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COMMENTARY

SOUTH CAROLINA V. NORTH CAROLINA— SOME PROBLEMS ARISING IN AN EAST COAST WATER DISPUTE

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INTRODUCTION

In June 2007, South Carolina sought leave from the Supreme Court of the United States to file an original bill of complaint. South Carolina asserted that North Carolina was using more than its share of the waters of the Catawba River, which flows from the Blue Ridge Mountains in North Carolina past Charlotte and into South Carolina at Lake Wylie. Among other things, South Carolina claimed that North Carolina had improperly approved inter-basin transfers of water from the Catawba into other river systems. South Carolina sought an equitable apportionment of the waters of the Catawba, and an injunction against further transfers. North Carolina opposed the filing of the complaint on the ground that the issue of the flow and usage of the Catawba already was the subject of a proceeding before the Federal Energy Regulatory Commission (FERC) on an application by Duke Energy to renew its fifty-year license for eleven power plants along the Catawba. Duke's relicensing application had involved a comprehensive negotiation among affected constituencies in both states, including state agencies, environmental groups, water users, and others. In October 2007, the Court granted South Carolina leave to file its bill of complaint.

* This commentary was written as part of Ms. Myles' presentation as a panelist during the ABA's 19th Section Fall Meeting in Indianapolis, Indiana. The panel addressed the legal challenges common in interstate water disputes, and how they are adjudicated through the original jurisdiction of the Supreme Court of the United States. Ms. Myles addressed an interstate water dispute, *South Carolina v. North Carolina*, Orig. No. 138, in which she acted as Special Master for the U.S. Supreme Court. The record of the proceedings can be found at http://www.mto.com/sm. Ms. Myles is a litigation partner in the San Francisco office of Munger, Tolles & Olson LLP.

The *South Carolina v. North Carolina* dispute was unique in a number of respects. Most notably, unlike most water disputes that the Court has heard, it did not involve any pre-existing interstate compact, and both of the states involved were riparian rights states. Accordingly, there was no pre-ordained benchmark—such as a regime established by compact or a set of adjudicated rights of prior appropriation—against which any equitable apportionment might be shaped. This meant that the equitable apportionment, if the Court were to get to the point of adjudicating the issue, would have been a "pure" apportionment, based on usage history, future needs, a weighing of the quality of uses, and other factors. It necessarily would have entailed an enormous amount of fact-finding, expert input, and, ultimately, judgment.

In the end, the case settled with the parties agreeing to resolve their disputes through the pending FERC proceeding. This paper discusses three issues that arose in the case that raised interesting puzzles and that might provide useful guidance for future cases: namely, the source of law in original jurisdiction cases, and in equitable apportionment cases in particular; the role of non-state parties in such actions; and the availability of bifurcation to streamline the adjudication process.

NATURE OF EQUITABLE APPORTIONMENT CASES

Because *South Carolina v. North Carolina* was a "pure" equitable apportionment case, the issue of the *source* of applicable law arose on more than one occasion. Without a compact or a set of previously adjudicated state law water rights, the Court ultimately would have to resolve the dispute based on a balancing of numerous relevant factors, as a matter of federal common law. But to what extent would state law play a role in any such resolution? This question arose frequently in the briefing on intervention and other issues as well.

Some background on the Court's equitable apportionment jurisprudence is useful to place this question in context. Early in the Court's history, it was unclear whether the grant of original jurisdiction to the Court in Article III, Section 2 also carried with it the power to make new law. In some of the early disputes between states, including those involving boundary and water disputes, states challenged the Court's power to make law, arguing that the jurisdictional grant gave the Court original jurisdiction but did not give it the power to make law—a power that was reserved to Congress.[1] The Court ultimately held that the purpose of the original jurisdiction grant was to allow the Court to resolve disputes between sovereign states that otherwise, absent such a dispute resolution mechanism, would be cause for war or interstate treaties. Because the Constitution had

[1] *See, e.g.*, Rhode Island v. Massachusetts, 37 U.S. 657, 677, 717–18, 720 (1838) (arguing only Congress has the power to make law and noting the jurisdictional challenge raised by Massachusetts and the Court's "limited and special original jurisdiction").

stripped the states of that aspect of their sovereign power—the power to wage war and to negotiate treaties—there needed to be a substitute mechanism to allow disputes to be resolved amicably, in a manner that respected the dignity of each sovereign state.[2] To the extent that such disputes might arise in an area where no binding law existed to guide the Court, the Court would have to fashion such law as common law, as a necessary part of its power to resolve the dispute itself.[3] The power to do so necessarily was part of the Court's constitutional power to resolve disputes between states, even in areas that went beyond the competence of Congress to makes laws on the subject matter.[4] As the Court explained in *Kansas v. Colorado*:

> One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever . . . the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law.[5]

It was against this set of background understandings that the Court developed its federal common law of equitable apportionment. The Court has held that the inquiry to determine one state's rights to the waters of a river over those of another state is necessarily very broad. Early in the Court's jurisprudence, it rejected

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[2] *See* Kansas v. Colorado, 206 U.S. 46, 97 (1907); Missouri v. Illinois, 180 U.S. 208, 234, 238 (1901) (quoting Louisiana v. Texas, 176 U.S. 1, 22–23 (1900)); Rhode Island v. Massachusetts, 37 U.S. at 724–27. As the Court explained in *Rhode Island v. Massachusetts*, which presented a similar issue of judicial lawmaking power in the context of a boundary dispute:

> Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree, or fight with its adversary, without the consent of congress: a resort to the judicial power is the only means left for legally adjusting, or persuading a state which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the state in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.

37 U.S. at 726.

[3] *See* Kansas v. Colorado, 206 U.S. at 95–98.

[4] *See id.* at 95 ("It does not follow . . . that because Congress cannot determine the rule which shall control between the two states . . . the controversy ceases to be one of a justiciable nature.").

[5] *Id.* at 97–98.

arguments by some states—particularly Colorado—that an upstream state has the sovereign right to take any and all water that runs through the state.[6] The Court also rejected equally extreme claims by downstream states that the upstream state has no right to draw water out.[7] In fact, in *Kansas v. Colorado* itself, the Court confronted two differing water rights regimes—prior appropriation in Colorado, and riparian rights in Kansas—and had to determine the appropriate rule in a dispute between two states whose laws would have produced very different results. As the Court noted, "[i]f the two states were absolutely independent nations [the dispute] would be settled by treaty or by force."[8] But "[n]either of these ways being practicable, it must be settled by decision of this court."[9] What resulted was a very broad inquiry. As the Court explained in *Nebraska v. Wyoming*:

> 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.[10]

ROLE OF STATE LAW

This brief history on the Court's equitable apportionment jurisprudence provides some background to the question regarding the role of state law—as well as to the intervention and bifurcation questions discussed below. The prior cases did not definitively address the degree to which, within this federal common law exercise of equitable apportionment, state law may be taken into account. In the *South Carolina v. North Carolina* case, South Carolina argued that state law permits and other authorizations previously granted by North Carolina to its water users were irrelevant because they would be overridden by whatever apportionment the Court might make as a matter of federal common law. But

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[6] *See id.* at 98, 117 (discussing Colorado's "extreme contention" and ultimately framing its holding in terms of an "equitable division of benefits").

[7] *See id.*

[8] *Id.* at 98.

[9] *Id.*

[10] 325 U.S. 589, 618 (1945); *see also* Colorado v. Kansas, 320 U.S. 383, 393–94 (1944) ("[I]n determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed . . . .").

this approach overlooks the possibility of state law expectations as a factor that the Court might consider as part of its federal common law analysis. In some cases, the Court has looked to state law as the federal common law rule in the case—for example, where both states recognize the same state law water rights rules and the Court determines that following those rules is the most fair and equitable course. This has occurred with some regularity in cases where both State parties follow the rule of prior appropriation.[11] State law also plays an indirect role where state law rights or other interests or uses are considered as part of the equitable apportionment analysis.[12] The Court consistently has held that state law and settled water uses authorized by state law are to be considered and weighed, as the circumstances require.

In light of these precedents and the broad reach of the equitable apportionment analysis, I concluded that state-created rights and interests, including authorizations previously granted under North Carolina law, could not be entirely disregarded in any equitable apportionment. For example, "the extent of established uses" and "the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former" are among the factors that the Court considers.[13] Indeed, the Court likely would consider existing rights of water users under North Carolina law to transfer water from the Catawba for use by their customers and citizens and the degree to which such users have operated in reliance upon the continued existence of those state law rights. In sum, state law ultimately would play a role even in a determination of rights under federal common law.

INTERVENTION

Another key issue that arose in the *South Carolina v. North Carolina* case was whether three non-state parties should be allowed to intervene. This issue ultimately was decided by the Court, which allowed two of the three parties to intervene. Duke Energy was one such party.[14] Duke claimed that it had an interest separate from the interests of the States by virtue of its FERC license and its operation of power plants both north and south of the border, including a significant reservoir at the border at Lake Wylie where water from Duke's plant would have to be regulated in order to give effect to any equitable apportionment decree that ultimately was entered in the case.[15] Duke also claimed that it had a significant

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[11] *See, e.g.*, Colorado v. New Mexico, 459 U.S. 176, 183–84 (1982); Nebraska v. Wyoming, 325 U.S. at 617–18; Wyoming v. Colorado, 259 U.S. 419, 470 (1922).

[12] *See* Connecticut v. Massachusetts, 282 U.S. 660, 670–71 (1931) (observing that an equitable apportionment analysis depends "upon a consideration of the pertinent laws of the contending States and all other relevant facts . . . .").

[13] *Nebraska*, 325 U.S. at 618.

[14] South Carolina v. North Carolina, 130 S. Ct. 854, 866–67 (2010).

[15] *Id.* at 866.

stake in the controversy by virtue of the pending FERC proceedings relating to its relicensing application, which Duke argued reflected a comprehensive agreement among constituencies that could be undermined by the relief sought by one or both of the parties.[16] Finally, Duke contended that the terms of its current and future licenses would be crucial to any consideration by the Court of whether and how equitably to apportion the Catawba River.[17]

The second intervenor permitted to join the case was the Catawba River Water Supply Project (CRWSP)—a joint venture between units of government of North Carolina and South Carolina.[18] One of the two participants in CRWSP was Union County, North Carolina, which was authorized under section 143-215.22L(a)(1) of the North Carolina General Statutes, to transfer up to five million gallons per day from the Catawba.[19]

The third proposed intervenor in the dispute was the City of Charlotte, North Carolina, which was a beneficiary of one of the inter-basin transfers to which South Carolina objected, and which allowed Charlotte's power facility to transfer up to thirty-three million gallons per day.[20]

Ultimately, a divided Court, with Justice Alito writing, permitted Duke and CRWSP to intervene, but denied intervention status to Charlotte.[21] The Court rejected the argument—advanced by South Carolina and by the Chief Justice in dissent—that intervention never should be allowed in interstate water disputes.[22] On the other hand, the Court emphasized that due respect must be given to the "sovereign dignity" of the party states, such that when a State is "'a party to a suit involving a matter of sovereign interest,' it is *parens patriae* and 'must be deemed to represent all [of] its citizens.'"[23] With this principle in mind, the Court followed the test previously announced in *New Jersey v. New York*: "An intervenor

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[16] *Id.* at 866–67.

[17] Duke Energy Carolinas, LLC's Reply Brief in Support of Motion to Intervene and File Answer at 12, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 138, Original), 2007 WL 6831124.

[18] South Carolina v. North Carolina, 130 S. Ct. at 864.

[19] *See id.* at 859, 864–65 (citing N.C. GEN. STAT. § 143-215.22L(a)(1) (2007)). The Court referenced the allegation in South Carolina's complaint that the North Carolina "statute 'grandfathers' a 5 mgd transfer by the CRWSP." *Id.* at 859; *see also* Brief of the State of South Carolina in Support of Its Motion for Leave to File Complaint at 6, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 138, Original), 2007 WL 3283683 (citing N.C. GEN. STAT. § 143-215.22I(b), (i) (2006) (repealed 2007) (current version at N.C. GEN. STAT. § 143-215.22L(b), (p) (2010))).

[20] South Carolina v. North Carolina, 130 S. Ct. at 859–61, 867–68.

[21] *Id.* at 858–59.

[22] *See id.* at 869 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

[23] *Id.* at 863 (majority opinion) (quoting New Jersey v. New York, 345 U.S. 369, 372–73 (1953)).

whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state."[24]

Within that framework, the Court easily dispatched the City of Charlotte, the interests of which the Court found would be represented by North Carolina, which had an interest in ensuring sufficient water for Charlotte and other North Carolina municipalities.[25]

As for Duke, the Court found that it had demonstrated "powerful interests that likely will shape the outcome of this litigation."[26] The Court emphasized that the manner in which an equitable apportionment is resolved is not a formulaic process but must take into account numerous factors, including:

> [P]hysical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.[27]

With these interests as background, the Court concluded that Duke's interests in operating its power plants, and its function of regulating the flow of much of the river, gave it a concrete interest in the outcome of the litigation. The Court also agreed with Duke that it had a strong interest in protecting the negotiated outcome of its relicensing proceeding. The Court noted that Duke's FERC license "regulates the very subject matter in dispute: the river's minimum flow into South Carolina."[28] The Court also found that the negotiated relicensing agreement "represents the full consensus of 70 parties from both States regarding the appropriate minimum continuous flow of Catawba River water into South Carolina under a variety of natural conditions and, in times of drought, the conservation measures to be taken by entities that withdraw water from the Catawba River"—factors that the Court concluded "undeniably are relevant to any 'just and equitable apportionment' of the Catawba River."[29] The Court concluded that these interests should be represented and taken into account

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[24] *Id.* (quoting *New Jersey*, 345 U.S. at 373).

[25] *Id.* at 867–68.

[26] *Id.* at 866.

[27] *Id.* (quoting Colorado v. New Mexico, 459 U.S. 176, 183 (1982); Nebraska v. Wyoming, 325 U.S. 589, 618 (1945)).

[28] *Id.*

[29] *Id.* at 866–67 (citation omitted).

in the litigation, and that neither state party was in a position to represent those interests.[30]

The Court also permitted CRWSP to intervene because, as a bi-state entity, its interests would not be adequately represented by either party. The Court reasoned:

> The CRWSP is an unusual municipal entity, established as a joint venture with the encouragement of regulatory authorities in both States and designed to serve the increasing water needs of Union County, North Carolina, and Lancaster County, South Carolina. It has an advisory board consisting of representatives from both counties, draws its revenues from its bistate sales, and operates infrastructure and assets that are owned by both counties as tenants-in-common. We are told that approximately 100,000 individuals in each State receive their water from the CRWSP and that "roughly half" of the CRWSP's total withdrawals of water from the Catawba River go to South Carolina consumers. It is difficult to conceive of a more purely bistate entity.[31]

Accordingly, the Court found that CRWSP's interests would not be represented adequately by either state.[32]

Four Justices dissented from the Court's ruling allowing the two interventions—the Chief Justice and Justices Thomas, Ginsburg, and Sotomayor. They argued that original jurisdiction is intended for resolution of state sovereign claims, not private claims, and that due to the uniquely sovereign nature of water disputes, intervention should rarely, if ever, be allowed in such disputes.[33] The interests of citizens in such disputes, the dissent reasoned, necessarily derive from the rights of the state—a principle that holds true regardless of whether the state will advocate a particular party's interest in the dispute. The dissent also was concerned about the practical consequences of opening the door to private intervention in water disputes:

> It is hard to see how the arguments the Court accepts today could not also be pressed by countless other water users in either North or South Carolina. Under the Court's analysis, I see no practical limitation on the number of citizens, as such, who would be entitled to be made parties. To the extent intervention

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[30] *Id.* at 867.

[31] *Id.* at 864 (citation omitted).

[32] *Id.* at 865.

[33] *Id.* at 871 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

> is allowed for some private entities with interests in the water, others who also have an interest will feel compelled to intervene as well—and we will be hard put to refuse them. An equitable apportionment action will take on the characteristics of an interpleader case, with all those asserting interests in the limited supply of water jostling for their share like animals at a water hole. And we will find ourselves in a quandary whereby we must opt either to pick and choose arbitrarily among similarly situated litigants or to devote truly enormous portions of our energies to original matters.[34]

The division in the Court on the intervention question highlights some continued difficulty in defining the Court's role in resolving interstate water disputes. The majority of Justices emphasized the multi-faceted nature of the exercise, and the numerous factors that need to be taken into account in resolving interstate water disputes. Equally appropriate, the dissenting Justices emphasized the sovereign nature of each state's interest, and the importance of resolving such matters at the sovereign level, rather than turning original actions into global water adjudications akin to intrastate disputes resolved at the state level and involving all interested parties.

BIFURCATION

Another issue that arose in *South Carolina v. North Carolina* was whether the liability issues in the case should be tried in two phases. In initial case management proceedings, both State parties favored such a bifurcation—the concept being that the initial trial could test the sufficiency of South Carolina's threshold showing of injury, and, if such injury were shown, the case could proceed to the merits. This concept was memorialized in the initial Case Management Plan, but the parties never were able to agree on the definition of the relevant phases. Following the Supreme Court's decision on intervention, the issue of bifurcation arose again, with South Carolina for the first time arguing against any form of bifurcation at the liability stage. This led to motion practice on the issue.

There is no special rule governing bifurcation in Supreme Court original cases. Supreme Court Rule 17.2 allows the Court in original cases to use the Federal Rules of Civil Procedure as "guides" in appropriate cases. Because a proposed bifurcation of a case for trial raises essentially the same procedural and timing considerations in an original case in this Court as it does in cases originating in the district courts, federal district court cases involving Rule 42(b) bifurcation provided a useful precedent. In those cases, the principal question on a motion for bifurcation of liability is whether the case can be resolved more efficiently

[34] *Id.* at 874–75 (citations omitted) (internal quotation marks and brackets omitted).

with one trial or two. If, for example, there is a separate and case-dispositive issue that, if resolved one way, would obviate a protracted trial on other liability issues, then it makes sense to hold a short trial on the one issue with the expectation that resolution of that issue may be all that is needed. If, by contrast, there is no clear division between the posited "threshold" issue and the issues that would have to be addressed in a second phase of trial, or if it is not clear what resolution of the first phase, if any, would obviate the second, then bifurcation may in fact prolong the ultimate resolution of the case because it may require certain issues to be tried or presented twice. Procedurally, the burden generally is on the party seeking to bifurcate to show why such a procedure is more efficient than a unitary trial.[35] In addition, although there are numerous precedents for holding separate trials on liability and damages, or on compensatory and punitive damages, there is far less support for bifurcating the phases of a liability determination.[36]

Ultimately, the result was that the case would proceed without bifurcation—despite the theoretical prospect that some form of bifurcation might speed up the resolution of the case. Although the parties initially had agreed on the concept of bifurcation—and even on the existence of a "threshold" question of South Carolina's injury that could be decided before other issues—the parties never agreed on the definition and scope of the two proposed phases. Their differences were not merely issues of wording, but rather reflected fundamentally different views as to South Carolina's burden of proof, both in the initial phase and in the action generally. For example, during the period when South Carolina was advocating a bifurcated trial, it offered a narrow view of the showing it would have to make to survive Phase I—namely, that the water flowing to its side of the border was insufficient to meet its needs, and that uses by North Carolina, viewed in the aggregate, were the cause of that insufficient flow. By contrast, North Carolina contended that Phase I would include consideration of not only the reduced flow and the aggregate uses by North Carolina, but also a host of other

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[35] Generally speaking, the procedure is to decide all issues in a single trial. *See* Willemijn Houdstermaatschaapij BV v. Apollo Computer, Inc., 707 F. Supp. 1429, 1433 (D. Del. 1989). Bifurcation is "the exception, not the rule." Laitram Corp. v. Hewlett-Packard Co., 791 F. Supp. 113, 114 (E.D. La. 1992). A party seeking bifurcation must justify departing from the unitary trial model, usually by showing that a bifurcated trial would be more efficient or avoid prejudice. *See, e.g.*, Rodin Properties–Shore Mall, N.V. v. Cushman & Wakefield of Pa., Inc., 49 F. Supp. 2d 709, 721 (D.N.J. 1999) (citations omitted); THK Am., Inc. v. NSK Co., 151 F.R.D. 625, 631–32 (N.D. Ill. 1993).

[36] Separate trials on liability and damages can create efficiencies because the damages issues may involve different evidence and do not need to be decided unless liability is proven. *See* Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 964 (10th Cir. 1993). Another common practice is to hold a separate trial on punitive damages after the main trial on liability and compensatory damages. In that instance, the objective is to avoid prejudice to the defendant that would result from allowing punitive damages evidence—such as evidence of the defendant's net worth—at the liability and compensatory damages stage.

issues, including whether other factors—such as natural drought conditions, or inefficient usage by South Carolina—caused or contributed to South Carolina's injury.

The parties also did not agree on what would happen at the end of Phase I. South Carolina contended that, if it made the initial showing of injury required by Phase I, the only question for Phase II would be the shaping of an appropriate decree, and it would be in that context that the Court would engage in any equitable balancing of the relative values of each state's water uses. In other words, the minimal showing called for under its definition of Phase I would entitle South Carolina to a decree—the only question then being how the decree would be fashioned in light of the competing equities. North Carolina, by contrast, appeared to view Phase I as being merely a "threshold," or jurisdictional, phase through which the parties would pass before proceeding to the merits of the case in Phase II. Under this view, if South Carolina failed to make the "threshold" showing of injury in Phase I, the Court would lack jurisdiction to proceed further. If South Carolina made the requisite Phase I showing, Phase II would involve a more fulsome inquiry into whether an equitable decree was warranted, including by balancing the relative values of water uses by the two states. Only after that broad inquiry resulted in a finding of liability, or entitlement, would the Court proceed to the Phase II question posited by South Carolina—the shaping of an equitable decree.

At the end of the day, and despite the parties' initial agreement that there could be a "threshold" issue of injury that, however defined, might be severed and decided separately at the outset of the trial, there was not a sound basis for bifurcating the liability stage of the case. Supreme Court precedent made clear that the liability inquiry in such a case must consider all relevant factors, and made it difficult, if not impossible, to sever a single issue or set of issues that could be singled out for early trial and disposition. Nor did the Court's prior cases support the existence of a separate "threshold" requirement of injury on the part of the complaining State without which the Court lacks jurisdiction to consider the merits of the controversy. Although there were several cases in which the Court declined to enter an equitable decree due to an absence of a concrete showing of injury, those rulings were made after a full trial, including, in most cases, consideration of relative values of each state's existing and proposed uses.[37] Finally, bifurcating the injury inquiry from the rest of the proceedings would not have served the interests of judicial economy. There would be a high probability of overlap between the question of South Carolina's injury and North Carolina's equitable uses of the Catawba, and thus the proposed phases likely would "involve

[37] *See, e.g.*, Colorado v. Kansas, 320 U.S. 383, 393–400 (1943); Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931); Missouri v. Illinois, 200 U.S. 496, 521–26 (1906).

extensive proof and substantially the same facts or witnesses as the other issues in the case[ ]."[38] When that is the case, "there is little efficiency to be gained" from bifurcation.[39]

CONCLUSION

Our Constitution entrusted the Supreme Court with the weighty role of resolving disputes between states—a device intended to avoid the prospect of warring sovereigns within our unique federalist system of government, but at the same time to respect the dignity of each sovereign state. For those reasons, original cases frequently involve contested issues that not only are of deep concern to the states involved, but also implicate the Court's constitutional role in resolving such disputes. Resolution of such issues is a crucial, if frequently overlooked, part of the Court's jurisprudence.

[38] 9A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2388 (3d ed. 2010).

[39] Ortiz v. Pearson, 88 F. Supp. 2d 151, 166 (S.D.N.Y. 2000).