

# THE HIGH COURT WADES INTO STATE-LAW WATER ALLOCATION

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## ABSTRACT

*Interstate water disputes have long been a mainstay of the Supreme Court's original jurisdiction, the traditional forum for sovereign states to resolve their water wars peaceably. For over a century, these remained disputes between sovereigns: until 2010, when the Court permitted a private power company to intervene in such a dispute. The decision was an affront to state sovereign control of water resources, but its implications reach beyond dignitary concerns. Under the public trust doctrine, states have long held a fiduciary responsibility to allocate water resources within their borders in the interests of their citizens. As global climate change and the increasing demands of energy production continue to stress America's water resources, the Court's decision will further complicate states' efforts to enact sound water policy for the future.*

## INTRODUCTION

In 2010, the Supreme Court permitted Duke Energy Carolinas, LLC, (Duke Energy) to intervene in an interstate water-rights dispute between North Carolina and South Carolina over the Catawba River.<sup>1</sup> It marked the first time in the Court's history that a private party successfully intervened in an action for the equitable apportionment of an interstate waterway.<sup>2</sup> By allowing Duke Energy's intervention, the Court effectively relaxed its standard for citizen intervention in equitable apportionments, giving the power company unprecedented direct access to the Supreme Court to represent its private water interests against the sovereign interests of the party-states.

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† Duke University School of Law, J.D. expected 2013; Wesleyan University, B.A. 2006. Thanks to Professor Jim Salzman, Melissa Boudreau, Katherine Miller, Gray Wilson, the supremely talented editorial staff of the *Duke Law Journal*, Janie Starr, Kirk Starr, and of course, Ariel Starr.

1. *South Carolina v. North Carolina*, 130 S. Ct. 854, 859 (2010).
2. *Id.* at 869 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

The Catawba River runs from North Carolina's Blue Ridge Mountains into South Carolina, where it becomes the Wateree River and then the Santee River, before flowing into the Atlantic Ocean. Duke Energy operates eleven hydroelectric dams on the Catawba River.<sup>3</sup> The company also makes significant water withdrawals to cool its coal-fired, natural-gas, and nuclear plants, providing power to its 2.3 million customers in the Carolinas.<sup>4</sup> The rapidly growing Charlotte, North Carolina metropolitan area has increasingly relied on interbasin transfers from the Catawba River to fuel its growth, reducing downstream flows into South Carolina, particularly in times of drought.<sup>5</sup> Drought in the Catawba-Wateree Basin has occurred with increasing frequency. The national conservation group American Rivers named the Catawba "America's Most Endangered River" in 2008 and listed "outdated water supply management" as the primary threat to the Catawba-Wateree Basin's ecosystems.<sup>6</sup> The *Energy Law Journal* named Charlotte as the U.S. metropolitan area most at risk of water shortages resulting from withdrawals by thermoelectric power plants.<sup>7</sup>

In 2007, South Carolina sued North Carolina under the Supreme Court's original jurisdiction for an apportionment of the Catawba River, complaining that its upstream neighbor was taking more than its equitable share of the waterway.<sup>8</sup> In particular, South Carolina challenged the validity of North Carolina's interbasin transfers to Charlotte and other municipalities.<sup>9</sup> Duke Energy, the City of Charlotte, and the Catawba River Water Supply Project (CRWSP)<sup>10</sup> all moved to intervene as defendants.<sup>11</sup> Justice Alito wrote for the

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3. *Id.* at 866 (majority opinion).

4. Benjamin K. Sovacool, *Running on Empty: The Electricity-Water Nexus and the U.S. Electric Utility Sector*, 30 ENERGY L.J. 11, 26 (2009).

5. See First Interim Report of the Special Master at 3–6, *South Carolina*, 130 S. Ct. 854 (Orig. No. 138) (“[South Carolina] alleges that the Catawba River Basin is a densely populated area that is expected to experience significant population growth over the next decade. It alleges that the Catawba is subject to severe periodic fluctuations in water level, and that its flow historically has been affected by prolonged droughts.”).

6. AM. RIVERS, AMERICA'S MOST ENDANGERED RIVERS: 2008 EDITION 13 (2008), available at [http://act.americanrivers.org/MER/PDFs/MER\\_2008.pdf](http://act.americanrivers.org/MER/PDFs/MER_2008.pdf).

7. Sovacool, *supra* note 4, at 24. Thermoelectric generation includes coal-fired, natural-gas, and nuclear plants. *Id.* at 13.

8. *South Carolina*, 130 S. Ct. at 858.

9. *Id.* at 859.

10. The CRWSP is a bistate entity that provides water to Lancaster County, South Carolina and Union County, North Carolina. *Id.* at 860.

11. *Id.*

majority of a closely divided Court, which granted intervention to Duke Energy and the CRWSP but denied Charlotte's motion.<sup>12</sup> Chief Justice Roberts concurred in the judgment in part and dissented in part, expressing that all three parties' motions should have been denied to preserve the sovereign nature of equitable-apportionment actions.<sup>13</sup>

States have historically played a primary role in the allocation of water resources within their borders, based on both the state sovereign ownership doctrine and the public trust doctrine.<sup>14</sup> Over the past hundred years, the Supreme Court has developed the doctrine of equitable apportionment to allow for the peaceful resolution of interstate water-rights conflicts, which have been some of the most divisive squabbles between the states.<sup>15</sup> Traditionally, these original actions have been exclusively disputes between sovereign entities: the states, the federal government, and Native American tribes.<sup>16</sup> For these reasons, Chief Justice Roberts argued in dissent that state sovereignty, a key factor in the Court's equitable-apportionment precedents, barred private-party intervention in equitable-apportionment actions.<sup>17</sup> But the Chief Justice's opinion tells only part of the story. The unique nature of water resources in the United States indicates that equitable apportionments are unlike other original actions. Beyond the equitable-apportionment precedents on which he relied, both traditional water federalism—as expressed through state public trust doctrines—and the specter of water scarcity build an even stronger argument against Duke Energy's intervention.

Because the earth has a finite supply of freshwater, water policy is fundamentally about tradeoffs between competing uses. The energy-water nexus is a principle recognizing the interdependence of energy production and water supply in the face of water scarcity. Water is critical to energy-resource extraction and energy generation, whether it be oil refining, hydroelectric generation, power-plant

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12. *Id.* at 858–59. Justice Alito was joined by Justices Stevens, Scalia, Kennedy, and Breyer. Chief Justice Roberts's opinion concurring in the judgment in part and dissenting in part was joined by Justices Thomas, Ginsburg, and Sotomayor. *Id.* at 858.

13. *Id.* at 869 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

14. *See infra* Part I.A.

15. *See infra* Part II.A.

16. First Interim Report of the Special Master, *supra* note 5, at 24–25.

17. *See infra* Part II.B.2.b.

cooling, or emissions scrubbing.<sup>18</sup> Traditional fuel sources of thermoelectric generation such as coal, natural gas, and nuclear power—which account for 87 percent of electricity production in the United States<sup>19</sup>—require significant quantities of water for the cooling process. For instance, a five hundred megawatt coal-fired power plant uses more than twelve million gallons in a single hour.<sup>20</sup> Water purification, distribution, and treatment are similarly reliant on energy production.<sup>21</sup> Electricity accounts for 75 percent of the cost of municipal water treatment and supply, and roughly 4 percent of the nation’s electricity goes to processing water.<sup>22</sup> End use of water, particularly activities such as water heating and laundry, also has significant energy costs.<sup>23</sup> As a result, the energy-water nexus instructs that energy policy and water policy should be developed jointly, in recognition of this interrelationship.<sup>24</sup>

Smart energy-water policy requires an understanding of how much water competing modes of electricity generation use. It is necessary to distinguish between consumption, in which water is

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18. Ann E. Drobot, *Transitioning to a Sustainable Energy Economy: The Call for National Cooperative Watershed Planning*, 41 ENVTL. L. 707, 715 (2011).

19. U.S. ENERGY INFO. ADMIN., ELECTRIC POWER MONTHLY WITH DATA FOR DECEMBER 2012: FEBRUARY 2013, at 23 tbl.1.1 (2013), available at <http://www.eia.gov/electricity/monthly/pdf/epm.pdf>.

20. NAT’L ENERGY TECH. LAB., ESTIMATING FRESHWATER NEEDS TO MEET FUTURE THERMOELECTRIC GENERATING REQUIREMENTS 8 (2010), available at [http://www.netl.doe.gov/energy-analyses/pubs/2010\\_Water\\_Needs\\_Analysis.pdf](http://www.netl.doe.gov/energy-analyses/pubs/2010_Water_Needs_Analysis.pdf).

21. Drobot, *supra* note 18, at 728; Michael E. Webber, *Catch-22: Water vs. Energy*, SCI. AM., Sept. 2008, at 36–39.

22. U.S. DEP’T OF ENERGY, ENERGY DEMANDS ON WATER RESOURCES: REPORT TO CONGRESS ON THE INTERDEPENDENCY OF ENERGY AND WATER 25 (2006), available at <http://www.sandia.gov/energy-water/docs/121-RptToCongress-EWwEIAcomments-FINAL.pdf#63>.

23. *See id.* at 26 (“Activities such as water heating, clothes washing, and clothes drying require 14 percent of California’s electricity consumption and 31 percent of its natural gas consumption. Most of that use is in the residential sector.”).

24. In a report to Congress, the Department of Energy advised that meeting the nation’s “energy and water needs [will require] properly valuing each resource, rather than following the current U.S. path of largely managing water and energy separately while making small improvements in freshwater supply and small changes in energy and water-use efficiency.” U.S. DEP’T OF ENERGY, *supra* note 22, at 11; *see also* *Hydropower: Hearing Before the S. Comm. on Energy & Natural Res.*, 112th Cong. 4–5 (2011) (statement of Steven G. Chalk, Chief Operating Officer and Acting Deputy Assistant Secretary for Renewable Energy, Department of Energy) (“We recommend that any studies on [energy] consider potential increases in water demand that will result from projected growth of energy production, and that interagency collaboration and consultation be part of these studies, as adequate water availability is an issue for every sector of the economy.”); Webber, *supra* note 21, at 36 (“We cannot build more power plants without realizing that they impinge on our freshwater supplies. And we cannot build more water delivery and cleaning facilities without driving up energy demand.”).

removed from the source, and withdrawal, in which water is used and returned to its source. The U.S. Geological Survey does not consider the 3,160 billion gallons of water that flow daily through hydroelectric turbines to be withdrawn—or consumed—because the water remains in the river and may even be used by successive dams.<sup>25</sup> But hydropower also involves significant water consumption via evaporation from large storage reservoirs.<sup>26</sup> It additionally creates significant water-quality impacts on aquatic ecology, such as changes in temperature, dissolved-nitrogen and dissolved-oxygen levels, and natural flow characteristics.<sup>27</sup> Further, hydroelectric generation “varies greatly with the amount of water available, depending upon weather patterns and local hydrology, as well as on competing water uses, such as flood control, water supply, recreation, and in-stream flow needs (for example, navigation and the aquatic environment).”<sup>28</sup> Therefore, although most water used for hydropower may technically remain in-stream, allocating water to hydropower involves tradeoffs with other uses and substantial impacts on riparian ecosystems.<sup>29</sup> As Part IV discusses, courts are poorly equipped to value natural resources and make these tradeoffs between competing uses.

The effects of global climate change will continue to aggravate water-supply problems<sup>30</sup> and demand that water and energy policy incorporate an understanding of the energy-water nexus. The Department of Energy reports that “[l]ong-term cyclical changes in precipitation patterns and the effect on flows in rivers and the operation of reservoirs and hydroelectric plants are a major concern

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25. U.S. DEP’T OF ENERGY, *supra* note 22, at 20.

26. *Id.*

27. *Id.* at 23.

28. *Id.* at 19.

29. Cf. Katherine A. Abend, *Avoiding Water-Intensive Energy Production: How To Keep the Water Running and the Lights On*, 41 ENVTL. L. REP. 11,020, 11,024 (2011) (“There are always opportunity costs when a community allocates water to support a power plant, instead of assigning it to public supply, agricultural, recreational, or environmental uses. The economic losses that droughts impose on various economic sectors and the environment demonstrate that those sectors would benefit greatly if less water were needed for thermoelectric facilities, especially in times of water scarcity.”).

30. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 1, 7 (S. Solomon et al. eds., 2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf> (“[N]umerous long-term changes in climate have been observed. These include changes in arctic temperatures and ice, widespread changes in precipitation amounts, ocean salinity, wind patterns and aspects of extreme weather including droughts, heavy precipitation, heat waves and the intensity of tropical cyclones.”).

to the energy industry.”<sup>31</sup> The problem is worsened by the fact that in the United States, the population is growing most rapidly in areas that are already water stressed, such as the Las Vegas, Phoenix, Atlanta, and Charlotte metropolitan areas.<sup>32</sup> Professor Ann Drobot warns that “[p]redicted impacts from climate change along with increased demands on both the energy and the water sectors fueled by projected population growth threaten to exacerbate already stressed water resources, raising the specter of resource supply disruptions in both sectors and escalating concerns over national security.”<sup>33</sup> As a result, now more than ever, good water policy will need to incorporate good energy policy, and good energy policy will need to incorporate good water policy.

This Note expands and reframes Chief Justice Roberts’s reasoning in *South Carolina*. It argues that, in addition to the Supreme Court’s equitable-apportionment precedents, state-law public trust doctrines should have persuaded the Court to deny citizen intervention in *South Carolina*. This Note also considers the policy implications of the Court’s challenge to state sovereignty over water resources, in light of the energy-water nexus and global climate change. Except in extreme circumstances, denying citizen intervention is normatively a better result given water scarcity and the communal nature of water resources across the United States, as reflected in state public trust doctrines. As equitable-apportionment actions—and interstate water disputes generally—occur with increasing frequency, the Court’s disruption of the balance between public and private water interests may significantly undermine both state and federal efforts toward more effective water-resource management. The Supreme Court has an important role to play as a forum of last resort for interstate water-rights disputes between sovereign states, but the intrastate allocation of water between

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31. U.S. DEP’T OF ENERGY, *supra* note 22, at 32. Other parts of the country may also face the cumulative effects of water shortages and increased demand for water. The U.S. Geological Survey predicts that in areas where reservoirs depend on snowmelt, climate change will lead to “reduced water availability during the season of peak water demand. This reduction in availability would result from a combination of increased evaporation and transpiration from warmer temperatures and a lengthening of the warm season, as well as increased irrigation demand.” HARRY F. LINS, ROBERT M. HIRSCH & JULIE KIANG, WATER—THE NATION’S FUNDAMENTAL CLIMATE ISSUE: A WHITE PAPER ON THE U.S. GEOLOGICAL SURVEY ROLE AND CAPABILITIES 4 (2010), available at <http://pubs.usgs.gov/circ/1347/pdf/circ-1347.pdf>.

32. ROBERT GLENNON, UNQUENCHABLE: AMERICA’S WATER CRISIS AND WHAT TO DO ABOUT IT 8–9, 23–26, 38–40, 83–84 (2009); NAT’L ENERGY TECH. LAB., *supra* note 20, at 9–10.

33. Drobot, *supra* note 18, at 731.

competing uses and users should be determined by elected legislatures and expert agencies, not the nation's high court.

This analysis proceeds in four parts. Part I outlines the legal bases for state sovereign ownership of water resources and the common-law development of state public trust doctrines. Part II examines the Supreme Court's equitable-apportionment jurisprudence, particularly the factors the Court considers when evaluating competing claims and the high standards the Court has imposed on citizen intervenors. Part III analyzes the Supreme Court's decision to permit citizen intervention in *South Carolina* and argues that the public trust doctrine and the Court's own equitable-apportionment precedents should have prevented that outcome. Finally, Part IV evaluates the Supreme Court's role in adjudicating water rights in light of the energy-water nexus and global climate change.

## I. STATE SOVEREIGN OWNERSHIP OF WATER RESOURCES

### A. *Traditional Water Federalism*

Generally speaking, the law of water allocation in the United States is state law, based on both the state sovereign ownership doctrine and the public trust doctrine. These doctrines are closely associated,<sup>34</sup> and both were inherited from the English common law, in which the monarch held title to certain natural resources for the common benefit.<sup>35</sup> Under the state sovereign ownership doctrine, the state governments assumed the role of the sovereign when they declared independence from the crown,<sup>36</sup> giving them title to

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34. The state sovereign ownership doctrine recognizes that upon achieving statehood, "one consequence is immediate state ownership of certain lands and waters previously owned by the British Crown or the federal government." 2 ROBERT E. BECK, *WATERS & WATER RIGHTS* § 30.02(a) (Amy L. Kelley ed., 3d ed. 2011). The state holds these lands and waters "in a fiduciary capacity, for the benefit of members of the general public, and indeed, the 'public trust doctrine' could be regarded as simply the law on the fiduciary aspect of state sovereign ownership." *Id.* This Note uses the term "sovereign ownership doctrine" to refer to the principle of state control of water resources and "public trust doctrine" to refer to a state's responsibilities to its people as a result of sovereign ownership.

35. *See Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 411 (1842) ("The dominion and property in navigable waters, and in the lands under them, [are] held by the king as a public trust . . . for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community.").

36. *See id.* at 410 ("[W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use . . ."). New states inherited the same

sovereign lands and waters.<sup>37</sup> The public trust doctrine is best understood as “the fiduciary obligation of the state to hold state sovereign resources for the benefit of the general public.”<sup>38</sup> Under the state sovereign ownership and public trust doctrines, control of water resources creates horizontal federalism in water rights.<sup>39</sup> Thus, states have adopted various schemes for water-rights management and have adapted these schemes to changing water needs.<sup>40</sup>

Water rights across the United States are usufructuary: a private party may have an entitlement to use water but not to own it. Contemporary water law reflects a longstanding tradition of communal rights in water inherited from the English common law. Blackstone wrote that water was incapable of purely private ownership, “[f]or water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein.”<sup>41</sup> Justice Holmes similarly noted, “[F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished.”<sup>42</sup> Holmes further emphasized, “This public interest is omnipresent wherever there is a State, and grows more pressing as population grows.”<sup>43</sup> The essentially public nature of water resources has been more aggressively asserted in the western United States, where numerous state constitutions and codes pronounce that water is public property.<sup>44</sup> But eastern states have also

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sovereign rights over water as the original states through the equal-footing doctrine. Pollard’s Lessee v. Hagen, 44 U.S. (3 How.) 212, 216 (1845).

37. See *Shively v. Bowlby*, 152 U.S. 1, 40 (1894) (“[T]he title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution.”).

38. 2 BECK, *supra* note 34, § 30.02(c); see also *Arnold v. Mundy*, 6 N.J.L. 1, 77 (1821) (describing navigable waters under the public trust as “common to all the citizens . . . subject only to the laws which regulate that use; that the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him not for his own use, but for the use of the citizen”).

39. Cf. 2 BECK, *supra* note 34, § 30.02(b) (discussing the public trust doctrine’s development as a matter of state law).

40. JOSEPH L. SAX, BARTON H. THOMPSON, JR., JOHN D. LESHY & ROBERT H. ABRAMS, *LEGAL CONTROL OF WATER RESOURCES* 12–14 (4th ed. 2006).

41. 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*18.

42. *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).

43. *Id.*

44. *E.g.*, CAL. CONST. art. X, § 2; COLO. CONST. art. XVI, § 5; TEX. WATER CODE ANN. § 11.021(a) (West 2008); WASH. REV. CODE ANN. § 90.03.010 (West 2004).

understood water rights to be usufructuary.<sup>45</sup> Thus, the inherently communal nature of water rights in the United States complements the public trust doctrine in establishing the public values implicated by water-resource management.

Although states continue to play the primary role in allocating consumptive water rights, many water resources are under complete or partial federal control, creating vertical federalism that coexists with horizontal federalism in water rights. For example, the federal government's broad authority over navigable waters is well established under the Commerce Clause.<sup>46</sup> Under the navigation power,<sup>47</sup> the Federal Energy Regulatory Commission (FERC) regulates all hydropower projects, and the federal government itself owns and operates many hydropower facilities.<sup>48</sup> Since the 1970s, the federal government has assumed new water-management roles under the Clean Water Act<sup>49</sup> and the Endangered Species Act.<sup>50</sup>

The public values implicated by water are well established in the United States based on the state sovereign ownership doctrine, the public trust doctrine, and the usufructuary nature of water rights. Though federal involvement in water rights has increased in the twentieth century, the states continue to bear the responsibility of managing water resources on behalf of the public interest when Congress has not acted to assert a federal interest.

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45. See 1 BECK, *supra* note 34, § 6.02(f) (discussing how eastern states, over time, have broadened the definition of what constitutes public water); see also *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913) (“[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable.”).

46. See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940) (“In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.”).

47. See *id.* at 404 (“[T]he power to regulate commerce necessarily include[s] power over navigation.”).

48. 2 BECK, *supra* note 34, § 40.01.

49. Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251–1387 (2006 & Supp. IV 2011)).

50. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (2006 & Supp. V 2012)). See generally SAX ET AL., *supra* note 40, at 639–73.

B. *The Evolving Public Trust and Its Application to Consumptive Water Rights*

Although public trust protections were initially applied only to navigable waters and fisheries, the doctrine evolved and expanded in the United States through federal and state common law.

1. *Illinois Central Introduces Affirmative Public Trust Duties.* In the late nineteenth century, the Supreme Court recognized that the public trust doctrine imposed affirmative duties on states to protect trust resources in the landmark case *Illinois Central Railroad Co. v. Illinois*.<sup>51</sup> This case held that land submerged under navigable waters was inalienable and the public trust “require[d] the government of the State to preserve such waters for the use of the public.”<sup>52</sup> The Court characterized the doctrine as “founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment.”<sup>53</sup> *Illinois Central* departed from the dominant understanding of the doctrine in the nineteenth century as involving “negative rights, preventing harm but imposing no affirmative duties on the landowner or state.”<sup>54</sup> Although some scholars have questioned both the facts and legal foundation of *Illinois Central*,<sup>55</sup> it has enjoyed remarkable influence over natural-resource policy.

2. *The Ecological Public Trust Doctrine.* In 1970, Professor Joseph Sax characterized the public trust as an adaptable judicial doctrine that states could employ to protect a wide range of natural resources beyond navigable waters and tidal lands.<sup>56</sup> According to

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51. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

52. *Id.* at 452–53.

53. *Id.* at 436.

54. Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 DUKE ENVTL. L. & POL’Y F. 57, 70 (2005).

55. See Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 924 (2004) (noting that Justice Field’s opinion was concerned with the anticompetitive practices of a corrupt railroad, not environmental preservation).

56. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Professor Sax, one of the most prominent voices in water law, is widely credited with reviving and reinventing the public trust doctrine. *E.g.*, Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 351–52 (1998). His seminal 1970 article is amongst the fifty all-time-most-cited law-review articles. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1490 (2012).

Professor Sax, “[p]ublic trust problems . . . occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals.”<sup>57</sup> Professor Sax proposes that the “mixture of procedural and substantive protections which the courts have applied in conventional public trust cases” could be applied to “controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands in a state where governmental permits are required.”<sup>58</sup> Under Professor Sax’s account, the public trust doctrine is simultaneously a flexible common law approach to natural-resource management and a sort of “people’s environmental right.”<sup>59</sup> In particular, Professor Sax advocates that the public trust doctrine should play a major role in the future of water allocation and conservation.<sup>60</sup> Professor Sax’s public trust doctrine assumes that state legislatures and agencies will invariably overstep their authority with respect to trust resources—perhaps, as a result of legislative or agency capture—and that courts must be given the tools to ensure good management practices. Professor Sax’s articulation of the public trust is as much a judicial doctrine as it is another argument in the environmental advocate’s toolkit, geared toward persuading judges that they have the authority to rein in careless legislatures. But Professor Sax’s public trust doctrine also raises legitimate concerns about judges overruling elected legislatures.

Some scholars have criticized Professor Sax’s expanded public trust doctrine because they see it as a threat to private property rights. For instance, Professor Richard Lazarus criticizes the expanded public trust doctrine as both ineffective and superfluous in the modern regulatory state, noting that “substantive embrace of legitimate governmental police power goals is no longer narrow; indeed, it is broader and more flexible than the embrace of the trust doctrine both in terms of permissible ends and the natural resources

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57. Sax, *supra* note 56, at 556–57.

58. *Id.*

59. See Jan S. Stevens, *The Public Trust: A Sovereign’s Ancient Prerogative Becomes the People’s Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980).

60. See Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 474 (1989) (“[P]ublic values have changed, and the use of water has reached some critical limits. One result is that we need to retrieve some water from traditional water users to sustain streams and lakes as natural systems and to protect water quality.”).

to which it applies.”<sup>61</sup> In contrast, Professor Barton Thompson articulates a conservative defense of the public trust, suggesting that “[t]he public trust doctrine, in summary, does not challenge the value and importance of development or private ownership of trust resources, nor does it bar development or privatization. Instead, the public trust doctrine speaks only against taking development or privatization to an excess.”<sup>62</sup> Under Professor Thompson’s articulation, the public trust doctrine is not a judicial hammer that guides policy or overrules legislatures but is rather a means of recognizing and articulating “the value of common ownership and common management of trust assets” within a private-property system, at the state-government level.<sup>63</sup> Professor Thompson’s narrower view of the public trust better reflects the doctrine’s role in most states in which the state government is the people’s trustee of water resources.

3. *State Formulations of the Public Trust Doctrine.* Professor Robin Kundis Craig suggests “that focusing too intently on the classic public trust doctrine and its origins vitiates the real import . . . [which is] the individualized state expansions of the classic public trust doctrine.”<sup>64</sup> All fifty states have adopted some form of the public trust doctrine through common law, state constitutions, or statutes.<sup>65</sup> Although in most states the public trust doctrine did not become the all-purpose judicial tool Professor Sax envisioned,<sup>66</sup> it retains

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61. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 674 (1986).

62. Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47, 61 (2006).

63. *Id.* at 68.

64. Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 784 (2010). Professor Craig further argues that as climate change redistributes water resources, making wet states drier and dry states wetter, “within water law, state public trust doctrines can be particularly well-suited to providing legal support for adaptive management-based climate change adaptation regimes,” *id.* at 781, a view that more closely follows Sax.

65. See generally Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classification of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1 (2007); Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010).

66. See J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SOUTHEASTERN ENVTL. L.J. 223, 228 (2006) (“With some notable exceptions, state courts appear to have acted as Lazarus predicted, not as Sax hoped. Few cases have actually forced states to alter their resource management plans.”).

importance as a comprehensive basis for articulating a state's right to protect and manage the public's interest in scarce natural resources like freshwater, however the state chooses to define the scope of such protections.

Several states have explicitly expanded the public trust doctrine to implicate consumptive water rights. For example, California extended public trust protections to tributaries as well as navigable waters.<sup>67</sup> Its Supreme Court required Los Angeles County to reduce its water intake from Mono Lake to protect wildlife, holding that “[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”<sup>68</sup> Hawaii extended the scope of its public trust doctrine to protect groundwater and created a presumption in favor of protecting all natural resources for the public benefit.<sup>69</sup> Several other states have since designated drinking water as a public trust resource or have articulated a right to clean water.<sup>70</sup> But not every state has followed California's example. Maine, for instance, has limited its public trust doctrine to the traditional concerns of navigation, fishing, and fowling.<sup>71</sup> Similarly, Arizona elected not to apply the public trust to groundwater.<sup>72</sup>

These variations in the fifty state public trust doctrines create some concern for the incorporation of the public trust doctrine into

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67. *See Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 721 (Cal. 1983) (“[T]he public trust doctrine . . . protects navigable waters from harm caused by diversion of nonnavigable tributaries.”).

68. *Id.* at 728.

69. *In re Water Use Permit Applications*, 9 P.3d 409, 447–54 (Haw. 2000).

70. *See, e.g.,* TENN. CODE ANN. § 68-221-702 (2011) (“Recognizing that the waters of the state are the property of the state and are held in public trust for the benefit of its citizens, it is declared that the people of the state are beneficiaries of this trust and have a right to both an adequate quantity and quality of drinking water.”); *Baxley v. State*, 958 P.2d 422, 434 (Alaska 1998) (“The public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use . . . .”); *Mayor of Clifton v. Passaic Valley Water Comm'n*, 539 A.2d 760, 765 (N.J. Super. Ct. Law Div. 1987) (“[I]t is clear that since water is essential for human life, the public trust doctrine applies with equal impact upon the control of our drinking water reserves.”); *Goldsmith & Powell v. State*, 159 S.W.2d 534, 535 (Tex. Civ. App. 1942) (“The Constitution of Texas designates rivers and streams as natural resources, declares that such belong to the State, and expressly invests the Legislature with the preservation and conservation of such resources.” (citation omitted)). At least eighteen states have developed what Professor Craig describes as “ecological public trust doctrines.” Craig, *supra* note 64, at 829–46.

71. *Bell v. Town of Wells*, 557 A.2d 168, 169 (Me. 1989).

72. *Seven Springs Ranch, Inc. v. State ex rel. Dep't of Water Res.*, 753 P.2d 161, 165–66 (Ariz. Ct. App. 1987).

the Supreme Court's equitable-apportionment jurisprudence. For example, South Carolina boasts relatively strong public trust protections for natural resources broadly, including drinking water and nonsubmerged lands.<sup>73</sup> In contrast, North Carolina's public trust protections are defined more narrowly, "includ[ing], but . . . not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State."<sup>74</sup> Such variations suggest concerns that any federal application of the public trust doctrine would necessarily be over- or underinclusive with respect to the party-states involved. But based on *Illinois Central* and subsequent cases, federal law recognizes a baseline level of state public trust protection for navigable waters.<sup>75</sup> The Court has further recognized that "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."<sup>76</sup> Ultimately, the modern public trust doctrine serves to supplement the state sovereign ownership doctrine in asserting that states retain the primary role in water-resource management, representing the interests of their citizens, when Congress has not acted to assert a federal interest. Despite the variations between states, the public trust doctrine plays a vital role in equitable-apportionment actions, especially when private interests threaten a state's sovereign responsibility to manage water resources in the public interest.

## II. EQUITABLE APPORTIONMENT OF INTERSTATE WATERS

### A. *The Court's Original Jurisdiction as a Forum of Last Resort for Sovereign Disputes*

States have historically had three avenues to resolve water disputes with other states: (1) interstate compacts subject to congressional approval, (2) congressional intervention, and (3) an

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73. *Sierra Club v. Kiawah Resort Assocs.*, 456 S.E.2d 397, 402 (S.C. 1995).

74. N.C. GEN. STAT. ANN. § 1-45.1 (West 2000).

75. *See Phillips Petrol. Co. v. Mississippi*, 484 U.S. 469, 479 (1988) ("[I]t came to be recognized as the 'settled law of this country' that the lands under navigable freshwater lakes and rivers were within the public trust given the new States upon their entry into the Union, subject to the federal navigation easement and the power of Congress to control navigation on those streams under the Commerce Clause." (quoting *Barney v. Keokuk*, 94 U.S. 324, 338 (1877))).

76. *Id.* at 475.

original action before the Supreme Court.<sup>77</sup> An interstate compact, achieved through negotiations between the party-states, is most desirable because it is the approach most likely to achieve a result that all parties perceive as fair.<sup>78</sup> Congressional apportionment has been used less than its alternatives, despite calls for greater federal intervention by some commentators.<sup>79</sup> That leaves the Supreme Court's original jurisdiction, which has been the forum of last resort for states when a mutual agreement could not be reached,<sup>80</sup> or when one state alleges that another has violated a preexisting agreement.<sup>81</sup>

Equitable apportionment developed as a federal common-law doctrine to address the interstate water disputes that began to come before the Court's original jurisdiction in the early twentieth century. Before 1900, the Court's original jurisdiction was reserved for interstate boundary disputes.<sup>82</sup> In *Kansas v. Colorado*,<sup>83</sup> the Supreme Court held that a water-rights dispute fell within its original jurisdiction over actions between two or more states.<sup>84</sup> The Court stressed the sovereign nature of the states' interest in water,<sup>85</sup> noting that no other appropriate forum existed for the states to resolve such

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77. GEORGE WILLIAM SHERK, *DIVIDING THE WATERS: THE RESOLUTION OF INTERSTATE WATER CONFLICTS IN THE UNITED STATES* 1–2 (2000).

78. See A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381, 410 (1985) (“Negotiation compromise among states is still the best apportionment vehicle, but in many cases the product of negotiation—interstate compacts—merely postpones the exercise of original jurisdiction.”); cf. *Colorado v. Kansas*, 320 U.S. 383, 392 (1943) (suggesting that interstate water disputes “should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power”).

79. See George William Sherk, *The Management of Interstate Water Conflicts in the Twenty-First Century: Is It Time To Call Uncle?*, 12 N.Y.U. ENVTL. L.J. 764, 813–14 (2005) (“Congress has acted only twice to apportion interstate water resources.”).

80. See, e.g., Caitlin S. Dyckman, *Another Case of the Century? Comparing the Legacy and Potential Implications of Arizona v. California and the South Carolina v. North Carolina Proceedings*, 51 NAT. RESOURCES J. 189, 226 (2011) (“[Equitable apportionment] is generally considered a last resort given the associated cost, antagonism, and uncertainty in the resulting resource allocation, not to mention the Court's reluctance to take these cases and act as a trial court.”).

81. See, e.g., *Montana v. Wyoming*, 131 S. Ct. 1765, 1769 (2011) (resolving a dispute between three states over the interpretation of terms in the Yellowstone River Compact).

82. Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, 198 (1993); Tarlock, *supra* note 78, at 384.

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

84. *Id.* at 141–43.

85. See *id.* at 146–47 (“Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand . . .”).

a dispute.<sup>86</sup> Equitable apportionment was developed for sovereign disputes in which “[i]f the two States were absolutely independent nations it would be settled by treaty or by force.”<sup>87</sup> Thus, from the early twentieth century, the Court handled interstate water disputes out of necessity rather than a perceived need to guide state water policy.

Procedurally, given that original actions “tax the limited resources of [the] Court by requiring [it] ‘awkwardly to play the role of factfinder,’”<sup>88</sup> the Court relies on an appointed special master.<sup>89</sup> The master is responsible for taking evidence and preparing a report for the Court, but the parties may also gather their own evidence and file exceptions to any findings of the special master.<sup>90</sup> Although a special master is not given the deference typical of appellate review, original jurisdiction may have “the practical disadvantage of short-circuiting the judicial process to which the Court is accustomed in its appellate work.”<sup>91</sup> Then-Justice Rehnquist criticized the Court for too often deferring to the special master’s findings, making the Court’s original jurisdiction more attractive to private litigants.<sup>92</sup> In the case of sovereign disputes between states, in which the Court’s original jurisdiction is exclusive, forum shopping is not a concern. But for private litigants, a truncated trial process and direct access to the Supreme Court may be quite attractive, if the Court permits their intervention.

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86. *See id.* at 143 (“The States of this Union cannot make war upon each other. They cannot ‘grant letters of marque and reprisal.’ They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations, and make treaties.”).

87. *Kansas v. Colorado*, 206 U.S. 46, 98 (1907).

88. *South Carolina v. North Carolina*, 130 S. Ct. 854, 863 (2010) (quoting *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971)).

89. *See* JOSEPH F. ZIMMERMAN, *INTERSTATE DISPUTES: THE SUPREME COURT’S ORIGINAL JURISDICTION* 43 (2006) (“The special master, appointed by the U.S. Supreme Court upon the invocation of its original jurisdiction, in recent decades has played important investigatory and recommendatory roles in assisting the court to settle interstate disputes.”).

90. Note, *The Original Jurisdiction of the United States Supreme Court*, 11 *STAN. L. REV.* 665, 688 (1959).

91. McKusick, *supra* note 82, at 193.

92. *See* *Maryland v. Louisiana*, 451 U.S. 725, 765 (1981) (Rehnquist, J., dissenting) (“It will obviously be tempting to many interests of a variety of persuasions on the merits of a particular issue to ‘start at the top,’ so to speak, and have the luxury of litigating only before a Special Master followed by the appellate-type review which this Court necessarily gives to his findings and recommendations.”).

*B. The Substantive Law of Equitable Apportionment*

The Court has entered an equitable-apportionment decree—requiring the upstream user to maintain a specified minimum flow so as not to injure the downstream user—only three times.<sup>93</sup> Thus, although many interstate water-rights disputes have reached the Supreme Court, they have usually been resolved outside the Court, in the shadow of its equitable-apportionment jurisprudence.

1. *All Relevant Factors.* The Court’s equitable-apportionment doctrine allows for a flexible, fact-specific balancing of “all relevant factors.”<sup>94</sup> The doctrine requires the court “to weigh the harms and benefits to competing States,”<sup>95</sup> through consideration of

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 downstream areas if a limitation is imposed on the former.<sup>96</sup>

None of the factors are decisive, and in practice they give way to more generalized notions of equity and fairness.<sup>97</sup> These factors take precedence over the water-rights regime of a particular state.<sup>98</sup> State law will be considered if both states have similar substantive water law, but it will not control the analysis.<sup>99</sup> The Court has likely deemphasized individual state regimes because an equitable-apportionment decree binds the party-states but not the individual water rights of their citizens. A decree may have a significant impact on an individual water user. However, because a decree controls the rights of state citizens in the aggregate, the allocation of water to individual citizens is left to the states themselves.<sup>100</sup>

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93. 3 BECK, *supra* note 34, § 45.07(a); *see also* *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (apportioning the North Platte River); *New Jersey v. New York*, 283 U.S. 805 (1931) (apportioning the Delaware River); *Wyoming v. Colorado*, 259 U.S. 419 (1922) (apportioning the Laramie River).

94. *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982).

95. *Id.* at 186.

96. *Nebraska*, 325 U.S. at 618.

97. *E.g.*, Tarlock, *supra* note 78, at 382.

98. 3 BECK, *supra* note 34, § 45.06(b).

99. *Id.*

100. *See Nebraska*, 325 U.S. at 623 (“Nor will the [equitable-apportionment] decree interfere with relationships among Colorado’s water users. The relative rights of the

2. *Efficiency and Conservation Duties.* The Court has recognized that states have an affirmative duty to use water efficiently and to conserve water resources. In 1982, it reaffirmed, “[C]onservation within practicable limits is essential in order that needless waste may be prevented and the largest feasible use may be secured . . . . [The] doctrine lays on each of these States a duty to exercise her right reasonably and in a manner calculated to conserve the common supply.”<sup>101</sup> But this duty is limited to measures that are “financially and physically feasible.”<sup>102</sup> In practice, the Court has not always given this duty much weight. For example, in *Montana v. Wyoming*,<sup>103</sup> the Court explicitly affirmed Wyoming’s right to reduce its downstream flows to Montana that resulted from Wyoming’s adoption of new “efficient” irrigation technology that, in fact, returned less water to the river.<sup>104</sup>

States’ affirmative duty to conserve water would seem to arise, at least in part, from the public trust doctrine, although the Court has never drawn such a connection between *Illinois Central* and its equitable-apportionment jurisprudence. Both the public trust doctrine and equitable apportionment are largely products of federal common law, and although unnamed, public trust principles are implicated in the language of the equitable-apportionment conservation duty.<sup>105</sup> In particular, a state’s duty to exercise water rights “reasonably and in a manner calculated to conserve the common supply”<sup>106</sup> evokes the fiduciary responsibilities inherent in public trust principles. But equitable-apportionment actions implicate the duty to conserve more broadly, beyond the public trust doctrine. States must pursue efficient use not only for the benefit of their own

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appropriators are subject to Colorado’s control.”); *Wyoming v. Colorado*, 309 U.S. 572, 579 (1940) (describing that an equitable-apportionment decree “was not intended to restrict Colorado in determining the use of the water of the river, according to Colorado laws and adjudications, provided the diversions do not exceed the aggregate amount of 39,750 acre feet”).

101. *Colorado v. New Mexico*, 459 U.S. 176, 185–86 (1982) (quoting *Wyoming v. Colorado*, 259 U.S. 419, 484 (1922)).

102. *Id.* at 185 (quoting *Wyoming*, 259 U.S. at 486).

103. *Montana v. Wyoming*, 131 S. Ct. 1765 (2011).

104. *See id.* at 1779 (Scalia, J., dissenting) (“Thanks to improved irrigation techniques, Wyoming’s farmers and cattlemen appear to consume more of the water they divert from the Yellowstone River and its tributaries today than they did 60 years ago—that is to say, less of the diverted water ultimately finds its way back into the Yellowstone.”).

105. *See supra* note 101 and accompanying text.

106. *Colorado*, 459 U.S. at 186 (quoting *Wyoming*, 259 U.S. at 484).

citizens but also for the benefit of water users in both upstream and downstream states.<sup>107</sup>

3. *A High Burden for Private-Party Intervention.* In part because equitable-apportionment actions do not directly control the water rights of individual citizens, the Court has historically imposed a high burden for citizen intervention. The Court articulated the standard for intervention by private citizens in *New Jersey v. New York*,<sup>108</sup> in which it considered Philadelphia's motion to intervene when Pennsylvania had already done so successfully.<sup>109</sup> The Court clarified the test for intervention, finding that "[a]n intervenor whose state is already a party should have 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."<sup>110</sup> In determining that Philadelphia had not met its burden, the Court stressed concerns about opening its original jurisdiction to an unlimited number of political subdivisions, corporations, or persons within a state, such that the Court would be effectively arrogating the state's power to allocate water resources amongst its citizens.<sup>111</sup>

The Court's result in *New Jersey* was dictated by the *parens patriae* doctrine, under which a state is presumed to represent the interests of all its citizens with respect to matters implicating state sovereignty.<sup>112</sup> The Court noted that the high burden for intervention was required out of a "necessary recognition of sovereign dignity," as "[o]therwise, a state might be judicially impeached on matters of

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107. See, e.g., *id.* ("We conclude that it is entirely appropriate to consider the extent to which reasonable conservation measures by New Mexico might offset the proposed Colorado diversion and thereby minimize any injury to New Mexico users. Similarly, it is appropriate to consider whether Colorado has undertaken reasonable steps to minimize the amount of diversion that will be required.").

108. *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam).

109. *Id.* at 370–71.

110. *Id.* at 373.

111. See *id.* ("If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth . . . . Nor is there any assurance that the list of intervenors could be closed with political subdivisions of the states. Large industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial.").

112. See *id.* at 372 ("[*Parens patriae*] is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173–74 (1930))).

policy by its own subjects.”<sup>113</sup> Thus the *New Jersey* test limited equitable-apportionment decrees to interstate allocation rather than intrastate allocation, largely preserving traditional water federalism for consumptive water rights. In practice, this test has created a sufficiently high burden such that prior to *South Carolina*, the only nonstate parties who had successfully intervened in equitable-apportionment actions were the federal government and Native American tribes.<sup>114</sup>

### III. CITIZEN INTERVENTION IN EQUITABLE-APPORTIONMENT ACTIONS

#### A. *A Relaxed Standard for Citizen Intervention: South Carolina v. North Carolina*

State control of water allocation is firmly grounded in both the Supreme Court’s equitable-apportionment precedents and public trust principles. As a result, the Court’s original jurisdiction was historically a forum of last resort for water quarrels. In *South Carolina*, the special master formulated a broad rule and recommended that all three parties (Duke Energy, the CRWSP, and Charlotte) be granted leave to intervene.<sup>115</sup> South Carolina filed exceptions with respect to each of the three parties.<sup>116</sup>

By permitting Duke Energy and the CRWSP to intervene, but not Charlotte,<sup>117</sup> the Court relaxed its standard for private party intervention in interstate water disputes. Thus, the Court gave nonsovereign parties unprecedented access to represent their private interests against the sovereign interests of the party-states. The Court’s reinterpretation of the *New Jersey* test and its inconsistent application of the *parens patriae* doctrine to the three prospective intervenors threaten to put the Court in the business of allocating water within states as well as between states. As a result, the Supreme Court compromised state sovereign ownership and public trust values

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113. *Id.* at 373.

114. *See, e.g., Arizona v. California*, 460 U.S. 605, 614–15 (1983) (allowing five Native American tribes to intervene); *New Jersey*, 345 U.S. at 370–71 (recognizing Pennsylvania’s, but not Philadelphia’s, right to intervene).

115. The special master formulated a new rule to govern intervention in original actions that would seem to greatly expand direct access to the Supreme Court on behalf of private parties. *See infra* notes 164–170 and accompanying text.

116. *South Carolina v. North Carolina*, 130 S. Ct. 854, 859 (2010).

117. *Id.*

and undermined the power of state legislatures to allocate water resources through the political process.

*B. Applying the New Jersey Test and the Parens Patriae Doctrine*

The *New Jersey* test, which the Court reaffirmed in *South Carolina*, requires that the nonstate intervenor “show a compelling interest ‘in his own right,’ distinct from the collective interest of ‘all other citizens and creatures of the state,’ whose interest the State presumptively represents in matters of sovereign policy.”<sup>118</sup> Thus, the *New Jersey* test has two prongs: the interest must be distinct from the interest of other state citizens as a class and not presumptively represented by a party-state.

1. *The City of Charlotte*. The Court held that Charlotte could not intervene, likely because the *New Jersey* test had specifically denied Philadelphia’s intervention when Pennsylvania was already a party to the suit.<sup>119</sup> Both Justice Alito and Chief Justice Roberts agreed that Charlotte’s interest was no different from that of any other municipality, individual, or corporation within North Carolina that would want to put its straw in the river.<sup>120</sup> Under the doctrine of *parens patriae*, the state is presumed to represent the interest of its citizens in matters implicating state sovereignty. This principle holds true even when the state’s and the citizen’s interests are inconsistent or even in opposition to each other.<sup>121</sup> Thus, regardless of whether North Carolina would *actually* represent Charlotte’s interests well or at all, North Carolina is presumed to represent Charlotte’s interests, because the Supreme Court’s original jurisdiction is not the proper forum for a state to be “judicially impeached on matters of policy by its own subjects.”<sup>122</sup> The limitation of the Court’s original jurisdiction to disputes in which there is no other appropriate forum influenced the Court in denying Charlotte’s intervention, because Charlotte had the option of pursuing its grievances in state court.

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118. *Id.* at 867 (quoting *New Jersey*, 345 U.S. at 373).

119. *See supra* notes 108–111.

120. *South Carolina*, 130 S. Ct. at 867; *id.* at 873 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

121. *See Kentucky v. Indiana*, 281 U.S. 162, 173 (1930) (“A State suing, or sued, in this Court, by virtue of the original jurisdiction over controversies between States, must be deemed to represent all its citizens.”).

122. *New Jersey*, 345 U.S. at 373.

2. *Duke Energy and the Catawba River Water Supply Project.* Although both Duke Energy and the CRWSP could also be expected to pursue grievances in state court, the Supreme Court found that they satisfied both prongs of the *New Jersey* test. But Justice Alito's analysis deviated from his own expression of the *New Jersey* test as applied to Charlotte. Both parties had a stake in the dispute because they both depend on the Catawba's waters and would be affected, at least indirectly, by the outcome. Duke Energy operates eleven hydroelectric dams along the Catawba River "that generate electricity for the region and control the flow of the river," and its interest in the litigation could thus have been described as compelling.<sup>123</sup> The CRWSP, representing the water-consuming citizens of two counties, could have been characterized similarly.<sup>124</sup> But neither Duke Energy nor the CRWSP should have been deemed to satisfy either prong of the *New Jersey* test.

a. *A Compelling Interest Distinct from the Interests of Other State Citizens as a Class.* Rather than focusing on the type of interest at stake—as the first prong of the *New Jersey* test requires—the Court instead emphasized Duke Energy's "powerful interests that likely will shape the outcome of this litigation," finding "no other similarly situated entity on the Catawba River."<sup>125</sup> In contrast, Chief Justice Roberts, in dissent, found Duke Energy's interests to be no different from those of any other user of the Catawba River's water in the Carolinas: "The State's 'citizens and creatures' certainly put the Catawba's water and flow to different uses—many for drinking water, some for farming or recreation, others for generating power. That does not, however, make their interest in the water itself unique."<sup>126</sup> Thus, although Duke Energy likely uses *more* water on the Catawba than any other individual user, its interest is still part of a class of other water users.

It follows that if the Court were to apportion water directly to Duke Energy, it would effectively be apportioning water within states rather than between states. Chief Justice Roberts noted that "[o]ther citizens of North Carolina doubtless have reasons of their own, ones they find as important as Duke Energy believes its to be," and

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123. *South Carolina*, 130 S. Ct. at 866.

124. *Id.* at 864–65.

125. *Id.* at 866.

126. *Id.* at 873 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

“[w]eighing those interests is an ‘intramural’ matter for the State.”<sup>127</sup> Even though Duke Energy’s hydropower operations are substantial, it still should not be able to defend its interest as a coequal litigant with North Carolina and South Carolina, who each represent the interests of countless state water users, including Duke Energy.

Following a similar line of reasoning as it applied to Duke Energy, the Court found that the CRWSP’s interest was distinct from those of other citizens of the Carolinas because of the volume of its withdrawals, the value of its water infrastructure investments, and its status as a bistate entity.<sup>128</sup> These arguments do not withstand scrutiny, nor do they reflect a cogent application of the *New Jersey* test. Many other counties in both North and South Carolina depend on the Catawba River and have spent money on water infrastructure; the CRWSP’s interests cannot be distinct simply because the entity involves counties from both states.<sup>129</sup>

The Court also found Duke Energy’s interest distinct because of its existing license with FERC and its ongoing efforts to renew the license.<sup>130</sup> But the Court’s reasoning focused on the useful information Duke Energy would provide rather than on the extent to which Duke Energy’s relationship with the federal government made it distinct from other citizen water users in the Carolinas.<sup>131</sup> In fact, the United States filed an amicus brief that refuted Duke Energy’s assertion that the pending renewal of its FERC license merited the power company’s intervention.<sup>132</sup> The mere fact that Duke Energy possesses information relevant (or even indispensable) to the dispute does not merit its party status, because possessing information does not set

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127. *Id.* at 874.

128. *Id.* at 864 (majority opinion).

129. *See infra* notes 145–150 and accompanying text.

130. *South Carolina*, 130 S. Ct. at 866–67.

131. *See id.* at 866–67 (“[Duke Energy’s Comprehensive Relicensing Agreement], likewise, represents the full consensus of 70 parties from both States regarding the appropriate minimum continuous flow of Catawba River water into South Carolina under a variety of natural conditions and, in times of drought, the conservation measures to be taken by entities that withdraw water from the Catawba River. These factors undeniably are relevant to any ‘just and equitable apportionment’ of the Catawba River and we are likely to consider them in reaching our ultimate disposition of this case.” (citation omitted) (quoting *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982))).

132. *See* Brief for United States as Amicus Curiae in Support of Plaintiff’s Exceptions at 20 n.3, *South Carolina*, 130 S. Ct. 854 (No. 138) (“[S]o long as the terms of the [relicensing agreement] are taken into account in the equitable apportionment, the mere fact that Duke impounds and releases the waters being apportioned does not give Duke a sufficiently concrete interest in the outcome of the apportionment.”).

Duke Energy apart from other citizens as a class. Many other citizens of the Carolinas may also have relevant information, but information alone is quite different from having a “distinct interest.”

The Court analogized permitting Duke Energy and the CRWSP’s intervention to its decision in *Maryland v. Louisiana*,<sup>133</sup> a case in which seventeen private gas pipeline companies were permitted to intervene in an original action.<sup>134</sup> But beyond the surface similarities, *Maryland* is easily distinguishable from *South Carolina*. In fact, *Maryland* provides an excellent example of the kind of interest that *is* compelling and “distinct from the collective interest of ‘all other citizens and creatures of the state’”<sup>135</sup> under the *New Jersey* test. In *Maryland*, several states challenged the constitutionality of Louisiana’s tax on natural gas imported into the state.<sup>136</sup> The Court reasoned, “[g]iven that the Tax is directly imposed on the owner of the imported gas and that the pipeline companies most often own the gas, those companies have a direct stake in this controversy.”<sup>137</sup> Dissenting in *South Carolina*, Chief Justice Roberts distinguished Duke Energy and the CRWSP’s interests from those of the pipeline companies, explaining that “an interest in a tax imposed only on discrete parties is obviously different from a general interest shared by all citizens of the State.”<sup>138</sup> In a footnote, Chief Justice Roberts further suggested that a private party “with a federal statutory right to a certain quantity of water might have a compelling interest in an equitable-apportionment action that is not fairly represented by the States.”<sup>139</sup> The distinguishing fact in the Chief Justice’s hypothetical is that the private intervenor would be asserting a right to use water based in federal law rather than state law, and thus a state would not be presumed to represent that federal water interest. But when a water user’s rights are wholly dependent on state law, it should be difficult, if not impossible, to satisfy the *New Jersey* test.

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133. *Maryland v. Louisiana*, 451 U.S. 725 (1981).

134. *Id.* at 745 n.21; *see also South Carolina*, 130 S. Ct. at 862 (“More recently, the Court has . . . permitted corporations to intervene in an original action challenging a State’s imposition of a tax that burdened interstate commerce and contravened the Supremacy Clause . . . .” (citing *Maryland*), 451 U.S. at 745 n.21)).

135. *South Carolina*, 130 S. Ct. at 867 (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam)).

136. *Maryland*, 451 U.S. at 728.

137. *Id.* at 745 n.21.

138. *South Carolina*, 130 S. Ct. at 873 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

139. *Id.* at 872 n.1.

*b. An Interest Not Presumptively Represented by a Party-State.* Although Justice Alito correctly stated the second factor in terms of whether the proposed intervenor is *presumptively* represented by a party-state, when applying the factor to Duke Energy and the CRWSP he instead considered whether the private intervenors are *actually* represented by the party-states. The Court noted that neither North Carolina nor South Carolina had “signed [Duke Energy’s FERC relicensing agreement] or expressed an intention to defend its terms.”<sup>140</sup> Justice Alito’s observation suggests that Duke Energy may not like how the party-states would *actually* represent its interests, but that observation should not have been decisive. That is, North Carolina and South Carolina must be *presumed* to represent all water users within their borders. The people of the Carolinas may rely on Duke Energy’s hydroelectric power, but state governments, not the Supreme Court, should bear the responsibility of balancing power generation with competing uses of water.

Similarly, with respect to the CRWSP, Justice Alito noted that South Carolina’s complaint included the CRWSP’s transfers to North Carolina as a portion of the total harm it attributed to North Carolina, and that North Carolina had asserted it could not represent the CRWSP as a joint venture.<sup>141</sup> Justice Alito also considered that “[t]he stresses that this litigation would place upon the CRWSP threaten to upset the fine balance on which the joint venture is premised, and neither State has sufficient interest in maintaining that balance to represent the full scope of the CRWSP’s interests.”<sup>142</sup> Again, Justice Alito provided evidence supporting whether North Carolina or South Carolina could adequately represent a party, rather than whether either state is presumed to represent the CRWSP under the *parens patriae* doctrine. Here, South Carolina is presumed to represent Lancaster County and North Carolina is presumed to represent Union County. Although it seems unlikely that either state would sacrifice the interests of these particular counties in favor of other water users, it is fully within their right to do so. Because the “CRWSP’s position is really no different from Charlotte’s,”<sup>143</sup> if either

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140. *Id.* at 867 (majority opinion).

141. *Id.* at 865.

142. *Id.*

143. *Id.* at 874 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *see also* First Interim Report of the Special Master, *supra* note 5, at 25.

county objects to its treatment, it may pursue its grievances in state court.

Because water is a sovereign interest, the states are properly deemed to represent the water rights of citizens such as Duke Energy and the CRWSP. Chief Justice Roberts observed that a private party's interest is "not properly represented' by a State when it is not a sovereign interest but instead a parochial one."<sup>144</sup> Here, Chief Justice Roberts highlighted how Justice Alito redefined "properly represented" to mean well represented rather than presumptively represented. Therefore, by broadening the definition of proper representation under the *New Jersey* test, the Court effectively relaxed the citizen intervention standard for equitable apportionments.

Although the Court was persuaded that Duke Energy and the CRWSP, as multistate entities, could not be presumptively represented by either state, this argument does not hold up to scrutiny. The Court's precedents suggest that the *parens patriae* doctrine applies equally to corporate entities, multistate entities, and corporate multistate entities.<sup>145</sup> Duke Energy is headquartered in Charlotte and has substantial operations in both states.<sup>146</sup> Similarly, the CRWSP represents the interests of a South Carolina county and a North Carolina county.<sup>147</sup> It follows that these entities would be represented by both state governments rather than neither. Thus, North Carolina can be presumed to represent Duke Energy's interests as its place of incorporation and South Carolina can be presumed to represent Duke Energy's operations within its borders. Chief Justice Roberts cautioned that "[a] bistate entity cannot be allowed to intervene merely because it embodies an 'intermingling of

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144. *South Carolina*, 130 S. Ct. at 874 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (citation omitted) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam)).

145. *See, e.g., New Jersey*, 345 U.S. at 373 ("The case before us demonstrates the wisdom of the [*parens patriae* principle]. The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River . . . Furthermore, we are told by New Jersey that there are cities along the Delaware River in that State which, like Philadelphia, are responsible for their own water systems . . . Nor is there any assurance that the list of intervenors could be closed with political subdivisions of the states. Large industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial.").

146. *About Us*, DUKE ENERGY, <http://www.duke-energy.com/about-us/default.asp> (last visited Mar. 4, 2013).

147. *See supra* note 10.

state interests,” because “[t]he same would be true of any bistate entity, or indeed any corporation or individual conducting business in both States.”<sup>148</sup> Thus, the Court may have opened its doors to any corporation doing business in both North Carolina and South Carolina that also happens to rely on water from the Catawba River. Ultimately, Chief Justice Roberts explained that “[b]istate entities are not States entitled to invoke our original jurisdiction, and should not be effectively accorded an automatic right to intervene as parties in cases within that jurisdiction.”<sup>149</sup> Such an interpretation is consistent with the Court’s long-held understanding of its original jurisdiction as a forum of last resort for interstate disputes concerning issues of state sovereignty.<sup>150</sup> Thus, bistate status alone should not be sufficient grounds to satisfy the *New Jersey* test.

Although both Duke Energy and the CRWSP may have had compelling reasons to seek intervention, Justice Alito’s determination that their interests were distinct from and could not be presumptively represented by the party-states is unconvincing under the *New Jersey* test. In *New Jersey*, the Court was specifically concerned about granting Philadelphia’s intervention because “[l]arge industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial.”<sup>151</sup> The *New Jersey* Court warned that “original jurisdiction should not be thus expanded to the dimension of ordinary class actions.”<sup>152</sup> By allowing Duke Energy and the CRWSP to intervene in *South Carolina*, the Supreme Court crippled the *New Jersey* test, effectively relaxing the standard for citizens seeking to intervene in future equitable apportionments and, perhaps, other original actions before the Court.

### C. *Finding an Appropriate Standard for Citizen Intervention in Equitable Apportionments*

Equitable apportionments are unique among original actions. But the *New Jersey* test, which was developed in the context of an equitable-apportionment action, has been the standard for

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148. *South Carolina*, 130 S. Ct. at 874 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (citation omitted) (quoting *id.* at 865 n.6 (majority opinion)).

149. *Id.*

150. *See supra* Part III.A.

151. *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam).

152. *Id.*

intervention in other original actions between states.<sup>153</sup> In *South Carolina*, both Justice Alito and Chief Justice Roberts acknowledged that an equitable apportionment might impose a higher burden for private intervention, but they disagreed as to how much higher this burden should be.<sup>154</sup> Citizen intervention in equitable-apportionment actions challenges both the boundaries of the Court's original jurisdiction and a state's sovereign right to allocate water resources within its borders. Building on Chief Justice Roberts's defense of state sovereignty, this Note argues that because of the law governing water resources in the United States, and the challenges presented by the energy-water nexus, the test for private-party intervention in an original action should, as a normative matter, bar most attempts at citizen intervention in equitable apportionments.

First, the Supreme Court has freely admitted that it is ill suited to serve as a trial court in equitable-apportionment and other original actions.<sup>155</sup> The Court's constitutionally granted original jurisdiction is thus born out of "a necessary recognition of sovereign dignity,"<sup>156</sup> in keeping with the Court's understanding of original jurisdiction as a forum of last resort. In *South Carolina*, Chief Justice Roberts warned that "[t]he Court's decision to permit nonsovereigns to intervene in this case has the potential to alter in a fundamental way the nature of our original jurisdiction, transforming it from a means of resolving high disputes between sovereigns into a forum for airing private interests."<sup>157</sup> And the *New Jersey* Court voiced this same concern

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153. See, e.g., *Illinois v. Milwaukee*, 406 U.S. 91, 97 (1972) (applying the *New Jersey* test when Illinois sought relief against several municipal entities in Wisconsin for allegedly polluting Lake Michigan).

154. Compare *South Carolina*, 130 S. Ct. at 862 (majority opinion) ("[A] compelling reason for allowing citizens to participate in one original action is not necessarily a compelling reason for allowing citizens to intervene in all original actions."), with *id.* at 871 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("[W]e have strongly intimated in other decisions (albeit in dictum) that private entities can rarely, if ever, intervene in original actions involving the apportionment of interstate waterways.").

155. See *id.* at 863 (majority opinion) ("[Original] actions tax the limited resources of this Court by requiring us 'awkwardly to play the role of factfinder' and diverting our attention from our primary responsibility as an appellate tribunal." (quoting *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971))).

156. *New Jersey*, 345 U.S. at 373; see also *United States v. Texas*, 143 U.S. 621, 643 (1892) ("Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation.").

157. *South Carolina*, 130 S. Ct. at 869 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

when it described its test as “a working rule for good judicial administration,” to prevent a scenario in which “a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.”<sup>158</sup> Although the Chief Justice may have overstated the risk in suggesting that original actions may become “town-meeting lawsuits,”<sup>159</sup> given the Court’s limited resources and the likely increase in water conflicts due to the energy-water nexus and global climate change, even a small rise in successful citizen intervenors may hinder the Court’s ability to resolve interstate water disputes.

The United States’ amicus brief advocated a similar position, arguing that relaxing the standard for intervention “could potentially involve the Court in the resolution of intramural water disputes on the scale of state-wide general stream adjudication.”<sup>160</sup> The amicus brief further expressed concern that “even assuming that these actions could be *litigated* manageably with a significantly expanded number of parties, the expansion would make it significantly less likely that these cases could be *settled*.”<sup>161</sup> Although in this particular case, Duke Energy played a central role in bringing the parties to a settlement,<sup>162</sup> it does not necessarily follow that settlement occurred because the Court permitted it to intervene. Duke Energy could have played a similar role by filing an amicus brief and participating in interstate negotiations.<sup>163</sup>

Second, the mistaken presumption that a party with necessary information is indispensable to an equitable apportionment is reflected in the special master’s rule, which the Court in *South Carolina* rejected as overly broad. The special master’s proposed

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158. *New Jersey*, 345 U.S. at 373.

159. *South Carolina*, 130 S. Ct. at 870 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (quoting *New Jersey*, 345 U.S. at 376 (Jackson, J., dissenting)).

160. Brief for United States in Support of Plaintiff’s Exceptions, *supra* note 132, at 21.

161. *Id.*

162. See Lyle Denniston, *The Key to Settling a Big Fight*, SCOTUSBLOG (Dec. 17, 2010, 7:40 PM), <http://www.scotusblog.com/2010/12/the-key-to-settling-a-big-fight> (“[W]hen negotiations that followed the ruling came to an end this Fall, the two states rallied around Duke Energy’s interests, and made a deal that might last for the next four or five decades, supposedly a model for regional cooperation.”).

163. See *South Carolina*, 130 S. Ct. at 875 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (“Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.” (quoting *Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) (per curiam))).

standard would have permitted intervention in a far wider range of circumstances than would the *New Jersey* test. It would encompass a party that is “the instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief,” or a party that “has a ‘direct stake’ in the outcome of the action.”<sup>164</sup> The fact that a party “would advance the ‘full exposition’ of the issues” would further support intervention.<sup>165</sup> Additionally, the special master’s rule failed to account properly for the *parens patriae* doctrine, which is implicated by both factors of the *New Jersey* test. Under the special master’s standard, Charlotte’s and the CRWSP’s motions to intervene were granted because the parties were “authorized to carry out” the interbasin transfers of which South Carolina complained.<sup>166</sup> In contrast, Duke Energy’s motion was granted because of its “direct stake in the outcome” and ability to advance “a full exposition of the issues.”<sup>167</sup>

The Court explicitly declined to adopt the special master’s proposed standard but implicitly incorporated elements of that standard into its application of the *New Jersey* test. Justice Alito dismissed the special master’s standard because “a compelling reason for allowing citizens to participate in one original action is not necessarily a compelling reason for allowing citizens to intervene in all original actions.”<sup>168</sup> Although Justice Alito noted that the special master’s rule accounted for “the full compass of our precedents,” referring to original actions broadly, he preferred the more limited *New Jersey* test developed in the context of an equitable apportionment.<sup>169</sup> But the special master’s rule seems to explain the outcome better than does Justice Alito’s application of the *New Jersey* test, which was discussed in Part III.B. The majority opinion emphasized both Duke Energy’s impact on the Catawba River’s flow through the operation of its hydropower facilities and its ability to provide essential information.<sup>170</sup> Both of these concerns are quite relevant to the special master’s standard, but they have little bearing on the *New Jersey* test. The Court’s rejection of the special master’s proposed rule would seem to support a conclusion that equitable

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164. First Interim Report of the Special Master, *supra* note 5, at 20–21.

165. *Id.* at 21.

166. *Id.* at 9.

167. *Id.* at 28–32.

168. *South Carolina*, 130 S. Ct. at 862.

169. *Id.*

170. *Id.* at 866.

apportionments are distinct from other classes of original actions. But instead, throughout the majority opinion, Justice Alito framed the issue as whether the parties should be permitted to intervene in an original action, echoing the special master's standard, which was derived from a range of original jurisdiction precedents.<sup>171</sup> In contrast, Chief Justice Roberts framed the issue in terms of intervention in an equitable apportionment specifically.<sup>172</sup>

Third, boundary disputes, another frequent player on the Court's original jurisdiction docket, provide an instructive comparison to equitable apportionments, highlighting that equitable-apportionment actions *are* different because of the communal nature of water rights in the United States. In a boundary dispute, a party-state may rely substantially on a private party's ownership interest in asserting its sovereign interest. For example, in *Texas v. Louisiana*,<sup>173</sup> the Court permitted Port Arthur to intervene because it claimed title to islands in the Sabine River that were the subject of a dispute between the federal government and Texas.<sup>174</sup> Unlike a boundary dispute, in which a private party seeks to intervene to defend its title, private parties in equitable apportionments do not have equivalent property interests to justify intervention. A usufructuary interest in water is distinct from private title to land, in which ownership entails considerably more than a limited right to use a natural resource for certain purposes. This distinction is supported by both the inherent qualities of water resources and the structure of water law in the United States.<sup>175</sup> All original actions before the Supreme Court are sovereign disputes, but some disputes may more significantly implicate sovereign concerns and public values than others. In water-rights disputes, the absence of a legally cognizable private ownership right

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171. *See id.* at 862 (“This Court likewise has granted leave, under appropriate circumstances, for non-state entities to intervene as parties in original actions between states for nearly 90 years.”).

172. *See id.* at 870 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (“Applying [the compelling-interest test], this Court has never granted a nonsovereign entity’s motion to intervene in an equitable apportionment action.”).

173. *Texas v. Louisiana*, 426 U.S. 465 (1976) (per curiam).

174. *Id.* at 466; *see also South Carolina*, 130 S. Ct. at 862 (citing *Texas*, 426 U.S. at 466). But even a claim to private title does not guarantee intervention. For example, in *Utah v. United States*, 394 U.S. 89 (1969) (per curiam), Morton International, Inc. moved to intervene in a dispute over title to portions of the Great Salt Lake, *id.* at 95. In denying Morton’s intervention, the Court noted, “If Morton is admitted, fairness would require the admission of any of the other 120 private landowners who wish to quiet their title to portions of the relicted lands, greatly increasing the complexity of this litigation.” *Id.* at 95–96.

175. *See supra* Part I.A.

in water typically eliminates the justification for citizen intervention. Thus, whereas the *New Jersey* test alone should be sufficient to bar citizen intervention in equitable apportionments, the nature and structure of water rights in the United States make such intervention all but impossible.

Ultimately, because of the usufructuary nature of water rights, traditional water federalism, and the public trust doctrine, equitable apportionments are distinct from other original actions. As discussed above in Part III.B, equitable-apportionment decrees control water rights at the state level rather than at the individual level. Each sovereign state is left to allocate its equitable share according to state-law principles, without federal intervention. A state's citizens should not be parties to an equitable apportionment because they are not individually bound by the Court's decree.<sup>176</sup> The existence of an appropriate, alternate forum—in this case, state court—for both Duke Energy and the CRWSP to dispute an intrastate allocation of water also counsels against giving private entities access to the Court's discretionary original jurisdiction. Chief Justice Roberts would have denied citizen intervention to protect state sovereignty and the Court's own docket, but the communal nature of water resources and environmental concerns further caution against a relaxed standard for nonstate parties. The public trust doctrine, in spite of its fifty different forms, remains the most enduring assertion of the communal nature of water rights in the United States, held by the state governments as representatives of the people.<sup>177</sup>

The looming concerns of the energy-water nexus and global climate change reinforce the need to protect the role of the states under the public trust doctrine. The public trust doctrine shapes what states can and cannot do with trust resources and also the extent to which federal courts should defer to states when the management of trust resources is at stake, absent congressional intent to the contrary. Private parties will rarely have interests in water that are not dependent on the interest of the states as representatives of their citizens. Therefore, the uniquely public values implicated by equitable apportionments and the communal nature of water resources support that it should be difficult for private parties to defend their interests in water as coequal litigants with sovereign states.

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176. See *supra* note 100 and accompanying text.

177. See *supra* Part I.A.

#### IV. THE FUTURE OF INTERSTATE WATER DISPUTES: COURTS AND LEGISLATURES

Although the Supreme Court has proved reasonably adept at balancing states' claims in equitable-apportionment actions, evaluating tradeoffs between competing types of water uses has not played a central role in equitable-apportionment jurisprudence. As the California Supreme Court characterized, "The scope and technical complexity of issues concerning water-resource management are unequalled by virtually any other type of activity presented to the courts."<sup>178</sup> The U.S. Supreme Court should recognize that adjudicating interstate water rights pushes the boundaries of its institutional competence,<sup>179</sup> beyond the inherent concerns of simultaneously playing the roles of trial and appellate court. The energy-water nexus dictates that states must make key tradeoffs between the need to use water resources in energy production versus other consumptive uses, as evidenced by the energy-water challenges facing Charlotte and other metropolitan areas across the United States.<sup>180</sup> Although evaluating competing policy proposals for national water policy is beyond the scope of this Note, these kinds of tradeoffs in the allocation of scarce natural resources, which are "highly charged political issues," are best handled through the political process, at either the state or federal level, rather than through the courts.<sup>181</sup>

Several scholars have challenged the efficacy of equitable apportionment as compared to interstate compacts or congressional intervention because of federalism concerns and the Court's inability to handle the highly technical information required to develop good

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178. *Envtl. Def. Fund v. E. Bay Mun. Util. Dist.*, 605 P.2d 1, 6 (Cal. 1980) (quoting *Envtl. Def. Fund v. E. Bay Mun. Util. Dist.*, 572 P.2d 1128, 1137 (Cal. 1977)).

179. *Cf. Eric T. Freyfogle, Lux v. Haggin and the Common Law Burdens of Modern Water Law*, 57 U. COLO. L. REV. 485, 522 (1986) ("[M]any courts today do not realize that, in altering common law water doctrines, they are altering the rules by which allocations are made . . . [C]ourts today typically understate their allocative role and therefore fail to fulfill it competently.").

180. *See Sovacool, supra* note 4, at 25–33 (describing the challenges faced by electric utilities and water planners in eight metropolitan areas).

181. *See, e.g., Henry Melvin Hart, Jr., Comment on Courts and Lawmaking, in LEGAL INSTITUTIONS TODAY AND TOMORROW* 40, 45 (Monrad G. Paulsen ed., 1959) ("[The legislature] is most significantly an instrument of negotiation and compromise of highly charged political issues which cannot be brought to acceptable settlement through the everyday processes of administration and adjudication. For the performance of this function it is superbly and uniquely equipped.").

water policy. Professor Dan Tarlock suggests that such criticisms are widespread because “[j]udicial deference to the quasi-sovereign states makes it difficult, if not impossible, for the Court to do other than to articulate vague standards of interstate equality rather than firm principles such as economic maximization.”<sup>182</sup> But Professor Tarlock argues that “the Supreme Court has often shown itself capable of striking sensible accommodation among competing demands,” particularly in the interpretation of existing compacts.<sup>183</sup> Others have not been quite so generous. For example, Professor Carl Erhardt argues that “the Court is inherently incapable of fully understanding the technicalities that are necessary in providing for an equitable solution,” leading to “a lack of truly informed decision-making” and “unpredictable results.”<sup>184</sup>

In response to the perceived problems of equitable apportionment, some scholars have advocated a stronger role for Congress in resolving interstate water-rights disputes.<sup>185</sup> But considering both the historical infrequency of congressional apportionments and the politically charged nature of these disputes, it seems unlikely that Congress will assume a more significant role in interstate water-rights disputes. Thus, Supreme Court equitable apportionments will continue to wield significant influence.<sup>186</sup> In addition, regardless of how many interstate water-rights disputes actually come before the Supreme Court, its equitable-apportionment jurisprudence casts a long shadow over settlement and compact negotiations. Thus, if the Court’s holding in *South Carolina* leads to an increased role for the Court in guiding intrastate water allocation policy, the repercussions will be felt broadly, as global climate change will likely lead to regional increases in drought conditions and more interstate water-rights conflicts.

The Catawba-Wateree Basin illustrates the complex interdependence of energy and water policy, and this

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182. Tarlock, *supra* note 78, at 382.

183. *Id.* at 411.

184. Carl Erhardt, *The Battle Over “The Hooch”: The Federal-Interstate Water Compact and the Resolution of Rights in the Chattahoochee River*, 11 STAN. ENVTL. L.J. 200, 213–14 (1992).

185. See generally Sherk, *supra* note 79; E. Leif Reid, Note, *Ripples from the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights*, 14 STAN. ENVTL. L.J. 145 (1995).

186. See, e.g., Dyckman, *supra* note 80, at 229 (“But the court system is increasingly becoming the locus of these decisions in the absence of cooperation. And in making allocations that change uses, associated property rights, and growth itself, the U.S. Supreme Court impacts the rest of the country’s water management.”).

interdependence cautions that the Court not overreach in its equitable-apportionment cases by engaging with substantive water-allocation policy, however indirectly. As discussed in Part I, Charlotte was named the country's metropolitan area most at risk for water shortages due to power-plant withdrawals.<sup>187</sup> These water shortages are anticipated largely because of plans by Duke Energy to build new thermoelectric plants in the Catawba-Wateree Basin.<sup>188</sup> Duke Energy is already the largest single water user in the Catawba-Wateree Basin,<sup>189</sup> and its entire energy portfolio in the Carolinas (comprised of hydroelectric, coal-fired, nuclear, oil, and natural-gas energy resources) is water intensive.<sup>190</sup> Duke Energy has already faced electricity supply problems from its plants on the Catawba River during drought conditions.<sup>191</sup> As is unsurprising for one of America's most endangered rivers,<sup>192</sup> the Catawba faces a wide range of water-quality issues, all of which are exacerbated by low water levels, including too many nutrients, too little dissolved oxygen, and fecal coliform and mercury contamination.<sup>193</sup> Thus, the Catawba River presents economic and environmental management challenges that necessitate tradeoffs by policymakers who are fully engaged with the concerns of municipalities, scientists, industry, and citizens. And the Catawba-Wateree Basin is only one of many similarly situated areas in the country facing policy tradeoffs in allocating scarce water resources, compounding the importance of these challenges.

Many were pleased with the results of the negotiated settlement between the states, Duke Energy, and the CRWSP, including the

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187. See *supra* note 7 and accompanying text.

188. See Sovacool, *supra* note 4, at 26–27 (“[T]he associated water use with [Duke Energy’s] planned thermoelectric plants] could exacerbate drought (at best) and risk interstate litigation and agricultural collapse (at worst).”).

189. See *Water Quality Facts*, CATAWBA RIVERKEEPER, <http://www.catawbariverkeeper.org/News/waterqualityfacts> (last visited Mar. 4, 2013) (“Evaporative losses from cooling [Duke Energy’s] nuclear and coal-fired power plants makes up almost 50% of the net water use in the basin.”).

190. Sovacool, *supra* note 4, at 26–27; *Alert: 2007 Drought Advisories, Drought Advisory #2*, CATAWBA RIVERKEEPER (Aug. 15, 2007), <http://www.catawbariverkeeper.org/News/News/alert-2007-drought-advisory>.

191. See News Release, Duke Energy, Duke Energy Carolinas Announces Special Power Purchase and Seeks Cost Recovery (Mar. 4, 2008), available at <http://www.duke-energy.com/news/releases/2008030401.asp> (detailing Duke Energy’s efforts to manage drought conditions, such as reducing hydropower operations, modifying plants, and purchasing power from another supplier in South Carolina).

192. See *supra* note 6 and accompanying text.

193. *Water Quality Facts*, *supra* note 189.

Catawba Riverkeeper Foundation, a nonprofit environmental group. The Southern Environmental Law Center, which represented the Riverkeeper, characterized the agreement as “a model for water conservation and efficiency measures that, if adopted by other municipalities, could help protect all the state’s rivers.”<sup>194</sup> Even though the settlement may have led to greater cooperation in the Carolinas, Professor Caitlin Dyckman is cautious, noting that “the precipitating circumstances [in *South Carolina*] were quite fortuitous, and may not be replicable; using litigation in lieu of negotiation is rarely preferable.”<sup>195</sup> The use of a special master, without the benefit of a full trial process to ensure adequate factfinding, raises particular concerns about making policy through the Supreme Court’s original jurisdiction.<sup>196</sup> It remains to be seen whether *South Carolina* will lead to a dramatic influx of private intervenors along the lines of the parade of horrors offered by Chief Justice Roberts.<sup>197</sup> But the potential for nonsovereign intervention will likely further complicate water-resource management at the state government level.

In this sense, the Court’s *South Carolina* holding reflects a short-sighted disregard for the complex policy challenges implicated by giving a private water user—whose “interest in water is an interest shared with other citizens,”<sup>198</sup>—party status in an equitable apportionment. Further, *South Carolina* put the Court in the driver’s seat and will allow the Court again to put its thumb on the scale in favoring some citizen water users over others, simply because they use more water—Duke Energy—or because the Court finds a particular citizen claim more compelling than another—the CRWSP as compared to Charlotte. As with Duke Energy’s intervention, such a policy favors the settled expectations of existing users and ties

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194. *Catawba River Interbasin Transfer Controversy Resolved*, CATAWBA RIVERKEEPER, (Jan. 19, 2010), <http://www.catawbariverkeeper.org/News/con-kan-ibt-dispute-finds-resolution> (quoting Julie Youngman, an attorney for the Southern Environmental Law Center).

195. Dyckman, *supra* note 80, at 229.

196. *See supra* notes 88–92 and accompanying text.

197. Chief Justice Roberts warned that nonsovereign intervention would “inevitably prolong the resolution of this and other equitable apportionment actions, which already take considerable time. Intervenors do not come alone—they bring along more issues to decide, more discovery requests, more exceptions to the recommendations of the Special Master.” *South Carolina v. North Carolina*, 130 S. Ct. 854, 875 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part).

198. *Id.* at 870.

states' hands with respect to introducing conservation measures.<sup>199</sup> Professor Sax hoped that courts would step in when captured legislatures and agencies failed to fulfill their fiduciary responsibilities to state citizens, in part because he believed that courts could more effectively stand up to the water-rights claims of powerful private interests.<sup>200</sup> But the adaptability of public trust principles makes the doctrine equally applicable when a federal court encroaches on the natural-resource obligations of the state governments. Ultimately, the federal common law of equitable apportionment developed to resolve sovereign disputes, not to make national water policy when Congress has not offered guidance on the issue. Although the settled expectations of existing users matter, environmental and natural-resource management considerations favor maintaining the states' traditional authority to determine the intrastate allocation of water rights by evaluating the interests of each individual water user in a process that is accountable to voters.

#### CONCLUSION

Despite the thorny task presented by an equitable apportionment of interstate waters, the Supreme Court was largely successful throughout the twentieth century in balancing the competing claims of states and recognizing each state's sovereign right to control and allocate the water resources within its borders. Now, the Court's deviation from this tradition in *South Carolina* threatens its own ability to resolve these disputes and state legislatures' ability to confront increasing freshwater scarcity. Both equitable-apportionment precedents and the state public trust doctrines should have prevented Duke Energy and the CRWSP's intervention in *South Carolina*. Further, the facts of the dispute and the policy concerns of the energy-water nexus and global climate change indicate that a rise in citizen interventions will threaten the traditional contours of water federalism and create more obstacles to developing sound water policy. As a nation and a global community, we will continue to face water shortages and the resulting need to make tradeoffs between competing uses. Having waded into such a complex, volatile, and fundamental policy challenge, the Court should

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199. Cf. Sax, *supra* note 60, at 474 (“[W]e have a potential head-on conflict between existing water users and their existing and future demands, and the existing and future demands of what may broadly be called in-stream uses.”).

200. *Id.* at 560.

step out, dry off, and work to preserve the status of equitable apportionments as a forum of last resort for disputes between sovereigns.