

# **ARIZONA V. CALIFORNIA AND THE EQUITABLE APPORTIONMENT OF INTERSTATE WATERWAYS**

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*Fifty years ago, the Supreme Court sided with Arizona in its decades-long dispute with California over the waters of the Colorado River. At the heart of the case's legacy is a paradox: There is widespread agreement that the Court reached the right result as a matter of policy, giving Arizona the water it needed to develop a dynamic, modern economy. Yet there is equally widespread agreement that the Court's reasoning was wholly unpersuasive, resting on a blatant misreading of a thirty-five-year-old federal statute. How can this be? Was there no legally principled way to rule for Arizona, where the equities in the case seemed to lie?*

*The answer is that the Court's predicament was one of its own creation. In a series of rulings over the preceding half century, it had placed prior appropriation—the time-honored Western water law principle of first in time, first in right—at the center of its doctrine of interstate equitable apportionment of water. This doctrinal development threatened to make equitable apportionment distinctly inequitable in the Colorado River case.*

*This Article traces the Court's equitable apportionment jurisprudence over the first half of the twentieth century. Through original archival research, this Article seeks to demonstrate that a majority of the Court felt constrained by the rule of interstate prior appropriation, leading it to resort instead to the dubious piece of statutory interpretation that has been so heavily criticized. Because equitable apportionment and prior appropriation are fundamentally at odds, the Court should abandon its overreliance on prior appropriation and treat existing use of*

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*water as merely one consideration to be weighed as part of a larger, multifactor balancing approach to equitable apportionment cases. Though a majority of the Court is generally reluctant to employ this sort of open-ended, subjective test (and with good reason), the unique nature of original jurisdiction equitable apportionment actions makes this approach the only appropriate one for dividing interstate waterways.*

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## INTRODUCTION

Poor Arizona—so far from God, so close to California. For its first half century as a state, Arizona’s plight could be aptly summarized in that variation on the famous quip about Mexico usually attributed to President Porfirio Díaz.<sup>1</sup> For its population to grow and its economy to flourish, Arizona needed one thing above all else: water from the Colorado River. But California had developed earlier and wanted the same water, and its outsized influence in Congress stymied Arizona’s efforts to stake its claim to the river and bring water to its farms and population centers in Phoenix and Tucson.

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1. “*¡Pobre México! ¡Tan lejos de Dios, tan cerca de los Estados Unidos!*” (“Poor Mexico! So far from God, so close to the United States!”). See, e.g., Richard R. Fagen, *The Realities of U.S.–Mexican Relations*, 55 FOREIGN AFF. 685, 685 (1977); *Gently Does It*, ECONOMIST, Dec. 5, 2009, at 40.

Fifty years ago, the Supreme Court answered Arizona's prayers. In *Arizona v. California*,<sup>2</sup> the Court gave Arizona virtually all the Colorado River water it had asked for, helping set the stage for the breakneck pace of growth the state has enjoyed in the decades since. At the heart of the case's legacy is a paradox of great significance. The Court's decision has helped produce impressive results—a state that in just a few short decades has become an engine of economic growth for the entire Southwest, with a booming desert metropolis that is now the sixth largest city in the nation.<sup>3</sup> And yet the nearly unanimous opinion among lawyers and scholars is that the legal reasoning embraced by the majority in *Arizona v. California* is something of an embarrassment—a blatant misreading of an act of Congress with no basis in legislative intent, the Court's jurisprudence, or Western water law.<sup>4</sup> For all that has been written about the case in the half century since the Court announced its decision, little has been said about the most enduring question the opinion raises: In a case where the equities seemed clearly to lie with Arizona, why did the Supreme Court need to contort itself into knots and produce such a poorly reasoned opinion in order to reach the right result? Was it bound to do so by some particular statutory or constitutional provision?

The answer is no. The Court's own precedents created the dilemma the Justices faced. For more than forty years, the Court had resolved equitable apportionment cases—original jurisdiction actions between states seeking a division of shared water resources—principally by applying the doctrine of prior appropriation, the longstanding principle of Western water law that earlier-in-time water users have priority over those who come later. In 1963, the Justices understood that faithful adherence to that doctrine would have dictated an outcome in favor of already-developed California. Determined to avoid that result, the Court had two realistic options. It could reverse course and hold that the doctrine of prior appropriation does not apply between states—that interstate water conflicts are to be resolved instead by giving each state its fair share. Or it could hold that the Boulder Canyon Project Act of 1928, the legislation authorizing construction of Hoover Dam, had, unbeknownst to everyone, actually divided the water between Arizona and California.<sup>5</sup> The majority opted for the latter course of action.

That choice was unwise. *Arizona v. California* presented a golden opportunity for the Court to correct its mistake and set interstate appropriation law on the right track. To this day, the Court's doctrine remains at odds with basic principles of fairness, federalism, and common sense. That few have noticed it is

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2. 373 U.S. 546 (1963).

3. See *List of United States Cities by Population*, WIKIPEDIA (last visited Nov. 12, 2013), [http://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_cities\\_by\\_population](http://en.wikipedia.org/wiki/List_of_United_States_cities_by_population) (citing 2010 U.S. Census figures and 2012 U.S. Census estimate). For an overview of Arizona's recent economic history, see Timothy D. Hogan, *Arizona at 100: A Look at the State's Economy Since 1987 and What the Future May Hold in Store* (2009), available at <http://www.azlibrary.gov/convocations/images/pdf/hogan09.pdf>.

4. See *infra* notes 73–78 and accompanying text.

5. Boulder Canyon Project Act, 45 Stat. 1057 (1928), (codified at 43 U.S.C. §§ 617–617u (2012)).

mostly a reflection of the infrequency with which the Court is called upon to divide interstate streams—in the parlance of the doctrine, to make an equitable apportionment of the water. Equitable apportionment cases, though, are a little bit like volcanic eruptions: They don't happen all that often, but when they do, they tend to matter quite a bit to the parties involved.

In an era likely to be marked by water shortages across the West (and perhaps even in the wetter parts of the nation), the Court is likely to be called upon, once again, in the coming decades to equitably apportion the waters of an interstate stream upon which millions of Americans rely. When it is, the Court will again have the opportunity do what it should have done a half century ago: make clear that when states ask the Court to divide waters, they come before it as equals, without regard to the accidents of geography and history—whether a state is upstream or downstream, whether its economy is young or old. The Court should take advantage of that chance to set its doctrine right.

It is not hard to understand why the Court has relied so heavily on prior appropriation: The alternative would require it to apply a difficult, multifactor, un-rule-like, equitable balancing approach that provides little certainty to would-be litigants. The Court has rightly spurned this type of inquiry in other areas of law. But original jurisdiction actions between sovereign states are *sui generis*: Only in this context is the Court called upon to resolve disputes that, were they to occur between independent nations, would be settled by treaty or by force. Both for practical reasons and because of deeply rooted constitutional principles, the often harsh, winner-take-all rules of prior appropriation are ill-suited to this delicate task. Instead, equity must be the Court's watchword—just as it is the cornerstone of international law in cases of cross-border water disputes.

This Article proceeds in four parts. Part I provides a short primer on *Arizona v. California*, briefly summarizing the development of the Colorado River Compact, the Boulder Canyon Project Act, and the many years of litigation that culminated in the Court's 1963 opinion. Part II explains the essential difficulty that confronted the Court at the time. It traces the evolution of the Court's equitable apportionment jurisprudence in the decades before *Arizona v. California*, exploring how and why prior appropriation came to be the defining principle of that body of law. Part III presents original historical research from the papers of the Justices who decided the case, demonstrating that a reluctance to apply prior appropriation, and thereby deny Arizona's claim to Colorado River water, lay behind the Court's decision to adopt the highly questionable rationale it used to resolve the case. Part IV outlines a better path the Court could have taken. It seeks to demonstrate the fundamental incompatibility between prior appropriation and equitable apportionment—arguing that although prior appropriation has served the West very well as a tool of intrastate water allocation, it is not a sound basis for dividing water between sovereign states in a federal system. The Article concludes by surveying the future landscape of interstate water allocation in light of looming shortages, discussing the opportunities and challenges the Court will likely have in settling high-stakes disputes between states seeking every drop of water they can get.

## I. ARIZONA V. CALIFORNIA: A PRIMER

### A. *The Colorado River Compact and the Boulder Canyon Project Act*

The Supreme Court's 1963 ruling had been decades in the making. The struggle among the seven Colorado River basin states (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming) for the river's water culminated, at least temporarily, in the Colorado River Compact of 1922 and the Boulder Canyon Project Act of 1928. A full recounting of the history of those enactments is well beyond this Article's scope.<sup>6</sup> For those unfamiliar with that history, however, a brief synopsis is necessary in order to understand the ensuing decades of litigation between Arizona and California.

Nearly as soon as John Wesley Powell made the first known passage through the Grand Canyon in 1869, it became clear that the Colorado River would be the main (in some places, the only) viable long-term source of water for much of the Southwest.<sup>7</sup> At the turn of the century, the region remained sparsely populated and largely undeveloped, with one notable exception: Southern California. Between 1880 and 1900 the population of Los Angeles grew nearly tenfold, exceeding 100,000 by the turn of the century.<sup>8</sup> And settlers in the Imperial Valley, a region in the far southeastern corner of California with extremely fertile soil but no water, had begun irrigating their fields with Colorado River water.<sup>9</sup> In doing so, Imperial Valley farmers faced two major obstacles. First, by geographical necessity, their irrigation canal ran through Mexico, which wanted the same water to irrigate its own land.<sup>10</sup> And second, the settlers lacked the capital and engineering expertise to build reliable infrastructure—a fact that became painfully evident when, during the flood year of 1905, they accidentally diverted the Colorado's entire flow, turning the low-lying Salton Sink into the Salton Sea.<sup>11</sup>

During the first two decades of the twentieth century, California's delegation in Congress—led by Senator Hiram Johnson and Representatives William Kettner of San Diego and Phil Swing of Imperial County—tried, without

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6. This section summarizes accounts of the period made at much greater length by others. The definitive source for the period in question is NORRIS HUNDLEY, JR., *WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST* (2d ed. 2009). Other useful sources whose accounts I have drawn upon include PHILIP L. FRADKIN, *A RIVER NO MORE: THE COLORADO RIVER AND THE WEST* (2d ed. 1996); BEVERLEY BOWEN MOELLER, *PHIL SWING AND BOULDER DAM* (1971); and DANIEL TYLER, *SILVER FOX OF THE ROCKIES: DELPHUS E. CARPENTER AND WESTERN WATER COMPACTS* (2003).

7. See generally WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* (reprint ed. 1992).

8. *General Population by City, Los Angeles County, 1850–1900*, LOS ANGELES ALMANAC, <http://www.laalmanac.com/population/po25.htm> (last visited Mar. 1, 2014) (showing city of Los Angeles population as 11,183 in 1880 and 102,479 in 1900).

9. See, e.g., HUNDLEY, *supra* note 6, at 17–22.

10. See, e.g., *id.* at 22–30.

11. See, e.g., Jeffery Kishel, *Lining the All-American Canal: Legal Problems and Physical Solutions*, 33 NAT. RESOURCES J. 697, 701–04 (1993).

success, to secure federal financing for a series of major water projects on the lower Colorado River. In a series of so-called “Swing–Johnson bills,” they sought to build an All-American Canal, which would supply the Imperial Valley with water secure from Mexican interference, as well as a dam that would provide both water and power to the rapidly growing urban coastal areas while at the same time controlling the floods that frequently battered the region.<sup>12</sup> Their efforts were stymied in part by the reluctance of Easterners to fund what they considered—with some justification—to be a wasteful handout whose main effect would be to hurt their own states’ farmers by flooding the market with cheap crops.<sup>13</sup> But a more significant barrier to the water projects Californians wanted was the strenuous opposition that came from their fellow Colorado Basin states. Representatives from these states feared—again, with some justification—that explosive growth in Los Angeles and the Imperial Valley would ensure, either legally or politically, that California would control in perpetuity the lion’s share of the Colorado’s annual flow.<sup>14</sup> The Supreme Court did much to stoke this fear when, in 1922, it held (mistakenly, I will argue) that the doctrine of prior appropriation generally controls disputes between states that apply the doctrine to intrastate water disputes within their territory.<sup>15</sup>

In this conflict, though, were the seeds of a bargain that would eventually become the Colorado River Compact. California would agree to place a ceiling on its annual appropriation from the river, and in exchange, the other states would consent to the construction of infrastructure to store and deliver that water. After protracted negotiations, the seven states in 1922 signed the Colorado River Compact.<sup>16</sup> The Compact divides the signatories into Upper Basin states (Colorado, New Mexico, Utah, and Wyoming) and Lower Basin states (Arizona, California, and Nevada), with the dividing line drawn at Lees Ferry, a point on the river in northern Arizona.<sup>17</sup> Article III of the Compact apportions to each basin “the exclusive beneficial consumptive use of 7,500,000 acre-feet<sup>18</sup> of water per

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12. See generally MOELLER, *supra* note 6, at 20–35, 86–122.

13. See HUNDLEY, *supra* note 6, at 118–19.

14. See *id.* at 121–24.

15. See *Wyoming v. Colorado*, 259 U.S. 419, 467–71 (1922). For more on Upper Basin fears that California would gain appropriative rights to the waters of the Colorado, see TYLER, *supra* note 6, at 111–22; Gregory J. Hobbs, Jr., *Colorado River Compact Entitlements, Clearing Up Misconceptions*, 28 J. LAND RESOURCES & ENVTL. L. 83, 84–85 (2008); James S. Lochhead, *An Upper Basin Perspective on California’s Claims to Water from the Colorado River Part I: The Law of the River*, 4 U. DENV. WATER L. REV. 290, 297–98 (2001).

16. The text of the Compact is available on the U.S. Bureau of Reclamation’s website, <http://www.usbr.gov/lc/region/pao/pdfiles/crcompct.pdf>, and some of the signatory states have codified it. See, e.g., COLO. REV. STAT. § 37-61-101; UTAH CODE ANN. § 73-12a-2.

17. As a consequence of this division, a small part of Arizona drains into the Colorado above Lees Ferry (i.e., in the Upper Basin), and parts of Utah and New Mexico drain into the Colorado in the Lower Basin.

18. An acre-foot is the volume of water required to cover one acre of land to a depth of one foot. It is equivalent to about 325,851 gallons.

annum” of the waters of the Colorado River system, permits the Lower Basin states to consume an additional one million acre-feet per year, and obligates the Upper Basin to deliver to the Lower Basin at Lees Ferry at least 75 million acre-feet of water over every ten-year period. In other words, the Compact divided the waters of the Colorado River between the Upper Basin and Lower Basin, but said nothing about how the water should be divided within each basin, leaving that issue for another day.

The solution pleased everyone but Arizona. The Upper Basin states had gotten what they wanted: protection from explosive growth in California. California had largely cleared the way for congressional action to build its water projects. And Nevada, which had almost no people and little irrigable land near the Colorado River at the time, could feel confident that it would get the small amount of water that it thought it could put to use. Alone among the basin states, Arizona had good reason to be upset about the Compact: It had gotten no protection from California, since the Compact did not divide the water among the Lower Basin states. Perhaps worse, it could no longer count on the support of the other basin states in blocking the federal water projects that would allow California’s growth to accelerate even faster. In essence, Arizonans felt, they alone had been thrown to the wolves, left at the mercy of their much more powerful western neighbor.<sup>19</sup>

This sentiment quickly manifested itself as the legislatures of the basin states debated whether to ratify the Compact. Nevada, New Mexico, and Utah assented to the proposal almost immediately; there was somewhat more resistance in Wyoming and Colorado, but they soon followed suit. Californians grumbled that the Compact did not *guarantee* congressional approval of the storage dam and canal they desired, and some sought to add more explicit language committing to those projects. This angered the other basin states, however, so the effort was eventually dropped and California too ratified the Compact.<sup>20</sup> Arizona, though, was another story. Its newly elected governor, George W.P. Hunt, doggedly fought the Compact. Along with his fellow opponents, Hunt made a variety of arguments, ranging from the reasonable (that the Compact put Arizona at the mercy of California and did too little to protect Arizona’s right to use the water in its tributaries of the Colorado), to the unreasonable (that if Arizona held out, it could hope to somehow appropriate virtually the entire annual flow of the Colorado), to the deranged (that the Compact was part of a Mexican plot to establish a colony of Chinese farm laborers in the Southwest, precipitating an intercontinental war).<sup>21</sup> Arrayed on the pro-Compact side were a number of influential leaders including Herbert Hoover, the Secretary of Commerce and chairman of the Colorado River Commission, and Carl Hayden, Arizona’s lone member of the House of Representatives. Despite their efforts, the Compact remained stalled in the Arizona legislature, and when Hunt was reelected in 1924, the other basin states began to realize that Arizona’s ratification would not soon be forthcoming.

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19. See DEAN E. MANN, *THE POLITICS OF WATER IN ARIZONA* 81–84 (1963).

20. HUNDLEY, *supra* note 6, at 226–32.

21. *Id.* at 232–46; see also Daniel Tyler, *Delphus Emory Carpenter and the Colorado River Compact of 1922*, 1 U. DENV. WATER L. REV. 228, 259–60 (1998).

At first it appeared that this might doom the Compact, and some of the basin states began preparations for the nightmare scenario the Compact was designed to avoid: a lengthy, expensive, painful, seven-state lawsuit in the Supreme Court to divide the river. But then it dawned on the states that a better alternative was simply to ignore Arizona and craft an agreement among the other six basin states that would still limit California's claim on Upper Basin water and pave the way for a federally financed dam and canal. Those negotiations nonetheless proved difficult: California continued to insist on some sort of guarantee that its willingness to limit its allocation would be accompanied by congressional approval of the infrastructure funding it so desperately wanted.<sup>22</sup> Upper Basin states began to worry that if California took the entire Lower Basin share for itself, Arizona would seek to satisfy its needs from the Upper Basin allotment.<sup>23</sup> A conference among the governors of the basin states at Denver in 1927 failed to resolve things, with the main holdup being that Arizona and California still could not agree on how to divide the Lower Basin's share among themselves (with several hundred thousand acre-feet of water per year separating their demands).<sup>24</sup> The Upper Basin states, increasingly fearful that no agreement would be reached, decided to bypass the squabbling states and go to Congress. They realized that if they could amend the Swing–Johnson bill to impose the limitations on California that they sought, California's congressional delegation, which had been pushing the legislation unsuccessfully for nearly two decades, would likely relent and accept the limitation as the price of finally securing congressional approval of a dam and canal.<sup>25</sup>

They were right. Congress ultimately approved the fourth Swing–Johnson bill, which became the Boulder Canyon Project Act, after it had been amended to the Upper Basin's liking.<sup>26</sup> It granted congressional approval to the Colorado River Compact, to be effective upon the ratification of the six of the basin states, contingent on the California legislature passing a law limiting itself to 4.4 million acre-feet of the Lower Basin's 7.5 million acre-foot annual share.<sup>27</sup> Californians were not pleased with that limitation, which was 200,000 acre-feet less than they had sought at the Denver conference. But, in return, the bill gave California what it had so long sought: a large dam (which would become Hoover Dam) on the lower Colorado River for water storage and hydroelectricity, plus the All-American Canal to bring water to the Imperial Valley without cutting across Mexico. Along with the Colorado River Aqueduct, financed and built during the Great Depression

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22. See HUNDLEY, *supra* note 6, at 226–32.

23. See Tyler, *supra* note 21, at 250–56.

24. *Arizona v. California*, 373 U.S. 546, 558–59 (1963).

25. See HUNDLEY, *supra* note 6, at 266–70.

26. Boulder Canyon Project Act, 45 Stat. 1057 (1928) (codified at 43 U.S.C. §§ 617–617u (2012)).

27. *Arizona v. California*, 373 U.S. at 560–61.



by Los Angeles's Metropolitan Water District,<sup>28</sup> this promised to ensure Southern California a reliable water supply for the foreseeable future.

The Act contained two other provisions that would loom large during the ensuing thirty years of litigation between Arizona and California. Section 4(a) of the Act authorized, but did not require, Arizona, California, and Nevada to enter into a compact that would divide the Lower Basin's share between them (with each state receiving, respectively, 2.8 million, 4.4 million, and 300,000 acre-feet), while splitting between California and Arizona any surplus water in the river and granting Arizona exclusive use of its tributaries, which were to be excluded from any obligation to deliver water to Mexico under a future treaty.<sup>29</sup> Meanwhile, section 5 of the Act authorized the Secretary of the Interior "to contract for the storage of water in [Lake Mead] and for delivery thereof at such points on the river and on said canal as may be agreed upon," and provided that "[n]o person shall have or be entitled to have the use for any purpose of the water stored . . . except by contract made as herein stated."<sup>30</sup> In December 1928, the House and Senate passed the bill by healthy margins, and President Calvin Coolidge signed it into law. Within three months, the requisite six basin states (all but Arizona) had ratified the Compact, California had agreed to the limitation the Act demanded, and plans moved ahead for construction of the dam and canal.

### ***B. Three Decades of Litigation***

Arizona had no intention of taking all this lying down. In rapid succession, it filed three separate lawsuits invoking the Supreme Court's original jurisdiction, without success.<sup>31</sup> First, in 1930 Arizona sought a declaratory judgment that the construction of a dam at Boulder Canyon would be unconstitutional without Arizona's consent, since one side of the dam would be anchored on Arizona's soil and it might interfere with Arizona's right to regulate appropriation of water within its borders. The Supreme Court held that Arizona's consent was not necessary because the federal government, under its Commerce Clause power, had the authority to build the dam to improve navigation and control floods, and that doing so would not interfere with Arizona prior appropriation law.<sup>32</sup> Arizona next sought to introduce oral testimony that the additional one million acre-feet allocated to the Lower Basin under Article III(b) of the Compact referred to tributary water intended solely for Arizona's benefit, but the Court held that such testimony was irrelevant because it was not written down and because Arizona had not ratified the Compact.<sup>33</sup> Frustrated, Arizona

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28. See Steven P. Erie & Pascale Joassart-Marcelli, *Unraveling Southern California's Water/Growth Nexus: Metropolitan Water District Policies and Subsidies for Suburban Development, 1928–1996*, 36 CAL. W. L. REV. 267, 271–73 (2000).

29. See 43 U.S.C. § 617c(a) (2012).

30. *Id.* § 617d.

31. See Margaret Bushman LaBianca, *The Arizona Water Bank and the Law of the River*, 40 ARIZ. L. REV. 659, 665–66 (1998); Mark Wilmer, *Arizona v. California, A Statutory Construction Case*, 6 ARIZ. L. REV. 40, 48–49 (1964).

32. *Arizona v. California*, 283 U.S. 423 (1931).

33. *Arizona v. California*, 292 U.S. 341 (1934).

decided to simply ask the Court to equitably apportion the waters of the Colorado between it and the other basin states, but the Court dismissed Arizona's complaint because the United States, which had substantial claims and interests in the river, was an indispensable party but could not be joined without its consent.<sup>34</sup>

Stymied by the Court, Arizona eventually gave in. In 1944, it ratified the Compact and contracted with the federal government for delivery of its share of the water. It faced just one remaining problem, but a major one: There was no way to get the water from where it was (the Colorado River) to where Arizona needed it (the Phoenix and Tucson areas, and agricultural operations in the Salt and Gila River valleys). And sparsely populated Arizona, unlike Southern California, lacked the financial wherewithal to build a canal on its own.<sup>35</sup> Arizona's influential senators, Carl Hayden and Ernest McFarland, sought to build support on Capitol Hill for a federally financed water infrastructure system for Arizona, which would eventually become the Central Arizona Project. In 1950 and again in 1951 the Senate approved such a bill, but California's powerful delegation in the House of Representatives consistently blocked it, arguing that until a compact among the Lower Basin states formally quantified each state's allocation—a compact, of course, which California had no intention of ever entering into—more federal funding of water projects was unwise.<sup>36</sup> With nowhere left to turn, Arizona returned once more to the Supreme Court in 1952, seeking an equitable apportionment—this time with the federal government's agreement to participate, giving the Court jurisdiction to hear the case.<sup>37</sup>

In 1954, the Court appointed a special master, Chicago attorney George Haight, to oversee fact-finding in the case. After Haight's death the following year, the Court appointed Simon Rifkind, the prominent New York lawyer and former federal judge, to replace him. California first sought to join the Upper Basin states as necessary parties, which undoubtedly would have dragged out the case for many years, but Rifkind (and ultimately the Court) held that only the Lower Basin states had a sufficient interest in the case to merit joinder.<sup>38</sup> The case continued and Rifkind began taking evidence in 1956 in San Francisco. California's case rested primarily on interstate prior appropriation: It argued that through its beneficial use of Colorado River water, it had acquired rights to more than 5.3 million acre-feet per year.<sup>39</sup> Arizona's case initially rested on the doctrine of equitable apportionment—essentially, that it would be unfair for California to get so much water and Arizona to get so little. This line of argument faced two serious

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34. *Arizona v. California*, 295 U.S. 174 (1935).

35. See MANN, *supra* note 19, at 68–69, 88–89.

36. See JACK L. AUGUST, JR., *DIVIDING WESTERN WATERS: MARK WILMER AND ARIZONA V. CALIFORNIA* 51–58 (2007).

37. See Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 42–43 (1966); Frank J. Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, 1963 SUP. CT. REV. 158, 162. For a thorough recent overview of the arguments made by the parties during this round of litigation, see Lawrence J. MacDonnell, *Arizona v. California Revisited*, 52 NAT. RESOURCES J. 363, 372–84 (2012).

38. *Arizona v. California*, 350 U.S. 114 (1955).

39. AUGUST, *supra* note 36, at 62–63.

problems, though. First, it was a hazy legal theory not grounded in any rule: It relied on considerations like Arizona's rapid rate of population growth, its large potential irrigable acreage, and its lack of any reliable alternative sources of water.<sup>40</sup> And second, Supreme Court precedent suggested that prior appropriation, not equity, would be the basis for resolving the dispute between the two states (more on this in the next section of the Article).<sup>41</sup>

Arizona's attorney, Phoenix lawyer Mark Wilmer, soon hit upon a fateful solution to the dilemma: He would argue that Congress, in enacting the Boulder Canyon Project Act, had actually divided the water between the Lower Basin states, with California to receive 4.4 million acre-feet per year, Arizona to receive 2.8 million acre-feet plus the exclusive use of its tributaries, and Nevada to receive 300,000 acre-feet. In August 1957, Arizona filed a brief introducing this new theory, repudiating its earlier reliance on the doctrine of equitable apportionment.<sup>42</sup> It quickly persuaded Rifkind, who in 1960 issued his report, concluding that the Project Act had granted the Secretary of the Interior the authority to divide the water stored in Lake Mead among the Lower Basin states in the proportion suggested by Arizona.<sup>43</sup> California unsurprisingly took issue with Rifkind's recommendations, bringing the matter before the Supreme Court. The Court (with Chief Justice Earl Warren, the former governor of California, recused) heard sixteen hours of oral argument over the span of four days in January 1962, but proved unable to decide the case that Term, due in large part to the sudden resignation, for health reasons, of Justices Felix Frankfurter and Charles Evans Whittaker.<sup>44</sup> With their replacements, Byron White and Arthur Goldberg, seated, the Court reheard oral argument in November of 1962. When the Court finally issued its opinion in June 1963, Arizonans rejoiced: They had won a tremendous victory.<sup>45</sup>

Writing for the Court, Justice Hugo Black reached two key conclusions: first, that the Boulder Canyon Project Act had divided the Colorado River between the Lower Basin states in the 4.4/2.8/0.3 million acre-feet proportion mentioned in section 4(a) of the Act; and second, that Arizona's tributaries were not included in the Project Act, meaning Arizona's use of tributary water would not be counted

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40. See *id.* at 66–67, 84.

41. See *infra* Part II.

42. AUGUST, *supra* note 36, at 78.

43. Report of the Special Master at 151–62, Dec. 5, 1960, *Arizona v. California* (No. 8, Orig.) [hereinafter Special Master's Report] (copy on file with Author).

44. Whittaker suffered an apparent nervous breakdown that he attributed to the stress surrounding his vote in *Baker v. Carr*, 369 U.S. 186 (1962). See Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 36 & n.43 (1997); see also Statement by Chief Justice Warren (Mar. 29, 1962) (on file in William O. Douglas Papers, Library of Congress, Manuscript Division, Box 1259). Frankfurter left the Court four months after suffering a stroke in April 1962. See *Felix Frankfurter Dies; Retired Judge Was 82*, HARVARD CRIMSON, Feb. 23, 1965, available at <http://www.thecrimson.com/article/1965/2/23/felix-frankfurter-dies-retired-judge-was/>.

45. See AUGUST, *supra* note 36, at 90–91.

toward its 2.8 million acre-feet allotment.<sup>46</sup> On the question of the tributaries, the Court noted that the statutory language favored California: The Project Act (and the accompanying bill enacted by the California legislature) limited California to 4.4 million acre-feet “of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River Compact,” plus half of any surplus.<sup>47</sup> Article III(a) of the Compact, in turn, referred to the waters of the “Colorado River system,” which it defined to include all tributaries.<sup>48</sup> But, the Court concluded, Congress surely did not mean to include Arizona’s use of its tributaries in its 2.8 million acre-foot allotment—among other things, that would mean Congress had opted to give California more water than it had been willing to settle for at the Denver governors’ conference in 1927,<sup>49</sup> and would mean that Congress had implausibly ignored Utah and New Mexico, both of which had Lower Basin tributaries but no claim on the mainstem, in dividing Lower Basin water.<sup>50</sup> Indeed, the Court split seven-to-one in Arizona’s favor on this point, with only Justice William O. Douglas dissenting.<sup>51</sup>

But on the all-important first question—whether the Project Act had actually divided the mainstem water among the Lower Basin states, or whether equitable apportionment would govern—a bare five-Justice majority determined that Congress had indeed made such a division. The Court first emphasized the importance of resolving the matter once and for all, rather than leaving it to future negotiations between the states, since otherwise “the conflicting claims of the parties will continue . . . to raise serious doubts as to the extent of each State’s right to appropriate water from the Colorado River System.”<sup>52</sup> It then looked to the legislative history of the Project Act, noting that although section 4(a) only invited (and did not require) the Lower Basin states to enter into the compact it outlined, it reflected Congress’s desire for the water to be divided in the 4.4/2.8/0.3 million-acre-foot proportion. That desire, the Court held, also manifested itself in section 5 of the Act, which, as the Court read it, authorized “the Secretary of the Interior, through his section 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water.”<sup>53</sup> This authority, in the Court’s view, included full discretion to decide, in time of shortage, which users should be cut off first.<sup>54</sup> The Court had a ready response to those who saw its holding as working a

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46. *Arizona v. California*, 373 U.S. 546, 572, 590–91 (1963). The Court’s opinion also resolved other issues beyond the scope of this Article, including a separate dispute between Arizona and New Mexico over the waters of the Gila River and the claims made by the United States for water for Indian tribes and public lands. *See id.* at 594–601.

47. *Id.* at 568 (quoting 43 U.S.C. §617c(a) (2012)).

48. *See* COLORADO RIVER COMPACT art. II(a), III(a) (codified at, *e.g.*, COLO. REV. STAT. §37-61-101).

49. *Arizona v. California*, 373 U.S. at 572–73.

50. *Id.* at 573.

51. *Id.* at 603 (Harlan, J., dissenting on apportionment issue); *see also id.* at 631–32 (Douglas, J., dissenting on both apportionment and tributary issues).

52. *Id.* at 564 (opinion of the Court).

53. *Id.* at 580.

54. *Id.* at 593.

breathtaking expansion of federal authority into an area of traditional state control: federal money, federal power.<sup>55</sup> In enacting the Project Act, “Congress responded to the pleas of the States to come to their aid.”<sup>56</sup> Beggars cannot be choosers, and in rescuing the States from their poverty and bickering, Congress had no intention of leaving the division of water to a process of negotiation among states that had long proven unable to agree.<sup>57</sup> The Court also decided a handful of other issues, most notably involving the water rights of Indian tribes and the federal government in the Lower Basin.<sup>58</sup> Its resolution of these questions was critical in its own right, but is beyond the scope of this Article.

Both Justice Harlan (joined by Justices Douglas and Stewart) and Justice Douglas authored unusually vehement dissents. Justice Douglas read his dissent from the bench in an “unusually sharp . . . tenor” that “startled those in the courtroom.”<sup>59</sup> Douglas wrote:

Much is written these days about judicial lawmaking; and every scholar knows that judges who construe statutes must of necessity legislate interstitially . . . . The present case is different. It will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature. The present decision, as Mr. Justice Harlan shows, grants the federal bureaucracy a power and command over water rights in the 17 Western States that it never has had, that it always wanted, that it could never persuade Congress to grant, and that this Court up to now has consistently refused to recognize.<sup>60</sup>

Justice Harlan’s assessment was nearly as harsh:

The Court’s conclusions respecting the Secretary’s apportionment powers, particularly those in times of shortage, result in a single

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55. Indeed, in section 18 of the Project Act, Congress had sought explicitly to *preserve* state power, providing that “Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders.” *Id.* at 585 (quoting 45 Stat. 1057, 1065 (1928)). The Court announced that “nothing in [section 18] affects our decision” about the scope of federal authority. *Id.* at 585–86.

56. *Id.* at 588.

57. *Id.* at 589 (“It was only natural that the United States, which was to make the benefits available and had accepted the responsibility for the project’s operation, would want to make certain that the waters were effectively used.”).

58. *See id.* at 595–601.

59. *Douglas Upbraids Black from Bench*, N.Y. TIMES, June 4, 1963, at 1. Some Court observers speculated that Douglas’s hostility toward Black was inspired in part by an ongoing feud between the two men over the propriety of Douglas’s multiple divorces and subsequent remarriages to younger women. *See* Jack Anderson, *Justices’ Tiff Caused by Woman*, WASH. POST, June 7, 1963, at D13. Black kept copies of these two newspaper articles, and others, in his files. *See* Hugo L. Black Papers, Library of Congress, Manuscript Division, Box 370, Folder 7.

60. *Arizona v. California*, 373 U.S. at 628 (Douglas, J., dissenting).

appointed federal official being vested with absolute control, unconstrained by adequate standards, over the fate of a substantial segment of the life and economy of three States. . . . Today's result, I venture to say, would have dumbfounded those responsible for the legislation the Court construes, for nothing could have been farther from their minds or more inconsistent with their deeply felt convictions.<sup>61</sup>

Justice Harlan offered a point-by-point rebuttal of the Court's arguments. Surveying the same legislative history, Justice Harlan noted that Congressman Swing and other major proponents of the Project Act had gone out of their way to emphasize that the federal involvement would not displace traditional state power over water appropriation, a key concern of the federalist-minded Westerners who had drafted the legislation.<sup>62</sup> Section 4 of the Act, Senator Johnson emphasized, was not to "be construed . . . as being the expression of the will or the demand or the request of the Congress" regarding the appropriate division of water,<sup>63</sup> and section 5, far from being an unconstrained grant of discretion to the Secretary of the Interior, was intended primarily to raise revenue and to ensure that Arizona could not receive water from Lake Mead in an attempt to circumvent the Colorado River Compact, which Arizona had not yet ratified.<sup>64</sup> It was not a congressional appropriation of water between the Lower Basin states; even less was it an authorization for the Secretary to decide who should be cut off in time of shortage.<sup>65</sup>

Above all, Justice Harlan emphasized, "Congress' entire approach . . . was governed by [a] deep-seated hostility to federal dictation of water rights."<sup>66</sup> Rather than tell states what to do, Congress repeatedly resorted to awkward and cumbersome shortcuts that avoided stepping on states' toes—making it "inconceivable" and "utterly incredible" to think that Congress intended section 5 to sub silentio grant unfettered control over the region's most precious resource to a single unelected federal bureaucrat.<sup>67</sup> Indeed, one of the many ironies of the case is that Arizona, a state that—from Barry Goldwater to William Rehnquist to Sandra Day O'Connor to Jan Brewer—is perhaps more closely associated than any other with the movement to limit federal power over the past half century, owes no

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61. *Id.* at 603–04 (Harlan, J. dissenting in part).

62. *Id.* at 604–05.

63. *Id.* at 606.

64. *Id.* at 615–16.

65. *Id.* at 625–27.

66. *Id.* at 612.

67. *Id.* at 612–14. For instance, rather than merely impose the 4.4 million acre-foot limitation on California (which would have been well within its power), Congress made the entire legislation contingent on the California legislature's voluntary acceptance of such a limitation—just one indication of Congress's paramount concern with not imposing its will on the states.

small part of its current prosperity to a judicial opinion that proudly and unabashedly ran roughshod over principles of federalism and decentralization.<sup>68</sup>

### C. *Fallout and Reaction*

The Court's opinion and its decree dividing the water, which came the following year,<sup>69</sup> quickly broke the logjam on Capitol Hill. California's strategy of blocking construction on any water project that would allow Arizona to share in the benefits of Colorado River water depended on the perception that the legal status of the water remained up in the air. Now that Arizona had an unequivocal legal entitlement to at least 2.8 million acre-feet per year of mainstem water, California decided the public-relations cost of maintaining its position was unacceptably high. Governor Pat Brown announced that the state would "not attempt to win by obstruction what it has not won by litigation,"<sup>70</sup> but a more accurate characterization would be that California would not seek to win through overt bad-faith public obstruction what it could no longer win through subtle, behind-the-scenes, superficially principled obstruction. In 1968, Congress passed and President Lyndon Johnson signed into law the Colorado River Basin Project Act, which finally authorized the Central Arizona Project, to bring Arizona the water it had so long sought.<sup>71</sup> California did manage to extract one key concession in exchange for its support: a provision that in the event of shortage, California would receive its full 4.4 million-acre-foot allotment before Arizona would get anything.<sup>72</sup>

Among the scholars and commentators who reviewed the Court's opinion, a consensus quickly developed. As a policy matter, it was a good thing—both for Arizona and for the region as a whole—that Arizona had secured a legal right to its share of the river's flow, providing the impetus for the Central Arizona Project and setting the stage for rapid economic growth in the region.<sup>73</sup> Had the outcome been otherwise, California could have been expected to use its influence in the House of Representatives to block any agreement, keeping Arizona underdeveloped in the hopes of maximizing its own share of water.<sup>74</sup> But as a legal

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68. Notably, Goldwater himself "gave Arizona's efforts only token support," apparently on account of his philosophical objections to large public-works projects, though he did cosponsor the legislation authorizing the Central Arizona Project. Robert Jerome Glennon, *Coattails of the Past: Using and Financing the Central Arizona Project*, 27 ARIZ. ST. L.J. 677, 722 (1995).

69. *Arizona v. California*, 376 U.S. 340 (1964).

70. Morris K. Udall, Congressman's Report 4 (July 12, 1963), available at <http://www.library.arizona.edu/exhibits/udall/congrept/88th/630712.html>.

71. Pub. L. No. 90-537, 82 Stat. 885 (1968).

72. 43 U.S.C. § 1521(b) (2012); see also Glennon, *supra* note 68, at 711; Douglas L. Grant, *Collaborative Solutions to Colorado River Water Shortages: The Basin States' Proposal and Beyond*, 8 NEV. L.J. 964, 971 (2008).

73. Edward W. Clyde, *The Colorado River Decision—1963*, 8 UTAH L. REV. 299, 310–11 (1964); David Haber, *Arizona v. California—A Brief Review*, 4 NAT. RES. J. 17, 26–27 (1964); Meyers, *supra* note 37, at 55; Trelease, *supra* note 37, at 168–69.

74. Meyers, *supra* note 37, at 55.

matter, all but the most die-hard Arizona partisans agreed, the opinion was indefensible. Its reasoning was “not impressive,” “thinly unconvincing,” and “absolutely inconceivable.”<sup>75</sup> It allowed the federal government to “contravene a fundamental principle of state water law in favor of a federal purpose not even articulated . . . in the Act.”<sup>76</sup> It was a “major departure from principles and practices of long standing,”<sup>77</sup> and a “long and tortuous tracing of a justification” for an “apparently indefensible piece of statutory interpretation.”<sup>78</sup> It is hard to think of another Supreme Court case that elicited such a universally divided verdict: policy good, reasoning bad.

## II. THE SUPREME COURT AND THE DOCTRINE OF EQUITABLE APPORTIONMENT

This history all raises the question: Couldn't the Court have reached the same result it did—guaranteeing Arizona a definite quantity of Colorado River water, thus allowing construction to proceed on the Central Arizona Project—using a more persuasive legal rationale? The answer is that it could have, but it would have had to overrule, or at least significantly alter, 40 years of its own (ill-conceived) precedent in the realm of equitable apportionment. The Court would have had to revisit its conclusion that the doctrine of prior appropriation applied to conflicts between states just as it applies to conflicts between users within a single state, and it would have had to loosen its threshold injury requirement—its insistence that a state demonstrate serious and immediate or imminent harm from another state's water diversions before invoking the Supreme Court's original jurisdiction. These things the Court was unwilling to do.

### A. *Equitable Origins*

Fights over water in the West between competing local users—miners, ranchers, farmers—date at least to the earliest days of the Gold Rush, but not until the twentieth century did major interstate conflicts arise. Interstate compacts would eventually become the most common method for settling these disputes, but states at first turned to the Supreme Court. These early cases commonly arrived at the Court in the same posture: Upstream state A increases its diversions of water; downstream state B complains that A is taking more than it is entitled to; and the Court appoints a Special Master to take testimony and make findings of fact. After the Special Master makes his recommendation, the Court either dismisses the suit or issues a decree dividing the water between the two states. In doing so, the Court

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75. Clyde, *supra* note 73, at 305, 309.

76. Joseph L. Sax, *Problems of Federalism in Reclamation Law*, 37 U. COLO. L. REV. 49, 54 (1964).

77. Trelease, *supra* note 37, at 184.

78. Meyers, *supra* note 37, at 55–56.



applies its equitable apportionment doctrine—a species of federal common law that draws from, but is independent of, state law.<sup>79</sup>

In three major cases and a handful of smaller ones during the first half of the twentieth century, the Court developed its doctrine of equitable apportionment. The first major case came in 1907, when Kansas sought an equitable apportionment of the Arkansas River, claiming that Colorado’s upstream diversions from the river had led to a shortage of water available for irrigation in Kansas.<sup>80</sup> The states took extreme positions: Colorado argued that it had the sovereign right to dispose of water and all other natural resources within its borders, even if that meant completely dewatering the Arkansas River before it entered Kansas. And Kansas argued the reverse: that Colorado lacked the right to reduce the natural flow of the Arkansas by any amount.<sup>81</sup> The Court rejected both positions, holding that the “cardinal rule” governing interstate water disputes was “equality of right. Each state stands on the same level with all the rest.”<sup>82</sup> What that meant is that the Court would equitably weigh all relevant factors, including the extent and economic value of established and potential future uses in each state, the availability of alternative sources of water, the costs to each state of reducing water use or improving conservation, and so forth. In the case at hand, the Court concluded that

the diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet, when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.<sup>83</sup>

The Court emphasized, though, that if the harm suffered by Kansas eventually increased or the benefits accruing to Colorado from its diversions of water diminished, Kansas remained free to seek a new equitable apportionment.<sup>84</sup>

The advantage of this sort of equitable, fairness-oriented, totality-of-the-circumstances approach is that it avoids overly harsh results—it gives the Court the ability to give each state half a loaf. The downside, of course, is that it is imprecise, unpredictable, and perhaps above all unlawyerlike—when the law says, in effect, that the Supreme Court should do whatever is fair, the Court cannot act (as it normally seeks to) simply as a neutral interpreter of laws crafted by the

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79. See, e.g., *Kansas v. Colorado*, 206 U.S. 46, 97–98 (1907); Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 681–83 (1959).

80. *Kansas v. Colorado*, 206 U.S. at 85.

81. *Id.*

82. *Id.* at 97.

83. *Id.* at 113–14.

84. *Id.* at 117–18.

political branches.<sup>85</sup> In almost no other areas of its jurisprudence is the Court asked to undertake such a transparent policymaking role—a role, apparently, that made the Justices uncomfortable.<sup>86</sup> Likely for that reason, in the decades following its decision in *Kansas v. Colorado*, the Court sought to move the doctrine of equitable apportionment away from this overarching concern for equity and toward a more rule-based approach. It did this in two ways: by adopting the doctrine of prior appropriation in interstate water disputes and by establishing a demanding threshold injury test for would-be complaining states.

### ***B. Interstate Prior Appropriation and the Threshold Injury Requirement***

In 1922, the Court took up a dispute between Colorado and Wyoming over the waters of the Laramie River, a small stream flowing northward from Colorado into Wyoming, eventually joining the North Platte River. Colorado had issued two permits for diversions of water from the Laramie, which led Wyoming to believe that there would be insufficient water left in the stream to satisfy the preexisting, senior appropriations that it had authorized.<sup>87</sup> Colorado, in response, sought an equitable apportionment of the river, under the principles of *Kansas v. Colorado*.<sup>88</sup> But this case was different. Whereas Kansas followed the common-law riparian rights doctrine (thanks to the relatively wet eastern half of the state, which developed before its more arid western half), “here the controversy is between states in both of which the doctrine of appropriation has prevailed from the time of the first settlements.”<sup>89</sup> As a result, the Court saw fit to apply the doctrine to a conflict between the states—simply ignoring the state line and giving priority to appropriations earlier in time, wherever they might be.<sup>90</sup> The basic rationale for this approach was that no state could fairly complain if federal law merely gave interstate effect to the law that the state had itself adopted for resolving conflicts between domestic water users.<sup>91</sup>

Writing for the Court, Justice Willis Van Devanter (a Wyomingite) brushed aside Colorado’s complaints that a suit between sovereign states implicated different interests than a suit between private appropriators, since “the interests of the state are indissolubly linked with the rights of the appropriators.”<sup>92</sup> Since the available supply on the Laramie was not enough to meet all the

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85. See, e.g., Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 441 (1995).

86. See Meyers, *supra* note 37, at 48–49.

87. *Wyoming v. Colorado*, 259 U.S. 419, 456 (1922).

88. *Id.* at 457.

89. *Id.* at 465.

90. This approach first appeared in *Bean v. Morris*, 221 U.S. 485 (1911), a suit between two private water users, one in Montana and one in Wyoming. *Wyoming v. Colorado* marked the first time the Court applied it in an original jurisdiction action between states.

91. See *Wyoming v. Colorado*, 259 U.S. at 470 (“The principle on which [prior appropriation] proceeds is not less applicable to interstate streams and controversies than to others.”).

92. *Id.* at 468.

appropriations in both states, and since Wyoming's appropriations were senior in time to Colorado's and accounted for nearly all the Laramie's annual flow, Colorado was permitted to appropriate only a small fraction of what it had sought.<sup>93</sup> The Upper Basin states quickly recognized the significance of this result: what could happen on the Laramie could happen on the Colorado, too—giving new impetus to the push for a Colorado River Compact.<sup>94</sup> Otherwise, one consequence of interstate prior appropriation would be a race among all Western states to develop and use as much water as they could, lest the region's limited supply be fully appropriated by the time they were ready to claim their share.

The second major tool the Court developed to avoid having to equitably apportion interstate streams was that it heightened the threshold injury requirement—the showing of harm that a complaining state must make at the outset of the case before it can proceed to the merits of its plea for an equitable apportionment. In *Kansas v. Colorado*, though the Court ultimately declined to order an equitable apportionment, it had no trouble finding the matter to be justiciable; it did not require Kansas to demonstrate any particular injury it had suffered as a result of Colorado's appropriations.<sup>95</sup> But soon, the Court began to require more—it announced that it would “not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence.”<sup>96</sup> Thus the Court refused to entertain Connecticut's plea to equitably apportion the waters of the Connecticut River, in response to Massachusetts's plan to divert water for use in Boston and surrounding areas, because even though Connecticut alleged that the proposed diversion would eventually harm its agricultural lands and inhibit its ability to generate hydropower, Connecticut had not shown by clear and convincing evidence that the injury would be sufficiently serious.<sup>97</sup> Likewise, in a dispute between Washington and Oregon over the Walla Walla River, the Court declined to consider Washington's request for an equitable apportionment on the ground that Washington's alleged injury was too speculative.<sup>98</sup> In so doing, it emphasized that “the burden of proof falls heavily” on the complaining state—“more heavily, we have held, than in a suit for an injunction when states are not involved.”<sup>99</sup>

The Court's last major equitable apportionment case of the first half of the century completes the picture. Nebraska sought an equitable apportionment of

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93. *Id.* at 495–96.

94. *See supra* note 15.

95. 206 U.S. 46, 98 (1907) (“Surely here is a dispute of a justiciable nature which might and ought to be tried and determined. If the two states were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this Court.”).

96. *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931); *see also* *New York v. New Jersey*, 256 U.S. 296, 309 (1921).

97. *Connecticut v. Massachusetts*, 282 U.S. at 663, 666–67.

98. *Washington v. Oregon*, 297 U.S. 517, 524 (1936).

99. *Id.*

the North Platte River among itself, Wyoming, and Colorado.<sup>100</sup> The Court noted that all three states followed the doctrine of prior appropriation,<sup>101</sup> so under *Wyoming v. Colorado*, “that principle would seem to be equally applicable here.”<sup>102</sup> But the Court departed from it to some degree, rejecting the notion that “there must be a literal application of the priority rule.”<sup>103</sup> Instead, while prior appropriation was “the guiding principle for an apportionment, it is not a hard and fast rule.”<sup>104</sup> The Court said it would also look to “physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas,” and more—in other words, precisely the conditions that would factor into equitable apportionment outside the context of prior appropriation.<sup>105</sup> Thus, for instance, the Court declined to shut off junior appropriators in Colorado in order to protect seniors far downstream in Nebraska, because “there is loss of water in transit from the upper downstream sections,” such that “it would be highly speculative whether the water would reach the Nebraska appropriator” at all.<sup>106</sup> And the Court pronounced its reluctance to strictly enforce priorities if doing so “would disturb and disrupt long established uses”—a reluctance it did not have in *Wyoming v. Colorado*, which concerned a proposed *new* diversion.<sup>107</sup> As one commentator has put it:

[R]ead carefully, *Nebraska v. Wyoming* represents a sensitive effort to fashion a law of equitable apportionment that gives great but not

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100. *Nebraska v. Wyoming*, 325 U.S. 589, 592 (1945).

101. As a matter of fact, this is only partially true. Nebraska, like Kansas, straddles the hundredth meridian; its eastern half generally has enough water for nonirrigated agriculture, while its western half does not. As a result, both Nebraska and Kansas are so-called “California doctrine” states, recognizing both appropriative and riparian rights. *See* Clark v. Allaman, 80 P. 571 (Kan. 1905); JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 349 (4th ed. 2006). There are slight nuances in the difference between the two states’ water laws, see, for example, Joseph W. Dellapenna, *Riparian Rights in the West*, 43 OKLA. L. REV. 51, 58–59 (1990), but it is not entirely clear why the Court considered Kansas to be a nonappropriation state in 1907 but considered Nebraska to be an appropriation state in 1945. Part of the answer may be that Kansas’s body of prior appropriation law remained undeveloped until the middle of the twentieth century. *See* 3 WELLS A. HUTCHINS ET AL., WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 296–301 (1977).

102. *Nebraska v. Wyoming*, 325 U.S. at 618.

103. *Id.*

104. *Id.* at 622.

105. *Id.* at 618.

106. *Id.* at 619. It should be noted, though, that this is not actually a departure from prior appropriation at all. Under the so-called “futile call doctrine,” prior appropriation states decline to cut off junior appropriators if the water thereby saved would not reach the downstream senior user (perhaps because of evaporation, percolation, or salinization). *See, e.g.,* Empire Lodge Homeowners’ Ass’n v. Moyer, 39 P.3d 1139, 1156 (Colo. 2001); San Carlos Apache Tribe v. Superior Court *ex rel.* County of Maricopa, 972 P.2d 179, 195 n.9 (Ariz. 1999).

107. *Nebraska v. Wyoming*, 325 U.S. at 619.

controlling weight to local water law. The Court's function is not to depart from local law and divide the waters by judicial fiat but rather to rub off its rough edges in situations where substantial prejudice to another state would result from the application of a local law, even if both states follow the same rule.<sup>108</sup>

This is how the doctrine stood when *Arizona v. California* arrived on the Court's doorstep. Both Arizona and California have long recognized the doctrine of prior appropriation,<sup>109</sup> so the "guiding principle" of any equitable apportionment between the two states would be seniority of appropriation, which obviously favored California. Nor would the caveats and exceptions to the rule that the Court added in *Nebraska v. Wyoming* have been of any help to Arizona. It had no established economy of water usage that it sought to protect; its entire point in bringing suit was that it needed Colorado River water before its economy could get off the ground. And it could not claim that California would get no benefit from limiting Arizona's appropriation; to a first approximation, a zero-sum conflict between the two states existed for a limited supply of water.

Even worse from Arizona's perspective, the Court's threshold-injury rule would almost certainly have kept the Court from deciding any equitable apportionment action between the two states to begin with. At the time, there was a significant surplus of water on the Lower Colorado; the Upper Basin was not close to using its full share of water, nor (thanks mostly to Arizona's inability to bring water to where it needed it) was the Lower Basin. California's diversions of water were not the cause of Arizona's injury. Rather, it was California's intransigence in blocking congressional approval of the Central Arizona Project—intransigence made politically palatable by the absence of a formal division of water among the Lower Basin states. This was not the sort of injury that the Court had previously been willing to recognize as a basis for invoking its original jurisdiction.<sup>110</sup>

Had the Supreme Court approached *Arizona v. California* as an equitable apportionment case, then, its own case law constituted a significant barrier to any ruling in Arizona's favor. Only by effectively repudiating the doctrine of interstate prior appropriation and abandoning its threshold-injury requirement could the Court reach such a result. Ironically, it was the doctrine of equitable apportionment that seemed to stand in the way of an equitable outcome in the case.

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108. A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381, 400 (1985).

109. As noted earlier, see *supra* note 101, California recognizes both appropriative and riparian rights. See *Lux v. Haggin*, 10 P. 674 (Cal. 1886); *SAX ET AL.*, *supra* note 101, at 340. But given the Court's 1945 holding in *Nebraska v. Wyoming* that Nebraska is an appropriation state, there was no basis for treating California as a nonappropriation state for purposes of interstate equitable apportionment.

110. See *Nebraska v. Wyoming*, 325 U.S. at 608 ("[T]he potential threat of injury, representing as it does only a possibility for the indefinite future, is no basis for a decree in an interstate suit."); Meyers, *supra* note 37, at 50 ("[T]he Supreme Court will not adjudicate an interstate water dispute until existing consumptive uses in one state cause harm or give rise to the immediate threat of harm in another case.").

### III. ARIZONA V. CALIFORNIA AT THE SUPREME COURT

The history of the case at the Supreme Court paints a telling portrait of a Court in many respects at odds with its own doctrine. The evidence in this Part comes from the papers of the Justices who decided the case, as well as one of the lawyers who argued it before the Court (Northcutt Ely, who represented California). This evidence, not discussed by prior scholars, shows that the Court seemed poised to side with California on the all-important issue of whether the Boulder Canyon Project Act apportioned the waters of the Colorado among the Lower Basin states. But before any opinion could be handed down, health problems forced Justices Frankfurter and Whittaker to retire. The Court set the case for reargument the following Term and made an about-face, giving Arizona the victory it had long sought, over vehement dissents by Justices Harlan and Douglas. Just as fascinating as the ultimate outcome is the story of how the Court became determined to avoid applying the doctrine of equitable apportionment at all costs, going so far as to embrace a theory whose proponents themselves occasionally admitted had no basis in either statutory text or congressional intent.

#### A. October Term 1961

The case arrived at the Court on California's exceptions to Special Master Rifkind's report, which had sided with Arizona on the two critical issues in the case—holding that Arizona's tributaries were not to be counted against the state for purposes of quantifying its share of water, and that the Project Act authorized the Secretary of the Interior to divide the waters of the Colorado River among the Lower Basin states.<sup>111</sup> The immense stakes were readily apparent to everyone involved. As one California lawyer put it: "The quantity of water in dispute is many times the quantity involved in any of the previous interstate water cases in the original jurisdiction of this Court. The number of people whose lives will be affected is likewise many times again as large as in any previous case."<sup>112</sup>

##### 1. The Frankfurter Memo

Oral argument stretched across four days in early January 1962, with Phoenix attorney Mark Wilmer representing Arizona and veteran water litigator Northcutt "Mike" Ely arguing the case for California. Shortly thereafter, Justice Frankfurter circulated to the other Justices an exhaustive, 142-page memorandum that he evidently intended to serve as an early draft of a potential opinion in the case.<sup>113</sup> The memorandum agreed with the Master on the issue of Arizona's

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111. Special Master's Report, *supra* note 43, at 152, 173.

112. Oral Argument Notes of Charles E. Corker (Nov. 20, 1961) (on file in Northcutt Ely Papers, Stanford University Library Archives, Box 154).

113. Memorandum from Justice Frankfurter (Jan. 1961) (on file in Northcutt Ely Papers, Stanford University Library Archives, Box 159) [hereinafter Frankfurter Memo]. It appears that Ely obtained a copy of the Frankfurter Memo in 1966 from one of Justice Frankfurter's law clerks who worked on the case. *See* Letter from Roland S. Homet, Jr. to Northcutt Ely (Jan. 14, 1966) (on file in Northcutt Ely Papers, Stanford University Library Archives, Box 159). An identical copy of the Frankfurter Memo appears in the papers of

tributaries. But it would have answered the other main question in the case—whether the Project Act authorized the Secretary to apportion the water among the Lower Basin states—with an unequivocal “no,” endorsing instead the rationale California had urged. The story of how the Court, over the course of a year and a half, migrated from this position to the one it ultimately adopted is both a compelling untold story in its own right and a window into the intractable problems with the Court’s equitable apportionment doctrine. Because Frankfurter’s memo provides the best window into the Court’s initial views of the main issues of the case, I will discuss its contents at some length.

After a thorough discussion of the geography and history of the Colorado River Basin, the Compact, and the Project Act, Frankfurter first confronted an issue that threatened to keep the case out of the Court entirely: jurisdiction. As previously noted,<sup>114</sup> a faithful application of the jurisdictional language would likely have doomed Arizona’s case, since there was no shortage of water in the Colorado River at the time (thanks primarily to the leisurely pace of development in the Upper Basin). The Special Master had concluded that the Court did possess jurisdiction, but under a creative and novel rationale: that Congress would be more likely to approve funding for the Central Arizona Project if Arizona could claim a legal entitlement to a specific quantity of water (presumably because it would make California’s obstruction politically untenable).<sup>115</sup> Frankfurter specifically rejected this approach, noting that it rested on unsupported speculation about how the House, Senate, and President would have reacted to a different set of facts.<sup>116</sup>

Instead, Frankfurter concluded that the Court’s jurisdiction could rest on a different ground: that even though the Upper Basin states were not presently using—and might never use—their full allotment of 7.5 million acre-feet, the Court could presume that they were, and thus deem that 7.5 million acre-feet a present claim on the river. When combined with the other claims on the river (including California’s, Arizona’s, Nevada’s, Utah’s and New Mexico’s claims on their Lower Basin tributaries, both basins’ treaty obligations to deliver water to Mexico, and the federal government’s claims on behalf of Indian reservations and federal lands), demand thus exceeded available supply.<sup>117</sup> This, in his view, sufficed to secure jurisdiction, even though no actual user in any state was (or would in the foreseeable future be) at risk of having insufficient water in the river to meet his needs.<sup>118</sup> Doctrinally, this move was quite suspect—it relied on a

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Justices Black, Douglas, Brennan, and White on file in the Manuscript Division of the Library of Congress.

114. See *supra* notes 109–110.

115. See Special Master’s Report, *supra* note 43, at 131.

116. Frankfurter Memo, *supra* note 113, at 81 (“We cannot say that the House of Representatives would have enacted the bill had the Committee reported it. We have even less assurance that subsequent Congresses will enact it, even if we determine the rights of the parties.”).

117. *Id.*

118. *Id.* at 81–82 (“Jurisdiction does not depend on ascertainment of the estimated supply. It is enough that supply is concededly less than all existing claims. Nor must present needs be exigent to sustain jurisdiction. That was settled in *Nebraska v. Wyoming*.”).

misreading of the Court's threshold-injury requirement, and it failed to cure the problem Frankfurter identified with the Master's approach: It rested the Court's jurisdiction on a speculative assessment of what was likely to occur in the future. But it also enabled the Court to reach the substance of the dispute.

On the first main merits question—whether Arizona's tributaries were to be counted against its share of water—Frankfurter sided with Arizona. He acknowledged, as the Master had,<sup>119</sup> that the text of the Project Act favored California, since, in setting forth the California limitation, it referenced a provision of the Compact that covered the entire "Colorado River system," including Arizona's tributaries.<sup>120</sup> But, Frankfurter continued, "[I]teral or surface reading of statutory language is often the most misleading": The legislative history of the Project Act made clear that Congress intended Arizona's tributaries to be excluded from the calculation, so that California's limitation would restrict the state to 4.4 million acre-feet of the first 7.5 million acre-feet *of water from the mainstem*.<sup>121</sup> A decisive point was that California had been willing to settle for 4.6 million acre-feet of the first 7.5 million acre-feet of mainstem water at the Denver conference of 1927, leaving Arizona her tributaries; to read the Project Act as including Arizona's tributaries in California's limitation would leave California with more water than it had been willing to settle for at Denver, a fairly nonsensical result.<sup>122</sup>

This resolution of the California limitation issue quickly came to be accepted by the entire Court (with only Douglas in stubborn opposition), and Black's eventual opinion for the Court in 1963 would adopt it virtually wholesale. While it is no doubt noteworthy for its breezy and casual disregard of the plain text of the statute in favor of legislative history, it was at least a faithful and accurate reading of that legislative history in light of common sense—there seems little doubt that Congress (or at least the senators and representatives who had actually thought about the matter) intended California's limitation to apply to mainstem water only, with the reference to the Compact provision slipping in unintentionally.

Frankfurter's memo is primarily notable, though, for its resolution of the second issue in the case: whether the Project Act actually divided the water among the Lower Basin states (or authorized the Secretary of the Interior to undertake such a division). On this critical issue, Frankfurter came to a conclusion sharply at odds with what the Court would ultimately decide: In Frankfurter's view, the Project Act neither divided the water nor authorized the Secretary to do so.<sup>123</sup>

Frankfurter flatly rejected the view that the Project Act either itself divided the Lower Basin water (as the Master had determined) or that section 5 of the Act authorized the Secretary, in the absence of a Lower Basin compact, to

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119. See Special Master's Report, *supra* note 43, at 173 ("Reflection has led to the conviction that the statutory language does not accurately express the true congressional intention.").

120. See *supra* notes 47–48 and accompanying text.

121. Frankfurter Memo, *supra* note 113, at 83.

122. *Id.* at 92.

123. *Id.* at 98.



make an apportionment by entering into contracts for the distribution of water (as the Court would ultimately hold). Frankfurter first noted that the legislative history the Master relied upon was equivocal at best, and served only to illustrate that certain members of Congress seemed confused about what authority section 5 conferred on the Secretary.<sup>124</sup> Section 5, Frankfurter carefully explained (in language that would eventually appear word-for-word in Justice Harlan's dissent<sup>125</sup>), served two purposes: It was "originally purely a financial tool" designed to ensure the United States got paid for contracted water deliveries, and later came to "serve the additional purpose" of ensuring that Arizona (which at the time the Project Act was passed had not yet ratified the Compact) would not be able to obtain water from Lake Mead except in accordance with the Compact.<sup>126</sup> It was not a vehicle for covertly giving an unelected federal bureaucrat complete discretion as to who should benefit from the West's most essential source of water. Frankfurter continued:

If the statute were completely silent as to whether the Secretary may disregard appropriations, the normal inference would be that Congress did not mean to displace existing law. No reason appears why Congress might have wanted to give the Secretary power to override the law of appropriation and the doctrine of equitable apportionment. . . . There is nothing to indicate that, in the absence of [a Lower Basin compact], the law of appropriation and the doctrine of equitable apportionment might not be quite adequate for the disposition of the remaining Lower Basin water issues. Since Congress was itself unwilling to resolve the delicate controversy of interstate water rights, it is too improbable that it intended to delegate such extensive discretion to an administrator to alter the prevailing law.<sup>127</sup>

Moreover, Frankfurter observed, the statute was *not* silent on this point—it explicitly *required* the Secretary to comply with preexisting appropriation law in determining whom to contract with. Section 18 of the Project Act provided that:

Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.<sup>128</sup>

This, in Frankfurter's view, was "no idle provision. It was inserted in the bill to quiet serious and persistent fears that the Project Act would place control of water rights in the hands of the United States and override state water laws"—a

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124. *Id.*

125. *See Arizona v. California*, 373 U.S. 546, 615 (1963) (Harlan, J., dissenting); *see also id.* at 617–18 (adopting word-for-word other parts of the Frankfurter memo).

126. Frankfurter Memo, *supra* note 113, at 99.

127. *Id.* at 104–05.

128. Boulder Canyon Project Act, § 18, 45 Stat. 1065 (1928), § 18 (codified as amended at 43 U.S.C. § 617q).

longstanding source of controversy between the states and the federal government in the West.<sup>129</sup> “It seems hardly likely that legislators as deeply concerned to preserve state control of water rights as were the Western Senators in 1928 would surrender for no particular purpose the rights of the States to enforce priorities interstate.”<sup>130</sup>

Frankfurter thus concluded that the Project Act did not divide the water among the Lower Basin states. What that meant, he reasoned, was that “Congress intended to leave untouched the law of interstate equitable apportionment,” a proposition for which he cited *Wyoming v. Colorado*, the case that first applied the doctrine of prior appropriation to disputes between states.<sup>131</sup> And lest there be any doubt about what he meant, he concluded emphatically: “[T]he Secretary in awarding contracts is expected . . . to respect priority of appropriation, both within a State and as among applicants in different States, subject to an apportionment made by this Court.”<sup>132</sup>

This, in turn, left two other questions about the interstate allocation of water. First, if the Court was to make an equitable apportionment of the Lower Basin water along principles of interstate prior appropriation, should it actually do so in this case, giving each of the Lower Basin states title to a definite quantity of water? Frankfurter noted the cloud hanging over potential congressional approval of the Central Arizona Project: “It has been alleged that legal doubts, if unresolved by this Court, will frustrate plans for further development of the river.”<sup>133</sup> Frankfurter tentatively concluded, however, that an actual equitable apportionment was best left for another day. For one thing, he noted that the Court’s “[c]onstruction of the California limitation resolves a great many” of the doubts surrounding water allocation, since it seemed to ensure there would be ample water left in the Lower Basin for Arizona and Nevada.<sup>134</sup> This would enable Arizona to “compute with some certainty the water legally available for her Central Arizona Project.”<sup>135</sup> Frankfurter also observed that “[n]one of the parties has submitted to this Court the considerations relevant in making an equitable apportionment”—namely, the quantities and dates of priority of appropriations in both states.<sup>136</sup> Indeed, once the California limitation was enforced, the total of Lower Basin appropriations was well below remaining Lower Basin supply, making any equitable apportionment premature. Though Frankfurter recognized that “the unsettlement of this contentious issue may embarrass development,” he deemed that a lesser evil than an overly hasty division of the river.<sup>137</sup>

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129. Frankfurter Memo, *supra* note 113, at 105.

130. *Id.* at 106.

131. *Id.* at 107.

132. *Id.* at 109.

133. *Id.* at 110.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 112.

The other remaining question Frankfurter confronted was how to divide Lower Basin water in the event of shortage—that is, if less than 7.5 million acre-feet per year was available. The Master had determined that shortage was to be borne pro rata in the same proportion as the proposed Lower Basin compact, with California bearing 44/75ths of the shortage, Arizona 28/75ths, and Nevada 3/75ths, without regard to prior appropriation. Frankfurter disagreed, concluding that prior appropriation should apply as usual:

Congress had no quarrel with the law of appropriation as such; it simply feared that unrestricted application of that law would permit California to devour all or nearly all of the available water. Congress limited the law of appropriation to the extent necessary to avoid this undesirable result. This purpose no more required that shortages be apportioned pro rata than it required destruction of the law of appropriation as a means of determining who among competing applicants should receive a secretarial contract for water delivery. The law of appropriation is a well-established and just law for the distribution of a water supply insufficient to satisfy all who wish to use it, placing the risk of insufficient supply on the user who would expand consumption rather than on an established economy. . . . The Master reasoned that because priorities do not govern among the States if 7,500,000 acre-feet or more are available, neither do they govern when there is a shortage. But the equities of the States are quite different when there is a shortage. It is one thing to reserve for future use in Arizona and Nevada water over an amount calculated to give some measure of satisfaction to California uses immediately contemplated; it is quite another to curtail even this minimum amount in favor of Arizona and Nevada plans for the distant future.<sup>138</sup>

In sum, then, Frankfurter’s memo provides a telling portrait of a Court initially inclined to, more or less, faithfully apply its precedents. To be sure, Frankfurter’s initial conclusion—that the Court had jurisdiction over Arizona’s suit—required the Court to essentially repudiate its prior insistence that it would only get involved in interstate water disputes upon a showing of immediate and substantial injury to the complaining state.<sup>139</sup> But beyond that, Frankfurter had crafted what would have been an essentially unremarkable opinion: excluding Arizona’s tributaries from the calculation but holding that, consistent with *Wyoming v. Colorado* and *Nebraska v. Wyoming*, interstate prior appropriation would serve as the basis both for an eventual equitable apportionment and for allocation of Lower Basin water in the event of shortage. Frankfurter’s colleagues, for their part, seemed to agree. Justice Black prepared notes on the Court’s cases involving equitable apportionment, which concluded that *Wyoming v. Colorado* was the “leading case on this subject” and that the rule of interstate prior

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138. *Id.* at 112–13.

139. *See supra* notes 96–99 and accompanying text.

appropriation would apply.<sup>140</sup> That reasoning, of course, would have led to the inexorable conclusion that Arizona would not get the water it sought.

*2. Conference, the Draft Opinion, and Reargument*

Because Chief Justice Warren was recused, Justice Black, as the most senior Associate Justice, presided at the conference where the Justices discussed the case, on January 24, 1962. Justice Douglas, who was out of town, had circulated a memo in advance of the conference in which he endorsed Justice Frankfurter's conclusions on the apportionment issue (though Douglas, alone among the Justices, would have gone further and included Arizona's tributaries in the calculation of Lower Basin supply).<sup>141</sup> In Douglas's view, equitable apportionment and thus interstate prior appropriation would provide the basis for allocating water among the Lower Basin states: "[Q]uestions of shortage are to be resolved by 'equitable apportionment,' which . . . was the basis of *Nebraska v. Wyoming*. This means that settled principles of western water law . . . would govern."<sup>142</sup> Douglas, in what would prove a fateful move, expressly considered and rejected the notion that the equitable apportionment would hinge on equitable considerations other than the simple principle of first in time, first in right.<sup>143</sup>

The Conference, though, did not go as Douglas and Frankfurter expected. Led by Black, a group of four Justices—including Justices Clark, Whittaker, and Brennan—indicated that they agreed with the Master's conclusion that the Project Act had divided the river. Black, who represented Alabama in the Senate when Congress passed the Act, drew heavily on his memory of the debates in Congress. In his recollection, "Congress got tired of" the constant wrangling between the Western states, so it "said, we'll settle this. We'll make the apportionment."<sup>144</sup> Black and the other Justices on his side of the case, as well as Special Master Rifkind,<sup>145</sup> seemed to be motivated largely by a vague sense—perhaps characteristic of the era—that the problem was a major one with national implications, so it ought to be settled by the federal government. Their discussions at the conference were long on such pronouncements and short on any type of

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140. Memorandum from Justice Black on Cases Involving the Doctrine of Priority and Equitable Apportionment 5 (no date given) (on file in Hugo L. Black Papers, Library of Congress, Manuscript Division, Box 371, Folder 2).

141. Memorandum from Justice Douglas to the Conference (Jan. 23, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:62, Folder 8). Many of the citations in this section are to documents found in the Brennan papers; I have cited to the Brennan papers because they appear to be the best organized collection of correspondence in the case. Copies of these documents can also be found in Boxes I:8 and I:27 of the Byron R. White Papers, Library of Congress, Manuscript Division, and in scattered locations throughout the William O. Douglas Papers, Library of Congress, Manuscript Division.

142. *Id.* at 13.

143. *Id.* at 3 n.1.

144. Notes from Justice Brennan of Justice Black's Statement at Conference (Jan. 24, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:75, Folder 18).

145. See MacDonnell, *supra* note 37, at 387–88.

close reading of the statute itself. Justice Stewart—who, along with Justice Harlan, took the Frankfurter/Douglas side of the debate—sought to remind his colleagues that “this is only a statutory construction case,” but made little headway.<sup>146</sup>

Since Warren was recused, this made for (in Douglas’s words) a “very alarming split because it makes a decision impossible.”<sup>147</sup> Douglas, apparently taken aback that four Justices had adopted a position he considered indefensible, sought out Black to discuss matters. Douglas came away from their discussion convinced that Black simply had no idea what he was talking about:

I concluded, after a long talk with Black, that the thing that set him off . . . was the power issue that had been involved in the debates on the Bill in the Senate. He told how the spokesmen for the private power companies . . . were trying at all times to get private power companies preferred; while Black was a member of the group in the Senate that preferred public power. Black participated in a so-called ‘filibuster’ that the Arizona senators conducted and in my talk with him after this January 24 Conference, he reflected all the zeal and passion of that filibuster. (Black called it a filibuster though it actually was not.)<sup>148</sup>

Douglas became quite aggravated, going so far as to question Black’s fitness to participate in the case. Douglas correctly perceived that the public-power question had nothing whatsoever to do with the issue actually before the Court:

As respects the power issue, federal standards are written into the Bill. . . . But it is equally clear that state law governs the water rights for irrigation. But Black was so blinded by the public power issue when the bill was before the Senate that his prejudice against the existence of states’ rights extends over to the irrigation water. This is utterly inconsistent with the terms of the Bill and is revolutionary insofar as the regime of the western states is concerned. . . . Black usually is dispassionate. But he is so emotionally steamed up and involved that this is one case in which he should not sit.<sup>149</sup>

Douglas quickly sought to undo the harm that he believed Black’s confused passion had wrought. On January 30, he circulated to the Court a second memo, saying that he had “gather[ed] from talking with several of the Brethren that there may have been a serious misconception of the problem concerning the

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146. Notes from Justice Brennan of Justice Stewart’s Statement at Conference (Jan. 24, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:75, Folder 18).

147. Memorandum from Justice Douglas to File 1 (Jan. 25, 1962) (on file in William O. Douglas Papers, Library of Congress, Manuscript Division, Box 1289).

148. *Id.* at 1–2.

149. *Id.* at 2–3. At Douglas’s request, a Court librarian searched the Congressional Record and found that during the Project Act debate, Black “had very little to say,” leading the librarian to believe that “[p]erhaps Mr. Justice Black had in mind his extensive remarks” on the debate surrounding the construction of a dam at Muscle Shoals in Alabama. Note from Supreme Court Librarian to Justice Douglas (Jan. 25, 1962) (on file in William O. Douglas Papers, Library of Congress, Manuscript Division, Box 1289).

question whether state law or federal law governs the apportionment of water under the Project Act.<sup>150</sup> Douglas, a native of Washington State's Yakima Valley with substantial interest in the region's natural resources,<sup>151</sup> took it upon himself to educate the Court about the history of water federalism in the West. He highlighted the distinction between power and water, noting that while federal law governs the former, there is a long and cherished tradition in the West of state control of water rights.<sup>152</sup> (Indeed, that distinction in the Court's jurisprudence continues to this day,<sup>153</sup> so to the extent Black and his like-minded colleagues viewed the case as being more about hydroelectric power than about water rights, it is not surprising they reached the outcome they did.) Douglas concluded: "With all respect, there is not a chapter of history that can be marshalled to show that Congress by the Project Act undertook to uproot the law of the Western States and leave the question of the existence of water rights and their priority to the Secretary of the Interior."<sup>154</sup>

Douglas ultimately failed to persuade any of the four Justices who had initially sided with Arizona on the apportionment issue. At first, Douglas seemed to gain some traction: Black, the leader of the pro-Arizona faction, announced his view that the Court lacked jurisdiction over the apportionment issue because it did not present a ripe case or controversy.<sup>155</sup> Justice Harlan, in response, pointed out that this made no sense: If there was jurisdiction over the question of the tributaries, the same was true for the apportionment issue.<sup>156</sup> Harlan, who along with Douglas endorsed the conclusions Frankfurter's memo had reached on the apportionment question, suggested the Justices meet for a second conference in light of Douglas's memo, to see if any of Black's group of four might be willing to switch sides.<sup>157</sup> But it was to no avail: The Court remained deadlocked 4-4 on apportionment, though neither Black nor Clark, nor Brennan, nor Whittaker had

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150. Memorandum from Justice Douglas to the Conference 1 (Jan. 30, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:62, Folder 8) [hereinafter Douglas Jan. 30 Memo].

151. See generally NATURE'S JUSTICE: WRITINGS OF WILLIAM O. DOUGLAS (James M. O'Fallon ed., 2000).

152. Memorandum from Justice Douglas to File, *supra* note 147, at 1-3.

153. Compare *California v. United States*, 438 U.S. 645, 663-70 (1978) (state control of water rights), with *California v. FERC*, 495 U.S. 490, 496-507 (1990) (federal preemption of state regulation of hydroelectric dams).

154. Douglas Jan. 30 Memo, *supra* note 150, at 10.

155. Memorandum from Justice Black to the Conference (Feb. 1, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:62, Folder 8).

156. See Memorandum from Justice Harlan to the Conference (Feb. 5, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:62, Folder 8); see also Memorandum from Justice Douglas to the Conference (Feb. 1, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:62, Folder 8).

157. Memorandum from Justice Harlan to the Conference (Feb. 19, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:62, Folder 8).

offered any coherent theory in support of their conclusion that the Project Act had divided the water.

With both sides lacking a majority, Frankfurter incorporated his memo into a draft opinion that he circulated in March; the only substantial change being that the draft opinion—unlike his earlier memo—pointedly declined to settle the appropriation question. Frankfurter’s cover letter to the Justices emphasized that in writing the opinion along these lines he was “carrying out the vote of the Conference,” though he noted that his own preference (and that of three other Justices) was to settle the apportionment issue in California’s favor.<sup>158</sup> Black and Douglas agreed that the wisest course of action was to withhold judgment on the apportionment question and set that issue for reargument the following term, along with two other cases addressing the interplay between state water law and federal water projects.<sup>159</sup> Douglas also prepared and circulated a dissent on the tributary issue.<sup>160</sup>

Before Frankfurter’s opinion and Douglas’s dissent could be handed down, however, health concerns intervened. In late March, Whittaker told his colleagues he was stepping down due to physical exhaustion.<sup>161</sup> Less than a week later, Frankfurter suffered a stroke.<sup>162</sup> From the hospital, Frankfurter initially told Black that, notwithstanding his health concerns, he “fe[lt] very strongly that the Colorado [River] opinion should come down,” and that he “strongly oppose[d] rehearing the case . . . on which so much work has been done.”<sup>163</sup> Black agreed that the Court could “hand down the opinion you have written while postponing

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158. Memorandum from Justice Frankfurter to the Conference (Mar. 22, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:78, Folder 3).

159. Memorandum from Justice Black to Conference (Apr. 5, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:62, Folder 8); Memorandum from Justice Harlan to Justice Black (Apr. 5, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:62, Folder 8). The two cases they had in mind were *Dugan v. Rank*, 372 U.S. 609 (1963), and *City of Fresno v. California*, 372 U.S. 627 (1963), both of which involved disputes over the extent to which the federal Central Valley Project had displaced certain doctrines of California water law. The Court in those cases ultimately determined that, to the extent owners of state water rights believed the federal project had taken or limited their rights, the proper remedy was a suit for just compensation under the Tucker Act, 28 U.S.C. § 1346. See *Dugan*, 372 U.S. at 611; *City of Fresno*, 372 U.S. at 629.

160. Draft Dissent of Justice Douglas (June 2, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:78, Folder 3).

161. Statement by Chief Justice Warren, *supra* note 44.

162. Memorandum from Dr. George A. Kelser (on file in Hugo L. Black Papers, Library of Congress, Manuscript Division, Box 371, Folder 3); see also *Felix Frankfurter Dies; Retired Judge Was 82*, *supra* note 44.

163. Memorandum from Justice Frankfurter to Justice Black (Apr. 6, 1962) (on file in Hugo L. Black Papers, Library of Congress, Manuscript Division, Box 371, Folder 3).

the [apportionment] questions for full argument next term.”<sup>164</sup> But Frankfurter’s health never recovered sufficiently for the opinion to be finalized or released, and Frankfurter would ultimately retire from the Court in August. With only six Justices left on the case and no author of the would-be majority opinion, the Court opted to set the entire case for reargument the following term.

### *B. October Term 1962*

There were two new faces on the Court when the new term began in October 1962: Byron White, who replaced Whittaker, and Arthur Goldberg, who replaced Frankfurter. When the case was reargued during the second week of November, there was little indication which way White and Goldberg would come out. At conference after oral argument, the picture began to clear itself up. Goldberg, a reliable pro-federal-power liberal, declared unequivocally that in his view, Congress had divided the water among California, Arizona, and Nevada in the 4.4/2.8/0.3 million-acre-feet ratio set forth in the proposed Lower Basin Compact.<sup>165</sup> Along with Clark and Brennan, whose positions had not changed, this gave Black four solid votes on the appropriation issue. But a fifth vote initially eluded them: Warren was still recused; Douglas, Harlan, and Stewart remained steadfast in their conviction that the Act had not undertaken a division of the water; and White, a Coloradan with some experience in Western water law, told his new colleagues he perceived “no expressed purpose of Congress to ignore state laws” on prior appropriation.<sup>166</sup>

This apparently set off a significant lobbying effort on the part of both sides to woo White, who had emerged as the swing vote. Black reiterated his view that the Court lacked jurisdiction to decide the apportionment issue in the first place, in the absence of any immediate shortage in the Lower Basin.<sup>167</sup> He rejected again the notion that equitable apportionment should apply, telling his colleagues that “[e]quitable apportionment is nothing but what this Court orders done by fiat. Much better to let Congress decide what amount of water should go to each state.”<sup>168</sup> Douglas circulated a memo emphasizing that if the Court had jurisdiction over the limitation issue, as all agreed it did, it also had jurisdiction over the apportionment issue, since the Central Arizona Project was unlikely to be

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164. Memorandum from Justice Black to Justice Frankfurter (Apr. 6, 1962) (on file in Hugo L. Black Papers, Library of Congress, Manuscript Division, Box 371, Folder 3).

165. Justice Brennan’s Notes of Justice Goldberg’s Statement at Conference (Nov. 16, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:75, Folder 18).

166. Justice Brennan’s Notes of Justice White’s Statement at Conference (Nov. 16, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:75, Folder 18).

167. Justice Brennan’s Notes of Justice Black’s Statement at Conference (Nov. 16, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:75, Folder 18).

168. *Id.*



approved unless both questions were resolved.<sup>169</sup> He also reminded White, his fellow Westerner, of the critical importance to the West of the doctrine of prior appropriation and the region's long struggle against the federal government to control its own water supply.<sup>170</sup>

Harlan, meanwhile, made one last effort to cobble together a majority for the position that the Project Act simply had nothing to say about apportionment. He circulated a memorandum making the most full-throated endorsement any of the Justices had yet offered of the doctrine of equitable apportionment:

I submit that, failing a tri-state compact, it is most consistent with the purposes of Congress that the equitable principles enunciated by this Court in interstate water-rights cases, modified by the Colorado River Compact and the California limitation, govern the apportionment of mainstream waters among the Lower Basin States whether in surplus or in shortage. I do not believe that the established principles of judicial apportionment were intended to be supplanted either by the legislative discretion of the Secretary of the Interior when there is ample water or by a new doctrine of proration where there is not.<sup>171</sup>

Much of the next two dozen pages of Harlan's memo appears essentially verbatim in his eventual dissent.<sup>172</sup> Harlan emphasized that equitable apportionment was a long-established, widely accepted means of settling interstate water disputes; that as between prior appropriation states, it applied that doctrine to reach fair and just results; that the Westerners who wrote the Project Act were comfortable with the doctrine and would have far preferred it to federal control of water rights, a concept to which they harbored an intense and pervasive hostility; and that nothing in the Act evinced any evidence of a congressional purpose to displace equitable apportionment or state law.<sup>173</sup>

The one thing Harlan did not do, however, was to assuage the fears of Black, Clark, Brennan, and Goldberg that equitable apportionment and prior appropriation would result in the lion's share of Lower Basin water going to California. He never made much effort, that is, to show that the application of equitable apportionment in this case would, in fact, be equitable. Quite the opposite: Just as Douglas had,<sup>174</sup> Harlan emphasized that, in this case, equitable apportionment and prior appropriation were one and the same, favoring the longer-established economy of California. Only toward the end of his memo did he hedge

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169. Memorandum from Justice Douglas to the Conference 4–5 (Nov. 14, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:78, Folder 3).

170. *Id.* at 5–6.

171. Memorandum from Justice Harlan 1–2 (Nov. 14, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:78, Folder 4).

172. Compare *id.* at 2–22, with *Arizona v. California*, 373 U.S. 546, 607–21 (1963) (Harlan, J., dissenting).

173. Memorandum from Justice Harlan, *supra* note 171, at 2–22.

174. See *supra* note 143 and accompanying text.

at all: In view of the absence of evidence in the record relating to equitable apportionment, “[i]t would be inappropriate,” he wrote, “for the Court to decree the terms of an apportionment.”<sup>175</sup> Instead, “leave should be granted the parties, if they wish, to apply for the appointment of a Master to determine the facts and the law applicable to the apportionment.”<sup>176</sup> That suggested the question remained open whether equitable apportionment would end up being as California-friendly as Harlan had earlier suggested it would be.

But this proved to be too little, too late. White soon informed his colleagues that he had sided with the Black group. “In view of the position of Mr. Justice White,” Black wrote to the Court, “it will not be necessary for us to have another conference on Friday, November 23. This makes it possible for me to assign the case, and I have assigned it to myself.”<sup>177</sup> This left only the issue of what rationale the majority would adopt, since no one had yet offered a persuasive way for the Court to rule for Arizona on the apportionment question. Clark, Brennan, White, and Goldberg met and concluded “that the statute should be read as empowering the Secretary in shortage situations to arrive at the fairest result for the contending states,” with broad latitude “to apply either state law or prior appropriative rights, or a proration formula, or some combination of both, or, indeed, to introduce a formulation of his own within the general constraints of the recognized methods of deciding such problems.”<sup>178</sup>

That rationale, indeed, would provide the basis for the majority opinion Black would ultimately deliver in June of 1963. The drafting of the opinions (and, indeed, much of the actual language of the opinions) reflected the Court’s internal memos over the preceding 18 months: Black, Clark, Brennan, White, and Goldberg sided with Arizona on both the tributaries issue and apportionment; Harlan and Stewart would have sided with California on apportionment but not the tributaries; and Douglas alone would have sided with California on both questions. All along the opinions elicited strong feelings on both sides, reflected both in the stridency of the Douglas and Harlan dissents<sup>179</sup> and also in the unusually effusive praise the Justices in the majority had for Black’s opinion.<sup>180</sup>

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175. Memorandum from Justice Harlan, *supra* note 171, at 31–32.

176. *Id.* at 32.

177. Memorandum from Justice Black to the Conference (Nov. 20, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:78, Folder 4).

178. Memorandum from Justice Brennan to Justice Black (Nov. 21, 1962) (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, Box I:78, Folder 4).

179. See *supra* note 59 and accompanying text.

180. Justice Brennan told Black, “[t]here’s no word but ‘magnificent’ for your Colorado opinion. I can’t suggest the change of a single word.” Memorandum from Justice Brennan to Justice Black (Apr. 1, 1963) (on file in Hugo L. Black Papers, Library of Congress, Manuscript Division, Box 371, Folder 1). Justice Goldberg deemed it a “monumental and magnificent decision” with which he was “in full agreement.” *Id.*

#### IV. THE INCOMPATIBILITY BETWEEN PRIOR APPROPRIATION AND EQUITABLE APPORTIONMENT

This brings us back to the question posed at the outset of this Article. In a case in which the equities seemed to strongly favor Arizona, why did the Court find it so difficult to craft a persuasive opinion reaching that result? As illustrated above, the Court's internal deliberations provide some answers. First, Justice Frankfurter, and then Justice Harlan—backed by Justices Douglas and Stewart—correctly perceived that Congress had done nothing that would displace the doctrine of equitable apportionment as the rule of decision in the dispute they confronted. But, thanks to *Wyoming v. Colorado* and *Nebraska v. Wyoming*, they found themselves unable to convince their skeptical colleagues that equitable apportionment could produce an acceptable outcome—so five Justices signed on to the highly dubious theory that Congress intended for the Secretary of the Interior to exercise essentially unfettered discretion in dividing up the Lower Basin's share of the Colorado River. As Dan Tarlock has observed in a different context, “when prior appropriation creates a large class of losers and the economic stakes are high, there are pressures on courts and administrators to make a crude cost-benefit analysis and step back from strict enforcement by finding the seams in the doctrine that blunt its harshness.”<sup>181</sup> That is quite an apt description of what motivated the Court in *Arizona v. California* to reach the novel statutory conclusion it did.

The Justices would have been better served, however, by confronting a different question: whether prior appropriation should play such a central role in equitable apportionments between Western states in the first place. Unfortunately, my research has turned up little indication that any of the Justices (except, perhaps, for Justice Douglas) had any inclination to revisit the matter. Had they explored the issue more thoroughly, they might have concluded that *Wyoming v. Colorado* and *Nebraska v. Wyoming* were misguided in their efforts to make prior appropriation the “guiding principle” behind equitable apportionment in the West. This argument has been made before, perhaps most notably by Colorado's Delph Carpenter, the architect of the Colorado River Compact.<sup>182</sup> A reexamination of this question, in light of what we have gleaned about the doctrines of prior appropriation and equitable apportionment in recent decades, reveals a compelling case that Carpenter was right, and the Court wrong.

##### *A. The History and Development of Prior Appropriation*

The process by which the West modified (and in many respects discarded) the riparian rights scheme of England and the Eastern states is a fascinating tale, perhaps the most poignant example American law provides of the adaptability and resilience of the common law. For purposes of this Article, the

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181. A. Dan Tarlock, *The Legacy of Schodde v. Twin Falls Land and Water Company: The Evolving Reasonable Appropriation Principle*, 42 ENVTL. L. 37, 59–60 (2012).

182. See Daniel Tyler, *Delphus Emory Carpenter and the Colorado River Compact of 1922*, 1 U. DENV. WATER L. REV. 228, 237 (1998).

key point is this: Prior appropriation developed as a *local* rule, designed to settle disputes between peers—farmers, miners, ranchers—competing over a limited water supply in a relatively confined geographic area. It is generally thought to have originated as “a simple and fair risk allocation regime among similarly situated competing claimants” in local mining and agricultural economies.<sup>183</sup> Prior appropriation first prominently appeared in the wake of the Gold Rush of 1849 in the mining camps in northern California, as neighboring prospectors fought over access to the limited water supplies available in the Sierra foothills. Water was essential to their mining operations, needed in large quantities so the miners could use high-powered hydraulic hoses to blast hillsides and free the gold deposits located within them. The forty-niners

had no use for a riparian law, developed thousands of miles away in country where water was plentiful, that called for most water to be left as is. Water was not an amenity in gold rush times, it was an engine. Mining—that is, society—could not proceed unless water could be assured in sufficient and certain quantities.<sup>184</sup>

The California Supreme Court quickly recognized the miners’ customary rules as the law of the land, announcing in a terse and memorable opinion that riparianism, unsuited as it was to the conditions of the West, would not govern the miners’ disputes.<sup>185</sup> Other Western states followed suit in the decades following their admission to the Union, and prior appropriation soon came to govern the entire interior West.<sup>186</sup>

Prior appropriation, above all, served two practical purposes. First, and most significantly, it decoupled ownership of a plot of land from ownership of water. Most land in the arid West does not include any significant source of water, and indeed in many areas, major sources of water were (and continue to be) located on federally owned lands.<sup>187</sup> Under riparianism, most land in the West

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183. A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N. D. L. REV. 881, 892 (2000). It is probably true that the traditional story of prior appropriation first developing in California mining communities is exaggerated in some respects. See, e.g., DONALD J. PISANI, *WATER, LAND, AND LAW IN THE WEST: THE LIMITS OF PUBLIC POLICY, 1850–1920*, at 10–11 (1996); Anthony Scott & Georgina Coustalin, *The Evolution of Water Rights*, 35 NAT. RESOURCES J. 821, 904–05 (1995); A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 770, 787 n.3 (2001) [hereinafter Tarlock, *The Future of Prior Appropriation in the New West*]. But the point remains, whatever the precise story of its origins, that it developed to resolve disputes between similarly situated claimants on a local scale, not to resolve the sort of large-scale, basin-wide disputes at issue in most equitable apportionment actions.

184. Charles F. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 319 (1985); see also Trelease, *supra* note 37, at 184–86.

185. *Irwin v. Phillips*, 5 Cal. 140, 146–47 (1855).

186. See, e.g., *Mettler v. Ames Realty Co.*, 201 P. 702 (Mont. 1921); *Jones v. Adams*, 6 P. 442 (Nev. 1885); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

187. Donald D. MacIntyre, *The Prior Appropriation Doctrine in Montana: Rooted in Mid-Nineteenth Century Goals—Responding to Twenty-First Century Needs*, 55 MONT. L. REV. 303, 308 (1994); see also, e.g., *Estate of Hage v. United States*, 687 F.3d

would be worthless. Prior appropriation encouraged settlers to stake their claim to a plot of otherwise dry land and bring water, often from many miles away, to make it valuable, putting limited water supplies to their best use.<sup>188</sup> It is for this reason that prior appropriation, in its early years, had populist overtones and drew support from lower-class dryland farmers, while riparianism was widely considered to favor larger, wealthier landowners who had long ago gained possession of the most fertile riparian lands.<sup>189</sup> Second, in addition to decoupling water ownership from land ownership, prior appropriation provided some degree of certainty. In a region in which water and wealth were coextensive, prior appropriation guaranteed those contemplating investing in risky farming or mining operations access to a dependable supply of water, without regard to later claims.

As a result, prior appropriation has come to be seen, not without justification, as the cornerstone of Western water law, to be neither disturbed nor questioned.<sup>190</sup> This sentiment certainly manifested itself during the Court's deliberations in *Arizona v. California*, as several of the Justices repeatedly emphasized the importance to the West of prior appropriation.<sup>191</sup> But to say that prior appropriation is an extremely valuable doctrine in some circumstances, and that it was absolutely central to the economic development of the West, is not to say that it is equally well suited to govern all water disputes in modern times. Indeed, the past few decades have witnessed a heated debate among judges, attorneys, government officials, and scholars over the continuing vitality of prior appropriation in the twenty-first century,<sup>192</sup> particularly in light of the economic and social transformation the West has undergone over the past several decades.<sup>193</sup>

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1281, 1283–84 (Fed. Cir. 2012) (describing 34-year dispute over private access to water sources on federal land in Nevada).

188. See, e.g., *Bd. of Cnty. Com'rs of Park Cnty. v. Park Cnty. Sportsmen's Ranch, LLP*, 45 P.3d 693, 706 (Colo. 2002) (“This new common law established a property-rights-based allocation and administration system which promotes multiple use of a finite resource for beneficial purposes.”).

189. See NORRIS HUNDLEY, JR., *THE GREAT THIRST: CALIFORNIANS AND WATER—A HISTORY* 96–99 (Rev. ed., 2001); see also, generally, DAVID SCHORR, *THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER* (2012) (suggesting the prior appropriation doctrine developed in large part to enhance small farmers' access to water, thereby increasing their wealth at the expense of large riparian landowners and corporations).

190. See, e.g., *Trelease*, *supra* note 37, at 186 (“Upon [prior appropriation] much of the wealth of the West has been built.”)

191. See *Arizona v. California*, 373 U.S. 546, 613–14 (1963) (Harlan, J., dissenting); *id.* at 629 (Douglas, J., dissenting) (prior appropriation is “as important to these Western States as the doctrine of seizin has been to the development of Anglo-American property law”); Memorandum from Justice Harlan, *supra* note 171, at 11.

192. Compare Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 ENVTL. L. 37 (2001) (arguing that prior appropriation remains critical), and Gregory J. Hobbs, Jr., *The Reluctant Marriage: The Next Generation (A Response to Charles Wilkinson)*, 21 ENVTL. L. 1087 (1991) (suggesting that, although prior appropriation as such may have waned in importance, its progeny continues to play a central role in water policy), with Charles F. Wilkinson, *In Memoriam, Prior Appropriation 1848–*

That debate continues to this day, and there are compelling arguments to be made on both sides. What is hard to dispute, though, is that prior appropriation works better in some circumstances than in others. In particular—and not surprisingly, in light of its historical pedigree—prior appropriation remains a more appealing doctrine on smaller scales than on larger ones. When four different homesteaders along a creek dispute who should have priority of access to the creek’s limited water supply, prior appropriation provides a sound and reasonable basis for resolving their competing claims. On larger scales and in larger disputes, prior appropriation is an uneasy fit, for a variety of reasons. As geographic distances increase, so do losses of water in transit, meaning that strict adherence to prior appropriation can lead to waste and economic inefficiency.<sup>194</sup> The same is true of the administrative complexity involved: Strictly applying prior appropriation on a long river will require extensive permitting and monitoring systems, and can give rise to massive and costly basin-wide litigation enforcement actions.<sup>195</sup> The larger the area involved, the more likely it is that large cities and urban water users will be involved in water disputes, and priority is often difficult if not impossible to enforce against municipalities.<sup>196</sup> In part for that reason, large-scale prior appropriation is often a rule with more force in theory than in practice. Few states have much experience with actually shutting out influential junior users in time of shortage; the response is more frequently to either increase the available supply of water or devise some means by which water is shared and senior users are compensated for their loss (though, of course, priority plays a central role in determining who gets compensated and how much).<sup>197</sup> The ongoing litigation and

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1991, 21 ENVTL. L. v (1991) (proclaiming the death of prior appropriation in water law and policy).

193. See, e.g., Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, *supra* note 182, at 892 (“[C]onditions have changed substantially since the second half of the 19th century, and the result is that priority is less important today. The world of small water users continues to exist, especially in Colorado, Wyoming, and Utah, but it has long ceased to exist or it is fading throughout much the West.”)

194. See *Nebraska v. Wyoming*, 325 U.S. 589, 619 (1945); *supra* note 106 (discussing futile call doctrine).

195. See, e.g., *United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1154–55 (9th Cir. 2010) (describing the more than 100-year history of the so-called Orr Ditch litigation, an adjudication of water rights on the Truckee River in Nevada); Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and Its Implications*, 73 U. COLO. L. REV. 173, 176 (2002) (noting the “time-consuming and mind-numbing complexities of state basinwide adjudications”); John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299, 393 (2006) (noting that while there are typically only a few dozen claims for adjudications of small rivers and streams, there can be tens of thousands of claims in larger adjudications).

196. Tarlock, *The Future of Prior Appropriation in the New West*, *supra* note 182, at 781–82.

197. *Id.* at 785–86; see also Robert W. Adler, *Climate Change and the Hegemony of State Water Law*, 29 STAN. ENVTL. L.J. 1, 24 (2010); Harrison C. Dunning, *State Equitable Apportionment of Western Water Resources*, 66 NEB. L. REV. 76, 118–19 (1987). Of course, if climate-change models prove accurate and water supplies in the West dwindle

negotiations between Southern California cities and the Imperial Irrigation District relating to the Quantification Settlement Agreement—under which the District, which has senior claims to California’s share of Colorado River water, pledged to limit its water use in exchange for financial compensation—provides perhaps the most prominent example of the role prior appropriation plays in these circumstances.<sup>198</sup>

Of course, it may well be the case that, even taking these factors into consideration, prior appropriation remains the best available water law for most Western states.<sup>199</sup> Again, I do not mean to take sides in that debate. My point, rather, is that to the extent Western states have encountered more difficulties in applying prior appropriation at the state level than in more local disputes, those problems would be magnified tenfold in any attempt to actually enforce an interstate prior appropriation regime. It would entail comparing priority dates and appropriation quantities for thousands or tens of thousands of water users across multiple states. It would mean figuring out whether water forgone by an upstream junior appropriator would reach a senior appropriator hundreds of miles downstream, and how long the journey would take. It would virtually guarantee never-ending litigation involving thousands of parties, as well as the federal government and Indian tribes, which own substantial water rights across the West and (in the case of the federal government) also have contractual obligations to deliver water to users.<sup>200</sup> Indeed, all of these issues arose, to varying degrees, in both *Wyoming v. Colorado* and *Nebraska v. Wyoming*, making these two cases in which the Court enforced interstate priorities some of the most painstakingly complex and factbound cases in the Court’s history.<sup>201</sup> Any attempt to do the same in a dispute over the Colorado River would be orders of magnitude more difficult.

These difficulties are magnified by the absence of strong pragmatic reasons for applying prior appropriation in interstate disputes. Perhaps the most oft-repeated rationale is some variation of the adage “what’s good for the goose is good for the gander”: By adopting prior appropriation as their intrastate water law,

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in coming decades, prior appropriation’s continuing viability in the face of a true shortage may face a significant test. See Adler, *supra*, at 24; A. Dan Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 LOY. L.A. L. REV. 979, 983–84 (1991).

198. For an overview, see SAX ET AL., *supra* note 101, at 808–11. In the interest of full disclosure, the author of this Article, in his capacity as an associate at Munger, Tolles & Olson LLP, has represented the Imperial Irrigation District in litigation stemming from the Quantification Settlement Agreement. This Article was completed, submitted, and accepted for publication before the author began working at Munger, Tolles & Olson and representing the District.

199. See, e.g., Tarlock, *The Future of Prior Appropriation in the New West*, *supra* note 182, at 778–80 (“Prior appropriation also flourishes by default because the alternatives to priority are not appealing.”).

200. This, in turn, produces additional side litigation over questions concerning sovereign immunity and joinder of necessary parties, which frequently prove to be quite thorny issues. See, e.g., *Orff v. United States*, 545 U.S. 596, 596–97 (2005).

201. See *Nebraska v. Wyoming*, 325 U.S. 589, 600–07, 623–29, 632–34, 636–51 (1945); *Wyoming v. Colorado*, 259 U.S. 419, 471–96 (1922).

states can hardly complain when it is applied against them in interstate disputes.<sup>202</sup> But the conclusion hardly follows from the premise. A downstream or late-developing state—say, Arizona—can be expected to argue that as a sovereign state through which a great river passes, it ought to be entitled to some equitable share of that river’s bounty. The state does not thereby preclude itself from determining that prior appropriation is the most efficient and reasonable means to divide water between competing claimants within its territories. On no other question of governance is such a principle—call it federalism estoppel—applied. A small, sparsely populated state, believing itself fairly entitled to representation in the U.S. Senate equal to that of California or Texas, does not incur an obligation to give all of its counties equal representation in the upper house of its legislature. A state that allocates its transportation funding among municipalities in a certain manner does not lose the right to seek a different sort of allocation among states competing for federal dollars. Indeed, the Supreme Court has recognized that strict common-law riparianism does not govern water disputes between states that apply riparian law to settle intrastate water conflicts.<sup>203</sup> There is no reason to treat interstate water cases involving prior-appropriation states any differently.

The other principal pragmatic arguments in favor of interstate prior appropriation fare no better. It is sometimes suggested that interstate prior appropriation must be maintained because the only alternative is a return to riparianism, prohibiting use of a river’s waters on nonriparian tracts of land. On this view, if interstate prior appropriation were rejected, “the lands would return to their naturally arid condition, the efforts of the settlers and the expenditures of others would go for naught, and values mounting into large figures would be lost.”<sup>204</sup> That fear is unfounded. Abandoning interstate prior appropriation would have no effect on state laws in the West permitting nonriparian uses of water; indeed, even eliminating *intrastate* prior appropriation in favor of some other system of water allocation need not (and certainly would not) entail a wholesale return to riparianism.

Other commentators note that interstate prior appropriation, at least in certain circumstances, has the potential to be a more predictable, rule-like doctrine than any conceivable alternative, offering greater security to incumbent users.<sup>205</sup> On larger rivers, though, that certainty and administratibility is likely to prove elusive even under prior appropriation, for the reasons already discussed.<sup>206</sup> Nor, on such rivers, is its application likely to produce a fair result; the risk of depriving entire states or large areas of land of any substantial water supply cannot be ignored. The fact that interstate prior appropriation may work well from a practical standpoint on certain small waterways cannot be a sound basis for applying the

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202. See, e.g., *Wyoming v. Colorado*, 259 U.S. at 470–71; *Bean v. Morris*, 221 U.S. 485, 487–88 (1911).

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

204. *Wyoming v. Colorado*, 259 U.S. at 468.

205. See, e.g., Tarlock, *supra* note 108, at 396.

206. See *supra* notes 193–96 and accompanying text.



doctrine inflexibly to the larger rivers, apt to generate the lion's share of dispute, to which it is not well suited.

***B. Federalism, Equal Footing, and Interstate Prior Appropriation***

These considerations alone should have given the Court significant pause before it made interstate prior appropriation the “guiding principle” behind equitable apportionment throughout the West.<sup>207</sup> And yet, there is a still more compelling reason why interstate prior appropriation is a problematic doctrine—not merely from a pragmatic standpoint, but from a constitutional one as well. Put simply, there is no conceivable way to square the doctrine of interstate prior appropriation with the principle, a cornerstone of our federalist system, that all 50 states, regardless of when they entered the Union, “will be upon an equal footing” with each other “in all respects whatever.”<sup>208</sup>

The equal-footing doctrine is one of the pillars of American federalism.<sup>209</sup> As the Court has put it, “the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.”<sup>210</sup> The idea that interstate prior appropriation is incompatible with that constitutional equality dates to at least the 1920s, when Delph Carpenter invoked it in support of an interstate compact to displace the rule of interstate priority announced in *Wyoming v. Colorado*.<sup>211</sup> Developments since Carpenter's time have confirmed his intuition. The reason for the incompatibility is a simple one: For obvious geographic and historical reasons, some states developed before others. In the arid West, a strict application of the rule of interstate priority would equate delay with doom. The latest states to develop—namely those of the Mountain West—would be at a perpetual disadvantage relative to their neighbor states on the Great Plains and Pacific Coast.

This reality was perhaps most clearly on display in the 1907 case of *Kansas v. Colorado*, in which the Court—likely not coincidentally—declined to apply interstate prior appropriation, relying instead on a rule of equitable apportionment rooted in principles of “equality of right and equity between the two States.”<sup>212</sup> Settlement in Kansas and Colorado proceeded in an approximately linear east-to-west fashion, so that water rights in eastern Kansas (to the extent the area relied on prior appropriation<sup>213</sup>) were generally senior to those in western Kansas, which in turn were senior to those in Colorado. The Court recognized,

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

208. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 224 (1845).

209. For an overview of the historical evolution of the doctrine, see Valerie J.M. Brader, *Congress' Pet: Why the Clean Air Act's Favoritism of California is Unconstitutional Under the Equal Footing Doctrine*, 13 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 119, 128–48 (2007).

210. *Coyle v. Smith*, 221 U.S. 559, 580 (1911); see also *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

211. See Tyler, *supra* note 181, at 237.

212. 206 U.S. 46, 114 (1907).

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

though, that “the barrenness which characterized portions of the territory of Colorado would have continued for an indefinite time unless relieved by irrigation.”<sup>214</sup> Equality of right, therefore, entitled Colorado to a rule of decision that took into consideration not only priority but also principles of fairness and equity:

Whatever has been effective in bringing about [Colorado’s] development is certainly entitled to recognition, and should not be wantonly or unnecessarily destroyed or interfered with. That this development is largely owing to irrigation is something of which, from a consideration of the testimony, there can be no reasonable doubt. It has been a prime factor in securing this result, and before, at the instance of a sister state, this effective cause of Colorado’s development is destroyed or materially interfered with, it should be clear that such sister state has not merely some technical right, but also a right with a corresponding benefit.<sup>215</sup>

The Court noted that the activities of junior appropriators in Colorado had “worked some detriment” to senior appropriators in southwestern Kansas, but when the Court “compare[d] the amount of this detriment with the great benefit which has obviously resulted to the counties of Colorado,” principles of equal footing compelled a ruling in Colorado’s favor.<sup>216</sup>

Beyond the general principle of state equality, there is a compelling reason for a strict application of the equal-footing doctrine in the particular context of interstate water disputes. The doctrine has special relevance to a state’s ability to use and safeguard its natural resources; indeed, that has been the primary area in which the Court has applied the doctrine in recent decades.<sup>217</sup> Control of navigable waters and the submerged lands lying beneath them are fundamental, essential attributes of state government. As the Court has noted, “the people of each State, based on principles of sovereignty, ‘hold the absolute right to all their navigable waters and the soils under them.’”<sup>218</sup> These state prerogatives are “conferred not by Congress but by the Constitution itself.”<sup>219</sup> And, as the Court has recognized, they have an ancient provenance:

The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests. The principle arises from ancient doctrines. See, *e.g.*, Institutes of Justinian, Lib. II, Tit. I, § 2 (T. Cooper transl. 2d ed. 1841) (“Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common”). The special treatment of navigable waters in English law was recognized

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214. *Kansas v. Colorado*, 206 U.S. at 110.

215. *Id.* at 109.

216. *Id.* at 113–14.

217. See Brader, *supra* note 208, at 147.

218. PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1227 (2012) (quoting *Martin v. Lessee of Waddell*, 41 U. S. (16 Pet.) 367, 410 (1842)).

219. *Id.* (quoting *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)).

in Bracton's time. He stated that "[a]ll rivers and ports are public, so that the right to fish therein is common to all persons. The use of river banks, as of the river itself, is also public." 2 H. Bracton, *De Legibus et Consuetudinibus Angliae* 40 (S. Thorne transl. 1968).<sup>220</sup>

These principles illustrate why the law of prior appropriation cannot easily be transplanted from intrastate disputes between private parties to interstate disputes between equal sovereigns. The distinction between a private-party suit and a suit involving sovereign states is a critical one because only states have "an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."<sup>221</sup> This is the essential mistake made by the Court in this area, dating back to Justice Van Devanter's opinion in *Wyoming v. Colorado*. It is echoed by contemporary commentators who continue to defend interstate prior appropriation.<sup>222</sup> To Justice Van Devanter and these commentators, "the interests of the State are indissolubly linked with the rights of the appropriators"—so if it were fair to deny water to junior appropriators, there is no substantial problem with denying it to the State.<sup>223</sup>

This gets the relationship between citizen and state backwards. The primary interest in the waters of a navigable river belongs to the state, and it is only through the operation of state law that a citizen appropriator comes to acquire a property interest in some portion of the water. In other settings, the Court has recognized this principle. For instance, in disputes regarding intervention by private parties in interstate water disputes, it has applied the doctrine of *parens patriae* to hold that a state represents the interests of its citizens, so that their participation is not needed (rather than the other way around).<sup>224</sup> Equitable apportionment is "a means of resolving high disputes between sovereigns," not "a forum for airing private interests."<sup>225</sup> Yet it is precisely this insight that the Court's application of interstate prior appropriation fails to recognize.

The principal task for state legislatures and courts in formulating intrastate water law is to determine what regime will best promote the overall social, economic, and environmental health of the state. If a state determines that its interests will be best served by a strict application of priority, that is the end of the matter; even if junior users get cut off entirely, that is a policy choice for the state to make. In a dispute between states, however, a broader perspective is needed: State sovereignty is at stake. From the perspective of federalism, it is not

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220. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997).

221. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); *see also Massachusetts v. EPA*, 549 U.S. 497, 518–19 (2007).

222. *See, e.g., Richard A. Simms, Equitable Apportionment—Priorities and New Uses*, 29 NAT. RESOURCES J. 549, 549–50 (1989).

223. *Wyoming v. Colorado*, 259 U.S. 419, 468 (1922).

224. *See, e.g., South Carolina v. North Carolina*, 558 U.S. 256, 274 (2010) ("[A] State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State, as *parens patriae*, represents on behalf of its citizens."); *United States v. Nevada*, 412 U.S. 534, 539 (1973).

225. *South Carolina v. North Carolina*, 558 U.S. at 277 (Roberts, C.J., dissenting).

sufficient to ask merely what arrangement is best from the standpoint of maximizing overall national welfare. It may well have been the case that more economic value could have been produced had most of the Colorado River's annual flow been appropriated by California. Californians made precisely that argument in the 1920s.<sup>226</sup> But each of the other basin states had an equal sovereign interest in the waters flowing within their borders—a sovereign interest guaranteed to them by the Constitution. And it was precisely these sovereign interests that necessitated the inquiry that must be at the center of any equitable apportionment: What division of the water will provide roughly equal benefits to the citizens of the quarrelling states?

That inquiry is, without question, a difficult one. If properly conducted, it will require the Supreme Court to painstakingly probe the multitude of factors initially relied upon by Arizona during proceedings before Special Master Rifkind in 1956: the extent and value of present and potential future uses in the states that are party to the dispute; their rates of population and economic growth; the feasibility of conservation; the availability of potential alternative sources of water; the rate of return flows; the states' respective contributions to the volume of the interstate waterway; and more.<sup>227</sup> Mark Wilmer, the lawyer who took over the case for Arizona in 1957 and promptly abandoned this litigation strategy, hit upon a key insight: The Supreme Court does not like this approach (and neither do Special Masters).<sup>228</sup> It “has left many Justices uneasy and therefore unwilling to adjudicate” equitable apportionment disputes.<sup>229</sup> As they pondered *Arizona v. California*, the Justices did not view the equitable balancing approach as a promising one.<sup>230</sup> It requires the Court to act in more of a legislative than a judicial capacity, calling for the exercise of Solomonian wisdom (or at least reasonable policy judgment), not the application of anything resembling legal rules. The totality-of-the-circumstances test I have endorsed as the proper standard in equitable apportionment cases is the epitome of the kind of “flabby” balancing test that is often decried as “a standing invitation to judicial arbitrariness and policy-

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226. See, e.g., HUNDLEY, *supra* note 6, at 116.

227. See *supra* note 40 and accompanying text; see also *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945) (“Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But 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, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.”).

228. AUGUST, *supra* note 36, at 84.

229. Meyers, *supra* note 37, at 49; see also *supra* notes 85–86 and accompanying text.

230. For instance, Justice Black, in an internal memorandum, criticized Justice Brewer's equitable-balancing opinion in *Kansas v. Colorado* for “fail[ing] to set out any definite rule” and not providing sufficient certainty. Memorandum from Justice Black on Cases Involving the Doctrine of Priority and Equitable Apportionment, *supra* note 140, at 5.

driven decisionmaking.”<sup>231</sup> No doubt the Court would agree with commentators who call upon Congress to apportion interstate waterways, rather than relying on costly and unsatisfying litigation.<sup>232</sup>

But when Congress fails to act—as it usually does<sup>233</sup>—it is incumbent upon the Court to recognize that there is no alternative to strong judicial involvement. There is no neutral position, no legislature, agency, or common-law tradition for the Court to defer to. For the Court to seek to avoid the dispute is, in effect, to award victory to one side. As Charles Meyers has observed:

The consequence of an understandable reluctance to apportion water on a vague, if not meaningless, standard and thereafter to supervise the development of the water resources of the litigant states has been a judicial abstinence which in essence favors the upstream state. The dismissal of a suit as nonjusticiable often amounts to a decision allowing the upstream state to continue its diversions.<sup>234</sup>

One need not endorse policy-driven judging in other settings to recognize that equitable apportionment actions are *sui generis*. They are disputes that, were the quarreling states independent nations, “would be settled by treaty or by force. Neither of these ways being practicable, [they] must be settled by decision of [the Supreme Court].”<sup>235</sup> The analogy to international water conflicts is a telling one. International law has rejected calls to put prior appropriation at the center of crossborder water disputes. Instead, it has adopted a flexible, multifactor test (reflected in the Helsinki Rules on the Uses of the Waters of International Rivers and the Berlin Rules on Water Resources) in which prior use, while an important consideration, is but one component of the ultimate inquiry, similar to Anglo-American riparian law.<sup>236</sup> The equal-footing doctrine—the “doctrine of the

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231. Tennessee v. Lane, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting).

232. See Meyers, *supra* note 37, at 48–49.

233. See SAX ET AL., *supra* note 101, at 836 (noting that, aside from *Arizona v. California*, the only other instance of congressional apportionment was the division of the waters of the Truckee and Carson Rivers between California and Nevada, though there the two states had actually agreed to the division in the form of an interstate compact that Congress was slow to ratify); E. Leif Reid, Note, *Ripples from the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights*, 14 STAN. ENVTL. L.J. 145, 178–79 (1995). The principal reason for the rarity of congressional apportionment is that Congress, and the Senate in particular, with its tradition of state equality, is highly reluctant to approve a division of water that lacks the blessing of the senators representing all the states involved. See Meyers, *supra* note 37, at 48.

234. Meyers, *supra* note 37 at 50. The Court’s reluctance to settle matters has a variety of other negative consequences that Meyers also identified, including depriving both states of the certainty needed to secure financing for investment in water projects. See *id.*

235. Kansas v. Colorado, 206 U.S. 46, 98 (1907); see also Memorandum from Justice Douglas to the Conference, *supra* note 141 (internal memorandum discussing analogy between equitable apportionment in the West and dispute over the Indus River between India and Pakistan).

236. See INTERNATIONAL LAW ASSOCIATION, HELSINKI RULES ON THE USES OF WATERS OF INTERNATIONAL RIVERS (1967), available at [http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational\\_tools/course\\_modules/ref](http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational_tools/course_modules/ref)

equality of States<sup>237</sup>—points toward the necessity of treating states in equitable apportionment cases with the same degree of respect and evenhandedness with which international law treats sovereign nations. The Court should approach these cases as a court of equity would, seeking to achieve a fair and reasonable result for all the sovereigns involved, rather than applying inflexible legal rules that systematically advantage some over others. The equal-footing doctrine, of course, does not guarantee resource equality—geography inevitably blesses some states more than others—but the doctrine does require that shared, limited, interstate resources be divided in a roughly equitable manner.

### C. *The Vermejo River Litigation*

The problematic and confusing nature of the Court’s doctrine is reflected in the Court’s most recent equitable apportionment decision on the merits: its resolution of *Colorado v. New Mexico*, a dispute over the Vermejo River, a small tributary of the Canadian River that originates in southern Colorado and flows southeastward into New Mexico.<sup>238</sup> Users in New Mexico had appropriated the entire flow of the river by the time a Colorado company, in 1975, sought to divert some water for industrial use.<sup>239</sup> The Court appointed a Special Master, who recommended appropriating 4,000 acre-feet of water per year to Colorado after weighing factors such as “waste, availability of reasonable conservation measures, and the benefit balance of and harm from diversion” to the two states—in other words, departing from interstate prior appropriation.<sup>240</sup> New Mexico objected that the rule of priority should govern. The Court, through Justice Marshall, sided with the Special Master, describing equitable apportionment as a “flexible doctrine which calls for ‘the exercise of an informed judgment on a consideration of many factors’ to secure a ‘just and equitable’ allocation.”<sup>241</sup> It noted that “the equities supporting the protection of existing economies will usually be compelling,” but recognized that “[u]nder some circumstances . . . the countervailing equities supporting a diversion for future use in one state may justify the detriment to existing users in another state.”<sup>242</sup> The Court remanded for additional fact-finding necessary to determine whether the Special Master’s recommended allocation was

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erence\_documents/internationalregionconventions/helsinkirules.pdf; INTERNATIONAL LAW ASSOCIATION, BERLIN RULES ON WATER RESOURCES (2004), available at [http://www.internationalwaterlaw.org/documents/intldocs/ILA\\_Berlin\\_Rules-2004.pdf](http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf). For commentary, see Margaret J. Vick, *The Law of International Waters: Reasonable Utilization*, 12 CHL.-KENT J. INT’L & COMP. L. 141, 154–67 (2012).

237. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

238. *Colorado v. New Mexico (Colorado v. New Mexico II)*, 467 U.S. 310, 312 (1984); *Colorado v. New Mexico (Colorado v. New Mexico I)*, 459 U.S. 176, 178 (1982).

239. *Colorado v. New Mexico I*, 459 U.S. at 178.

240. *Colorado v. New Mexico II*, 467 U.S. at 313–14.

241. *Colorado v. New Mexico I*, 459 U.S. at 183 (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)).

242. *Id.* at 187.

appropriate.<sup>243</sup> In his concurrence, Chief Justice Burger, joined by Justice Stevens, sharply repudiated interstate prior appropriation:

I emphasize that under our prior holdings these two states come to the Court on equal footing. Neither is entitled to any special priority over the other with respect to use of the water. Colorado cannot divert all of the water it may need or can use simply because the river's headwaters lie within its borders. Nor is New Mexico entitled to any particular priority of allocation or undiminished flow simply because of first use. Each state through which rivers pass has a right to the benefit of the water but it is for the Court, as a matter of discretion, to measure their relative rights and obligations and to apportion the available water equitably. As the Court's opinion states, in the process of apportioning the water, prior dependence and inefficient uses may be considered in balancing the equities. But no state has any priority over any other state. It is on this understanding of the Court's holding that I join the opinion and the judgment.<sup>244</sup>

When the case came back to the Court two years later, though, the Court—this time through Justice O'Connor—struck a substantially different tune, in an opinion foreshadowed by Justice O'Connor's concurrence in the first case two years earlier.<sup>245</sup> The Special Master, after making the additional factual findings the Court requested, had reaffirmed his earlier recommendation.<sup>246</sup> The Court, however, held that Colorado had not met its burden of proving, “by clear and convincing evidence, that reasonable conservation measures could compensate for some or all of the proposed diversion and that the injury, if any, to New Mexico would be outweighed by the benefits to Colorado from the diversion.”<sup>247</sup> It was the standard of proof that did all of the heavy lifting of the Court's opinion. Colorado's evidence that New Mexico could save water through additional conservation measures amounted only to “generalizations” and “[m]ere assertions about the relative efficiencies of competing projects”; it had pointed to no “specific measures New Mexico could take to conserve water.”<sup>248</sup> The Court recognized that “the flexible doctrine of equitable apportionment extends to a State's claim to divert previously appropriated water for future uses,” but, voicing its concern about “[s]ociety's interest in minimizing erroneous decisions in equitable apportionment cases,” imposed a standard so demanding it appears to make it virtually impossible for a junior appropriator in Colorado's position to prevail in such suits.<sup>249</sup> Justice Stevens, in dissent, recognized as much, criticizing the majority for “sidestep[ping]” the equal-footing principle and “accepting New

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243. *Id.* at 189–90.

244. *Id.* at 191 (citations omitted).

245. *Id.* at 191–96.

246. *Colorado v. New Mexico II*, 467 U.S. 310, 315 (1984).

247. *Id.* at 317.

248. *Id.* at 319–20.

249. *Id.* at 323, 320.

Mexico's argument that the benefits of this system should inure solely to the benefit of New Mexico" by virtue of first use.<sup>250</sup>

The Vermejo River litigation, in a sense, serves as a microcosm for the Court's equitable apportionment jurisprudence. The Court started off on the right foot, initially recognizing that states in interstate water disputes come before it as equal sovereigns, and that neither a State's upstream location nor its first use entitles it to any particular share of water. But, when push came to shove, the Court shied away from making the difficult equitable decisions a faithful application of this rule would entail. As one commentator has observed, "when all was said and done, Colorado got no water whatsoever"—an odd outcome in a case purporting to equitably apportion an interstate stream.<sup>251</sup> The Court's decision in the Vermejo litigation to impose a clear-and-convincing-evidence standard of proof on the would-be junior appropriator served essentially the same function as the rule of interstate prior appropriation had in *Wyoming v. Colorado*: In both cases, the Court opted for a neutral-seeming rule that, in reality, weighted the scales strongly in favor of the senior appropriator. The same thing might also be said of the threshold injury requirement the Court often imposes on complaining states, a doctrine that, if applied rigorously, gives a strong advantage to defendant states.<sup>252</sup>

Going forward, it remains to be seen what role equitable apportionment has to play in resolving interstate water disputes. Some have virtually written it off, arguing that "equitable apportionment actions are no longer viable alternatives by which interstate water conflicts may be resolved."<sup>253</sup> That may be an overreaction; the historical trend suggests the Court seems to veer back and forth between extremes, and there are signs that pattern may continue.<sup>254</sup> At the very least, though, the Vermejo litigation confirms that the Court missed a significant opportunity in *Arizona v. California* to set the doctrine on sounder footing. Where the Court has such a difficult time doing equity in equitable apportionment actions, something is wrong.

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250. *Id.* at 328.

251. Robert Haskell Abrams, *Interstate Water Allocation: A Contemporary Primer for Eastern States*, 25 U. ARK. LITTLE ROCK L. REV. 155, 165 (2002).

252. *See, e.g., Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1027 (1983) (declining to equitably apportion anadromous fish in the Columbia–Snake River system).

253. George William Sherk, *Equitable Apportionment After Vermejo: The Demise of a Doctrine*, 29 NAT. RESOURCES J. 565, 583 (1989); *see also* William D. Olcott, Comment, *Equitable Apportionment: A Judicial Bridge over Troubled Waters*, 66 NEB. L. REV. 734, 747 (1987).

254. *See* SAX ET AL., *supra* note 101, at 867 (noting that the Court "seemed to veer back toward [*Colorado v. New Mexico I*]" in *Nebraska v. Wyoming*, 515 U.S. 1 (1995), where, in revisiting the 1945 equitable apportionment over the North Platte River, the Court suggested that Wyoming should be given an opportunity to demonstrate that more water would be available for it to appropriate but for wasteful practices in Nebraska).



## CONCLUSION

One might reasonably ask, even if I am right, why does any of this matter? Equitable apportionment actions are rare, and some have argued that their era has passed.<sup>255</sup> What is the significance of the fact that, 50 years ago, the Court employed dubious legal reasoning to justify an outcome that it could have reached on sounder ground?

The answer is that the next several decades are virtually certain to give rise to a significant number of interstate water disputes—some old, some new. Climate change, combined with rapid rates of population growth in the West, seems likely to put increasing stress on limited water supplies, exacerbating existing interstate water conflicts.<sup>256</sup> Indeed, those same trends are spawning interstate conflicts over water even outside the West,<sup>257</sup> evidenced by the recent equitable apportionment litigation between South Carolina and North Carolina over the waters of the Catawba River.<sup>258</sup> Burgeoning disputes over limited groundwater supplies are another likely source of future equitable apportionment actions.<sup>259</sup> Elsewhere, some conflicts that were thought to have been resolved will likely need to be revisited in light of changing circumstances. In *Nebraska v. Wyoming*, for instance, the Court entertained Nebraska's motion to reopen a 50-year-old equitable apportionment in light of changed circumstances.<sup>260</sup> The same might be true of a number of interstate water compacts, which could become the

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255. See, e.g., Tarlock, *supra* note 108, at 402 (describing *Nebraska v. Wyoming* as “the last of the major equitable apportionments”).

256. See generally, e.g., Tim Barnett et al., *The Effects of Climate Change on Water Resources in the West: Introduction and Overview*, 62 CLIMATIC CHANGE 1 (2004); Phillip W. Mote, *Climate-Driven Variability and Trends in Mountain Snowpack in Western North America*, 19 J. CLIMATE 6209 (2006); BUREAU OF RECLAMATION, COLORADO RIVER BASIN WATER SUPPLY & DEMAND STUDY, FINAL STUDY REPORTS (2012), available at <http://www.usbr.gov/lc/region/programs/crbstudy/finalreport/index.html>.

257. See, e.g., Abrams, *supra* note 250, at 155; Alyssa S. Lathrop, Comment, *A Tale of Three States: Equitable Apportionment of the Appalachian–Chattahoochee–Flint River Basin*, 36 FLA. ST. U. L. REV. 865, 866 (2009); Stephen E. O’Day et al., *Wars Between the States in the 21st Century: Water Law in an Era of Scarcity*, 10 VT. J. ENVTL. L. 229, 230 (2009); Michael D. Tauer, *Evolution of the Doctrine of Equitable Apportionment—Mississippi v. Memphis*, 41 U. MEM. L. REV. 897, 897–98 (2011).

258. *South Carolina v. North Carolina*, 558 U.S. 256 (2010) (resolving dispute over intervention); *South Carolina v. North Carolina*, 552 U.S. 804 (2007) (granting leave to file a bill of complaint). In the interest of full disclosure, it should be noted that the Author of this Article assisted Kristin Linsley Myles, the Special Master appointed by the Supreme Court in the case, in the preparation of an interim report.

259. See, e.g., Justin Newell Hesser, Comment, *The Nature of Interstate Groundwater Resources and the Need for States to Effectively Manage the Resource Through Interstate Compacts*, 11 WYO. L. REV. 25, 36–37 (2011); John R. Zimmerman, *Nevada–Utah Interstate Groundwater Negotiations*, 24-SPG NAT. RESOURCES & ENV’T 54, 56 (2010).

260. See *Nebraska v. Wyoming*, 507 U.S. 584, 593 (1993).

subject of increasing litigation if they are not renegotiated in coming years.<sup>261</sup> This includes the Colorado River Compact, where disputes are on the horizon on a multitude of issues ranging from who will bear the brunt of shortages to how to deal with obligations to the environment, Mexico, and Indian tribes.<sup>262</sup> If these disputes are not resolved through negotiation, it is possible that some states will seek to withdraw from interstate compacts and will seek equitable apportionments in the Supreme Court.<sup>263</sup>

It would be preferable, of course, if these disputes could be settled by new and updated interstate compacts. Any lawyer or scholar familiar with the decades-long history of *Arizona v. California* is bound to recoil at the prospect of new litigation between states in the Supreme Court over water rights in the Colorado River basin. But there is little doubt that the Court's equitable apportionment jurisprudence will play an important role in any future negotiations between states over a diminishing supply of water in the basin. All such negotiations will take place in the shadow of the Court's doctrine, in the same way that other types of settlement discussions between would-be litigants are colored by the results the parties could expect to obtain in court. The risk is that the Court's doctrine, if problematic, could stand as an obstacle to fruitful negotiation. If some state believes that, notwithstanding the cost and uncertainty of litigation, it could achieve a better outcome in the Supreme Court than at the bargaining table, its incentive to compromise will be weakened. It is not difficult to imagine that some enterprising governor or state attorney general will opt to hold out and take his or her chances at the Supreme Court.

In part for this reason, the U.S. Reports are filled with original-jurisdiction cases that could and should have been settled more efficiently by interstate compact, but were not. In these instances, there is simply no alternative to Supreme Court involvement. Congressional apportionment is a figment; if the

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261. A number of these disputes have already made their way to the Court, though they generally call for application of principles of compact interpretation, not equitable apportionment. *See, e.g.*, *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120 (2013); *Montana v. Wyoming*, 131 S. Ct. 1765 (2011).

262. *See, e.g.*, Robert W. Adler, *Revisiting the Colorado River Compact: Time for a Change?*, 28 J. LAND RESOURCES & ENVTL. L. 19, 30–46 (2008); Eric L. Garner & Michelle Ouellette, *Future Shock? The Law of the Colorado River in the Twenty-First Century*, 27 ARIZ. ST. L.J. 469, 506 (1995); David H. Getches, *Competing Demands for the Colorado River*, 56 U. COLO. L. REV. 413, 427–28 (1985); Douglas Kenney et al., *The Colorado River and the Inevitability of Institutional Change*, 32 PUB. LAND & RESOURCES L. REV. 103, 115–34 (2011); W. Patrick Schiffer et al., *From a Colorado River Compact Challenge to the Next Era of Cooperation Among the Seven Basin States*, 49 ARIZ. L. REV. 217, 220–28 (2007).

263. *See* Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 170–71 (2003); *see also* Adler, *supra* note 261, at 20–23; Kenney et al., *supra* note 261, at 130–34. Of course, the idea of renegotiating the Colorado River Compact is a source of much controversy. *See, e.g.*, Emily Jeffers, Note, *Creating Flexibility in Interstate Compacts*, 36 ECOLOGY L.Q. 209, 225 (2009) (quoting former Interior Secretary Ken Salazar vowing to reopen the Compact only “over my dead body”).

states themselves cannot settle their dispute, Congress will not do so.<sup>264</sup> *Arizona v. California* provides the only example in the Nation's history of Congress dividing an interstate stream where the quarreling states could not agree on an allocation, and the Congress that enacted the Boulder Canyon Project Act in 1928 would no doubt be quite surprised to learn that it had done so.

In light of these insights, the doctrine of equitable apportionment is not some historical artifact—far from it. It is an essential tool that the Supreme Court will almost certainly need to pluck from the shelf, dust off, and put to use in the coming years. An equitable apportionment action in the Court's original jurisdiction is truly the path of last resort. If neither the states themselves nor Congress will resolve the conflict, there are only two possibilities: the Supreme Court can step in, or it can let the benefits and burdens of resource ownership lie where they fall, by geographic and historical accident, to the systematic advantage of some states over others. The principle of equal footing makes that an unacceptable outcome.

The Court can be excused for not enjoying its role in these disputes, but it cannot be excused from performing that role. The stakes are too high, and the implications for federalism and state sovereignty are too great. Yet, all too often over the past century, the Court has sought to duck the difficult task of weighing the equities and dividing the waters. This reluctance has manifested itself in many ways: the high threshold injury requirement, the clear-and-convincing evidence standard, the rule of interstate prior appropriation. In *Arizona v. California*, it produced a strained and unrealistic reading of an important federal statute. The next time the Court is called upon to equitably apportion an interstate waterway, it would be well advised to heed the lesson of that case, and to take a different path.

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264. See *supra* note 232 and accompanying text.