands on our water are much greater, with many more users. Complex models estimate flows and withdrawals. The Court is not well equipped to handle this complex and voluminous data. Because the Court lacks the ability to analyze the complex data, equitable apportionment may be subjectively applied.[495]

E. Congress Should Offer Incentives for States to Enter into Water Apportionment Compacts

Given that Congress likely lacks the political will to develop and impose water apportionments on states, Congress should provide incentives for states to enter water apportionment compacts. These incentives could involve monetary payments and technical assistance. Support could be tied to advancing water management goals, linking land use planning to water supply planning, coordinating and cooperating with other states in water management, and conserving water resources.

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489 Nelson, *supra* note 129, at 1849.

490 Colorado v. New Mexico, 467 U.S. 310, 317 (1984) (citations omitted).

491 *Id.* at 325–26 (Stevens, J., dissenting).

492 *Id.* at 326.

493 *Id.*

494 *Id.*

495 Nelson, *supra* note 129, at 1849.

VIII
CONCLUSION

Interstate water apportionment is broken. The United States Supreme Court last apportioned waters seventy-eight years ago. The last water apportionment compact was entered into over forty years ago. A small number of interstate waters have been apportioned by either method. The requirements for the Court to even consider an apportionment case have always been stringent. The recent unanimous decision in *Florida v. Georgia II*, however, makes court apportionment highly unlikely.[496] Meanwhile, droughts and water shortages have increased disputes between states.

The barriers to court apportionment give states little incentive to enter compacts. Although little consistency exists in Supreme Court apportionment cases, the senior user and the largest user almost always win. The Court's use of the status quo as the baseline guarantees that result. Therefore, those states with senior, large water uses seek to maintain the status quo, knowing that the Court remains unlikely to interfere. Appeals from states wishing to engage in new uses, particularly rural states that consume little water, fall on deaf ears.

Fair apportionments of water between competing states require changes by the United States Supreme Court, the United States Congress, or both. The Court should defer to state water allocation doctrines and allow more access to apportionment. Congress should provide incentives to states to enter water apportionment compacts. Until these changes are made, states will continue to pursue the status quo and fail to consider equitable allocation between the states or conservation of the resource.

496 Florida v. Georgia, 141 S. Ct. 1175, 1180 (2021).