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Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases

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INTRODUCTION

With the flurry of scholarship and public attention devoted to cases arising under the Supreme Court's appellate jurisdiction, the proceedings in the Court's original docket have evolved as a not-oft-heeded Eleusinian Mystery of sorts.[1] However, the arcane procedures and delegations of authority used by the Court in executing its original jurisdiction[2]—where the Supreme Court functions as a trial court—have garnered newfound attention of late. Much focus became centered on the Court's final decree in the contentious dispute between New

1. Based on the mythological tale of Demeter, the Goddess of Corn, the Eleusinian Mysteries were private rituals held every five years by the ancient Greeks in the temple at Eleusis, near Athens. *See* EDITH HAMILTON, MYTHOLOGY 53-64. Because a cloud of secrecy enshrined the ceremonies, the mysteries have been a source of fascination and curiosity in both ancient and modern eras; worshippers were bound to a vow of silence, heeding Demeter's cautionary warning that her secret rites were "mysteries which no one may utter, for deep awe checks the tongue." *Id.* at 63.

2. Original jurisdiction "means the power to hear and decide a lawsuit in the first instance, while appellate jurisdiction means the authority to review the judgment of another court that has already heard the lawsuit in the first instance." WILLIAM H. REHNQUIST, THE SUPREME COURT 31 (n. ed. 2001). While stating that courts of appeals and supreme courts usually exercise only appellate jurisdiction, Rehnquist recognizes that the Constitution, through Article III, specifically provides that the United States Supreme Court exercise original jurisdiction in limited cases—cases affecting foreign ambassadors and cases in which one of the states itself is a party. *Id.*

York and New Jersey over the ownership of Ellis Island,[3] which was followed by two decisions resolving two disputes over state rights to the waters of the Arkansas and Colorado Rivers.[4]

While the Court was constitutionally charged with acting as the court of first instance in each of these cases, and in three more still pending, the Court delegated the bulk of its responsibilities in each case to appointed Special Masters, who were to issue subpoenas, rule on motions, obtain witness testimony, collect evidence, and, in some cases, preside over trials.[5] In *New Jersey v. New York*,[6] a contentious dispute dating back to the early 1800s, a Special Master officiated over the full course of proceedings for more than two years before formulating a 168-page report, plus appendices, that set forth both his findings of fact and his conclusions of law.[7] *Kansas v. Colorado*,[8] another antiquated case dating back more than a century, was assigned to multiple Special Masters, while *Arizona v. California*,[9] a comparatively "fresh" case dating back to 1952, was shuffled through the hands of five Special Masters. In each instance—the 1999 decision in *New Jersey v. New York*, the 2000 decision in *Arizona v. California*, and the 2001 decision in *Kansas v. Colorado*—the Court issued an opinion in substantial harmony with the respective Special Master's recommendations and proposed decrees.[10]

Such delegations of authority are not uncommon for the Court in exercising its original jurisdiction. The Court delegates many of its trial functions to Special Masters, who are

3. New Jersey v. New York, 526 U.S. 589 (1999) (acting under its original jurisdiction, the Supreme Court held that New Jersey retained sovereignty over certain land-filled portions of Ellis Island, enjoining New York from enforcing its laws over those portions).

4. Kansas v. Colorado, 121 S. Ct. 2023 (2001) (exercising its original jurisdiction to grant Kansas a remedy for Colorado's diversion of water from the Arkansas River); Arizona v. California, 530 U.S. 392 (2000) (exercising its original jurisdiction to determine states' rights to the Colorado River, and ultimately determining that claims brought by various tribes for increased water rights were not precluded by earlier decisions).

5. *See* discussion *infra* Part II.C.

6. New Jersey v. New York, 526 U.S. 589 (1999); *see also* discussion *infra* Part III.B.

7. Office of the Special Master, Final Report of the Special Master, *New Jersey v. New York*, No. 120, Orig., *available at* 1997 WL 291594 (Mar. 31, 1997) [hereinafter Special Master Report].

8. 121 S. Ct. 2023 (2001).

9. 530 U.S. 392 (2000).

10. Kansas v. Colorado, 121 S. Ct. at 2027; Arizona v. California, 530 U.S. at 418-19 (2000); New Jersey v. New York, 526 U.S. at 589.

neither elected nor appointed by an elected body, and has appointed Special Masters with increasing frequency since the inception of the Court.[11] Indeed, the Court has acknowledged the appointment of Special Masters in original jurisdiction cases as standard practice.[12] Particularly as the Court's appellate docket has grown, the Court has delegated greater pockets of its fact-finding *and* its legal decision-making authority in original jurisdiction cases to Special Masters, who sometimes have little or no judicial experience and who embark on their duties with limited guidance or oversight from the Court.[13]

The lack of procedures available to define the processes of the Special Masters, the Special Masters' autonomy, and the closed-chamber appointment mechanism for selecting Special Masters threaten hallmarks of the American judicial system: open, adversarial processes, judicial accountability, and uniformity of judgments. Where once the Special Masters were limited to issuing subpoenas, obtaining testimony, and producing reports setting forth evidentiary findings,[14] today they are poised to invade the province of the Court.[15] Because the Court has held that a "Master's findings . . . deserve respect and a tacit presumption of correctness," the Court has been reluctant—though not unwilling[16]—to disturb them. Even if Special Masters have been permitted to wrest too much authority away from the Court in original jurisdiction cases, the role of the

11. Based on surviving records, the Court delegated authority to gather and report evidence in fewer than five original jurisdiction cases during the eighteenth and nineteenth centuries. This number grew substantially in the twentieth century, with the appointment of Special Masters for this purpose evolving into common practice. *See* discussion *infra* Part II.A. & Appendix.

12. *See* Maryland v. Louisiana, 451 U.S. 725, 734 (1981) ("[A]s is usual, we appointed a Special Master to facilitate handling of the suit.").

13. *See* Appendix (setting forth the relevant experience of Special Masters); *see also* discussion *infra* Part II.C.

The appointment of Special Masters also implicates social concerns, including those related to female and minority representation. For example, the Court has never appointed a woman as Special Master. Hon. John C. Coughenour et al., *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745, 788 n.1 (1994) ("Turning to Special Masters, during a 60-year period from 1930-1990, the United States Supreme Court appointed 82 Special Masters . . . all whom were men."); *see also* Lee Seltman, Working Paper of the Ninth Circuit Gender Bias Task Force: Appointments of Special Masters to the Supreme Court and the Ninth Circuit 8 (1992).

14. *See* discussion *infra* Part II.A.

15. *See* discussion *infra* Part II.B.

16. Colorado v. New Mexico, 467 U.S. 310, 317 (1984).

Special Master should not necessarily be abolished. The Special Masters do fulfill important duties that are practical and arguably necessary, such as collection of evidence. Still, the role of Special Master is one that should be scrupulously circumscribed.

In light of the lack of institutional oversight or accountability of the Special Masters, this Article examines the confines of the Special Masters' authority, explores the reasons for the Court's heavy reliance on Special Masters, and studies the interplay between the Special Master and the Court in modern practice, focusing on the much-noted dispute between New York and New Jersey.[17] Part I provides both a historical and contemporary overview of the Court's original jurisdiction, defining both the constitutional authority for the jurisdiction and the nature of original jurisdiction cases. Part II explores the evolution of the Court's use of Special Masters, as well as the procedures and practices Special Masters use in carrying out their duties. Part III presents the relatively recent Ellis Island dispute of *New Jersey v. New York* as a case study of the Special Master-Court relationship. Part IV discusses the constitutional difficulties posed by Special Masters, suggesting that the Special Masters' authority should be modified given the substantial interests of the states litigating original jurisdiction cases before the Court. In conclusion, Part V presents the most constitutionally sound and feasible modifications to the practice of using Special Masters.

As discussed in Part V, the Court, at a minimum, should articulate additional procedures to guide original jurisdiction proceedings to partially resolve the difficulties posed by the role of the Special Master. Such procedures are necessary to ensure that the Court, as the Article III court to which original jurisdiction cases are committed, retains sufficient control. Further, either the Court or Congress should restore greater responsibility to the Court or institutionalize the preferred practice of appointing senior or retired federal judges as Special Masters. Alternatively, Congress could either establish a specialized federal court to share concurrent jurisdiction with the Supreme Court or provide that the federal district courts shall share concurrent jurisdiction.

17. The report from *New Jersey v. New York* is used as a case study for this Article because it is the most widely available. *See* Special Master Report, *supra* note 7.

Each of the proposed solutions either fails to redress all of the difficulties presented by the current use of Special Masters or presents new practical difficulties of its own. Redirecting Special Master functions to the Court could potentially resolve almost all of the difficulties posed by the role of Special Masters, but the Court, given both that it is the beneficiary of Special Masters' services in original jurisdiction cases and that it has prioritized its appellate docket duties, is unlikely to reclaim greater authority or declare the use of Special Masters unconstitutional. A specialized court would allow for the development of institutional knowledge over time by Article III judges, but history also has shown that specialized courts are disfavored and often ill-fated. Concurrent jurisdiction in the federal district courts has proven adequate for adjudication of many categories of original jurisdiction cases, but is not well-suited for disputes in which the Court's original jurisdiction remains exclusive—state-against-state disputes—because state boundaries are coterminous with federal district boundaries. Concurrent original jurisdiction exercised by the federal district courts, therefore, could create interstate tensions between adjudicator and litigant. The increased application of procedures limits the discretion of Special Masters, but does not curtail their extra-constitutional authority. Finally, appointing senior or retired federal judges would place the powers of the Special Master into the hands of an Article III adjudicator, yet the ranks of senior and retired federal judges, at present, suffer from underrepresentation of women and minorities.

Assuming that the Special Master's broad discretion and the lack of oversight by an Article III court are the overarching difficulties to be resolved—and taking into account the practical considerations posed by each of the proposed solutions—the combination of two solutions rises to the forefront: increased application of procedures and reinstitution of senior or retired judges as Special Masters. Increased application of procedures is the least intrusive and most easily implemented means of limiting the discretion of Special Masters and bringing original jurisdiction cases within the rubric of all other cases brought within the American justice system. The practice of appointing senior or retired federal judges, while currently resulting in a lack of diversity, would ensure that the Special Master functions were carried out by an Article III adjudicator. The underrepresentation of women and minorities would occur within what is hopefully only an interim period until representation of

various protected groups increased.

I. THE COURT'S ORIGINAL JURISDICTION IN PERSPECTIVE

A. THE ORIGINAL JURISDICTION CLAUSE

The Original Jurisdiction Clause, located in Article III, Section Two, Clause Two of the Constitution, provides that "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction."[18] In its first decade, the Supreme Court interpreted this constitutional grant of original jurisdiction as self-executing and unassailable by Congress.[19]

The bounds of the Court's original jurisdiction were firmly established in the landmark case of *Marbury v. Madison*.[20] Under the facts of *Marbury*, Marbury, being neither an ambassador nor a state, could not bring a lawsuit in the Court under a strict application of the original jurisdiction provision of Article III "because he was asking the Supreme Court to grant him relief in the first instance, without his ever having gone to a lower court."[21] Marbury had sought relief in the Court under the authority of the Judiciary Act of 1789, through which Congress had expanded the Court's original jurisdiction. The Court heard the case, only to declare that Congress was without power to expand the constitutional limitation on the Court's original jurisdiction. In the words of Chief Justice Marshall, "If [C]ongress remains at liberty to give this [C]ourt appellate jurisdiction, where the [C]onstitution has declared their jurisdic-

18. U.S. CONST. art. III, § 2, cl. 2.

19. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 451, 463-64, 479 (1793); *see also* HANNIS TAYLOR, JURISDICTION AND PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES 41-42, 44 (1905). The Court's exercise of appellate jurisdiction, in contrast, is constitutionally sound only when consistent with enabling legislation enacted by Congress. *See* U.S. CONST. art. III, § 2, cl. 2.

20. 5 U.S. (1 Cranch) 137 (1803); *see also* REHNQUIST, *supra* note 2, at 31-32. Rehnquist notes that the Court was without jurisdiction over the case of *Marbury v. Madison* because the criteria for original jurisdiction were not met, but that the Court heard and decided the case in order to declare that it was without jurisdiction, as well as make the more familiar pronouncement that "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177.

21. REHNQUIST, *supra* note 2, at 31.

tion shall be original; and original jurisdiction where the [C]onstitution has declared it shall be appellate; the distribution of jurisdiction, made in the [C]onstitution, is form without substance."[22]

Notwithstanding Marshall's holding in *Marbury* that the Court's original jurisdiction can be subject neither to accretion nor to diminution, the Court and Congress have over time gerrymandered the boundaries of the Court's original jurisdiction, providing that the Court maintains exclusive original jurisdiction in some categories of disputes,[23] concurrent original jurisdiction—shared with the federal district courts—in others,[24] and no jurisdiction over cases precluded by the Eleventh Amendment or cases falling outside the purview of the Court's original jurisdiction as contemplated by the Framers.[25] Consequently, in modern Supreme Court jurisprudence, the only category of cases in which the Court exercises exclusive original jurisdiction is controversies between states, despite the constitutional enumeration of cases falling within the Court's original jurisdiction.[26]

With regard to state party disputes, Congress, since 1789, has provided that the Supreme Court "shall have original *and exclusive* jurisdiction of all controversies between two or more states,"[27] even if other non-state parties are present in the litigation.[28] The Court in 1792 explained Congress's definition of "original jurisdiction" with regard to disputes between states: "[W]henever a state is a party, the [S]upreme [C]ourt has exclusive jurisdiction of the suit; and her right cannot be effectually supported . . . by a voluntary appearance before another

22. *Marbury*, 5 U.S. (1 Cranch) at 174.

23. *See infra* text accompanying notes 27-30.

24. *See infra* text accompanying notes 31-36.

25. *See infra* text accompanying notes 73-80.

26. *See infra* text accompanying notes 27-36.

27. 28 U.S.C. § 1251(a) (1994) (emphasis added). By contrast, other original jurisdiction cases, such as those "affecting Ambassadors, other public Ministers and Consuls," can be heard in the federal district courts, where Congress has provided that these lower federal courts have concurrent original jurisdiction shared with the Supreme Court. U.S. CONST. art. III, § 2, cl. 1; *see* 28 U.S.C. § 1251(b)(1) (1994).

28. *See, e.g.*, Maryland v. Louisiana, 451 U.S. 725, 744-45 n.21 (1981) (involving the inclusion of seventeen intervening pipelines companies); California v. Arizona, 440 U.S. 59, 61 (1979) (involving the inclusion of the United States as a party); Arizona v. California, 373 U.S. 546, 564 (1963) (involving the inclusion of the United States as a party).

tribunal of the Union."[29] The exclusive nature of the Court's original jurisdiction thus requires the Court to function in all respects as a trial court, or a court of first instance, in cases between state opponents.[30]

In many of the remaining categories of original jurisdiction cases, by contrast, Congress—without unconstitutionally robbing the Supreme Court of its original jurisdiction—has incrementally vested the federal district courts with *concurrent* original jurisdiction, which permits the district courts to entertain the suits without regard to the Court's jurisdiction to hear those cases.[31] More specifically, the Judiciary Act of 1789, as revised in 1978, provides that the Supreme Court "shall have original *but not exclusive* jurisdiction" over actions involving ambassadors, public ministers or other foreign consulate officers, controversies by the United States against a state, and all actions or proceedings by a state against non-citizen persons.[32]

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29. Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 406 (1792). *Georgia v. Brailsford*, the fourth case decided by the Court under its original jurisdiction, involved a claim by the state of Georgia that it should be allowed to intervene in a dispute between two private parties regarding debt and property that Georgia claimed by right of a state confiscation act. *See id.* at 402-04.

30. *See* REHNQUIST, *supra* note 2, at 31-32 (distinguishing the Court's role in cases of original jurisdiction from its role in cases of appellate jurisdiction).

For an instructive (but somewhat outdated) discussion of original jurisdiction in the United States, as compared and contrasted with original jurisdiction in selected other nations, see generally W. J. Wagner, *Original Jurisdiction of National Supreme Courts*, 33 ST. JOHN'S L. REV. 217 (1959), which examines the establishment and scope of original jurisdiction in the United States, Argentina, Australia, Brazil, Canada, Mexico, and Switzerland.

31. 28 U.S.C. § 1251(b) (1994). The district court's concurrent original jurisdiction allows it to entertain original jurisdiction cases that would otherwise be committed to the Supreme Court. The availability of district courts to entertain original jurisdiction cases has led the Court to dismiss original jurisdiction cases without prejudice to be brought in the district courts, providing that the Court is not obliged to exercise its original jurisdiction where an alternative forum is available. *See, e.g.*, Mississippi v. Louisiana, 506 U.S. 73, 77 (1992) (citing cases).

With respect to proceedings against foreign officials, Congress amended the Court's original jurisdiction in 1978 to provide that the district courts hold concurrent original jurisdiction with the Supreme Court, based on a policy determination that the Supreme Court not be burdened by such proceedings. *See* 28 U.S.C. § 1251(b); S. REP. NO. 95-1108, at 8, *reprinted in* 1978 U.S.C.C.A.N. 1941, 1946-47; *see also* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 472 (6th ed. 1985).

32. *See* 28 U.S.C. § 1251(b) (emphasis added). Although disputes between states are now the only category of disputes in the Court's *exclusive* original jurisdiction, such jurisdiction over proceedings against foreign officials was exclusive until 1978. *See id.*

Congress's vesting of concurrent authority in the district courts is consonant with Chief Justice Marshall's adage in *Cohens v. Virginia*[33] that the constitutional grant of original jurisdiction to the Court does not deprive other federal courts of original jurisdiction over the same categories of cases:

> It may be conceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there; but where, from its nature, it cannot originate in that Court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the [C]onstitution, to maintain the construction. . . .[34]

Although it is the currently prevailing view, Marshall's view has not always been the controlling view, and both intentionalist and strict textualist readings of the Constitution demonstrate that it might not be the correct one. First, a draft of Article III that was debated at the Constitutional Convention provided for concurrent original jurisdiction in any of the lower federal courts ordained and established by Congress.[35] The draft provision was stricken during debate, prior to ratification.[36] From an intentionalist perspective, therefore, Marshall's conclusion seems contrary to the intent of the Framers. Second, while a strict textualist reading might be "subversive to the spirit" of the Constitution, at least one Justice writing in the eighteenth century, Justice Iredell, believed that the Original Jurisdiction Clause made original jurisdiction exclusive and barred the Court from exercising appellate jurisdiction over cases within its original jurisdiction.[37] Justice Iredell's adherence to his strict textual reading of the Original Jurisdiction Clause sparked a national controversy that, in turn, spurred the adoption of the Eleventh Amendment.

The impetus for the Eleventh Amendment grew swiftly and sharply following Justice Iredell's opinion for the Court in the

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33. 19 U.S. (6 Wheat.) 264 (1821).

34. *Id.* at 395. This proposition was further ratified by the Court in *Ames v. Kansas*, 111 U.S. 449 (1884), in which the Court held that it was "unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction." *Id.* at 469.

35. *See* RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 294 n.3 (4th ed. 1996) [hereinafter HART & WECHSLER].

36. *See id.* at 295 n.3.

37. *See* William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329, 343-44 (1995).

1793 case of *Chisholm v. Georgia*,[38] the Court's third original jurisdiction case. In *Chisholm*, the Court held that the Constitution contemplated that an unconsenting state could be subject to a suit brought before the Court by the citizen of a sister state.[39] The proposition gained immediate notoriety and "fell upon the country with a profound shock."[40] The Congressional response was to propose, only one day after the *Chisholm* decision, the Eleventh Amendment.[41] The Eleventh Amendment, which was ratified by the states in January 1798, reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[42]

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38. 2 U.S. (2 Dall.) 419 (1793).

39. *Id.* at 420-22, 425, 431.

40. Alden v. Maine, 527 U.S. 706, 720 (1999) (citing 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (rev. ed. 1926)). In *Hans v. Louisiana*, 134 U.S. 1, 11 (1890), the Court summarized the congressional response to the *Chisholm* decision:

> [*Chisholm*] created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court.

Id.

41. *See* TAYLOR, *supra* note 19, at 71; William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1058-60 (1983); Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 555 (2001).

42. U.S. CONST. amend. XI. The historical notes to the Eleventh Amendment read as follows:

> This amendment was proposed to the legislatures of the several States by the Third Congress, on March 4, 1794; and was declared in a message from the President to Congress, dated January 8, 1798, to have been ratified by the legislatures of three fourths of the States. The States which ratified this amendment, and the dates of ratification are: New York, Mar. 27, 1794; Rhode Island, Mar. 31, 1794; Connecticut, May 8, 1794; New Hampshire, June 16, 1794; Massachusetts, June 26, 1794; Vermont, between Oct. 9 and Nov. 9, 1794; Virginia, Nov. 18, 1794; Georgia, Nov. 29, 1794; Kentucky, Dec. 7, 1794; Maryland, Dec. 26, 1794; Delaware, Jan. 23, 1795; North Carolina, Feb. 7, 1795; and South Carolina, Dec. 4, 1797.
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> This amendment was passed in consequence of the decision of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793), which held that a state could be sued by a citizen of another state in assumpsit.

U.S. CONST. amend. XI historical notes.

Thus the Eleventh Amendment removed from the purview of all federal courts cases once thought to fall under the Court's original jurisdiction. Further, the Eleventh Amendment has been interpreted to deprive all federal courts of jurisdiction over cases between states and private citizens, without extending as far as disputes between two or more states.[43] To some, the purpose of the Eleventh Amendment appears to have been "to strike out a specific clause of Article III of the Constitution"—part of the Original Jurisdiction Clause.[44]

The survival of *exclusive* original jurisdiction for state-against-state suits, but not for the other delineated categories of original jurisdiction cases, might be tethered to the Constitutional Convention's preoccupation with state-against-state disputes as the impetus for the Original Jurisdiction Clause.[45] The sole references to the establishment of original jurisdiction during the Constitutional Convention point to contentious and prevalent boundary disputes as one area in which the Articles of Confederation had proven defective.[46] At the time of the adoption of the Constitution, boundary disputes were pending between eleven of the thirteen states, suggesting that members of the Convention explicitly understood that disputes between states would occupy the federal courts.[47] Yet some scholars argue that "the draft Constitution did not contemplate judicial cognizance of border disputes, and thus must have had other kinds of controversies in mind" in creating original jurisdiction in the federal courts for state-against-state disputes.[48]

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43. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821). For a case to fall within the scope of the Eleventh Amendment and therefore to be exempt from federal judicial power, the Court in a subsequent case held that the suit must implicate the state by name, not as a party in interest, in which the state has a partial proprietary interest in one of the parties to the suit. *See* Bank of the United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904, 908 (1824).

44. Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine*: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1288 (2000).

45. *See* HART & WECHSLER, *supra* note 35, at 6-8.

46. *See id.*; TAYLOR, *supra* note 19, at 82-84.

47. *See* TAYLOR, *supra* note 19, at 83-84 (citing Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838)).

48. James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1301 & n.142 (1998) (noting that an early draft "assigned to Congress authority over boundary disputes between states (as had the Articles of Confederation), and specifically barred the federal courts from hearing interstate disputes 'regard[ing] Territory or Jurisdiction'"). Instead, Pfander suggests that original jurisdic-

Under the Articles, border disputes were to be settled by *ad hoc* tribunals established by the states;[49] Congress was to be the tribunal of last resort for disputes "between two or more states concerning boundary, jurisdiction, or any other cause whatever."[50] Although the *ad hoc* tribunal was utilized only once under the Articles of Confederation,[51] despite a burgeoning array of disputes that had erupted between states over the location of their borders,[52] this mechanism for handling boundary disputes was viewed as fatally deficient. The deficiency of the Articles was that resolution of interstate disputes, as a preliminary matter, would have required the establishment of diplomatic relations between the sovereign states or would have led potentially to a host of skirmishes by states attempting resolution by a resort to force, just as with border disputes between international sovereigns.[53]

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tion over state-party suits was intended to facilitate debt allocation and collection for debt flowing from the Revolutionary War. *Id.* at 1301 n.143.

49. HART & WECHSLER, *supra* note 35, at 6 n.31 (explaining the process by which the tribunals were formed and noting the only case resolved under this system); MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789, at 342 (1950) ("Ancient disputes about boundaries and navigation rights were discussed and settled rapidly.... The usual procedure was for the states concerned to appoint commissioners, and, once these had agreed, for the legislatures to adopt the agreement, a process still followed as problems arise among American states."); *see, e.g.,* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 300 (1888) (refusing to grant original jurisdiction to an action upon which a state, in its own courts, obtained a money judgment from action of another state).

50. Articles of Confederation, art. IX, *reprinted in* THE UNITED STATES CONSTITUTION ANNOTATED x (The American Law Book Co. 1924) (1778). For a discussion of the British Privy Council's resolution of colonial boundary disputes prior to the revolution, see TAYLOR, *supra* note 19, at 82-83.

51. HART & WECHSLER, *supra* note 35, at 6 n.31. The presiding *ad hoc* tribunal unanimously voted against Connecticut in its battle with Pennsylvania over property located in present-day Wyoming. *Id.*

52. *See* 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 26 (1911).

53. *See* Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, 185 (1993) (noting that stakes in disputes between states are often as high as those in disputes between international sovereigns, which usually result in force or negotiation); Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 669 (1959) (discussing the similarities in the resolution of interstate and international disputes and a potential international tribunal modeled on the Court's treatment of interstate disputes); *see also* Virginia v. Tennessee, 148 U.S. 503, 504 (1893) (noting that original jurisdiction was established in order for the Court to resolve boundary disputes that "otherwise might be the fruitful cause of prolonged and harassing conflicts").

Because the Supreme Court was the only federal court mandated by the Constitution,[54] an impartial national tribunal was the necessary and preferred alternative to leaving such disputes to the *ad hoc* state tribunals.[55] Only by committing such actions to the Supreme Court could state-against-state cases circumvent the abuses that the Framers were certain would result if such disputes were left to resolution by state court judges.[56]

As might be expected, given the concerns articulated at the Constitutional Convention, boundary disputes have comprised—and continue to comprise—the bulk of the Court's original docket.[57] One of the first border disputes resolved under the new rubric of the Constitution was between New Jersey and New York in 1831,[58] involving the dispute over Ellis Island and surrounding islands. New Jersey later filed new actions to determine its rights to Ellis Island because of the changing geography of the islands. Thus, the Ellis Island dispute continued to percolate in the Court until the 1999 final decree.[59]

B. CASES ARISING UNDER THE ORIGINAL JURISDICTION CLAUSE

As of the late 1990s, the Court has decided roughly 170 original jurisdiction cases in its more than two hundred years

54. The Constitution provides only for "such inferior [federal] Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

55. *See* James Brown Scott, *The Role of the Supreme Court of the United States in the Settlement of Inter-State Disputes*, 15 GEO. L.J. 146, 165-67 (1927).

56. Some scholars argue that although states could have invoked common law immunities or separate-sovereign immunities, such actions would have escaped the Court's appellate jurisdiction because neither of these immunities had their origin in federal law. James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 558-60 (1994).

57. *E.g.*, New Jersey v. New York, 523 U.S. 767, 770-71 (1998); Louisiana v. Mississippi, 282 U.S. 458, 459 (1931); New Jersey v. New York, 30 U.S. (5 Pet.) 284, 290 (1831); *see also* TAYLOR, *supra* note 19, at 57 (pointing out that, aside from cases between states involving boundary disputes, there are few other cases where the Supreme Court's original jurisdiction was involved in controversies between states).

58. *See* New Jersey v. New York, 28 U.S. (3 Pet.) 461, 461-67 (1830); 30 U.S. (5 Pet.) 284 (1831); Special Master Report, *supra* note 7, at 16 (discussing the history of the New Jersey-New York boundary dispute); Scott, *supra* note 55, at 170.

59. New Jersey v. New York, 526 U.S. 589, 589-90 (1999).

of existence.[60] Despite the limited number of cases, the Court's original jurisdiction has brought a variety of disputes between sovereign states within its reach, including disputes over water apportionment and interstate commercial burdens.[61] Water disputes include controversies in the western states regarding the control of water rights and the diversion of state waters.[62] States also have litigated to curtail burdensome commercial activities and restrictions imposed by another state[63] or to collect sizable estate taxes, as when California and Texas battled over the right to tax Howard Hughes' estate.[64] Other cases include disputes over which state has the right to profits from unclaimed securities belonging to unidentified holders[65] and the apportionment of Civil War-era state debt following West Virginia's secession from the Commonwealth of Virginia to join Union forces. [66]

In order to invoke the Court's original jurisdiction, a state party must make a motion for leave to file in the Court. While the jurisdiction appears mandatory, the Court votes on whether to grant leave to allow the filing of a complaint commencing an original jurisdiction action; a majority of the Court must vote to grant leave, as compared with the four votes necessary to grant a writ of certiorari invoking the Court's appellate jurisdiction.[67] In evaluating whether leave shall be granted, the Court scrutinizes the pleading under a heightened "clear and convincing" standard, consistent with its declaration that "the burden of

60. HENRY J. ABRAHAM, THE JUDICIAL PROCESS 171 (6th ed. 1993); LAWRENCE BAUM, THE SUPREME COURT 9 (1995).

61. *See* Appendix. With regard to environmental concerns, a state may sue in a representative capacity or as *parens patriae* to enjoin pollution of its resources from a neighboring state. *See, e.g.*, Georgia v. Tenn. Copper Co., 206 U.S. 230, 237-38 (1907). A state has a right to sue on behalf of its citizens as *parens patriae* if "the injury alleged affects the general population of a State in a substantial way." Maryland v. Louisiana, 451 U.S. 725, 737 (1981). The Court has narrowly circumscribed this right, however, foreclosing the opportunity for states to sue as a "nominal party in order to forward the claims of individual citizens." *Id.*

62. *See, e.g.*, Kansas v. Colorado, 185 U.S. 125, 145-46 (1902) (finding the dispute over Colorado's diversion of Arkansas River and tributaries, contrary to the rights of Kansas, justiciable under the Court's original jurisdiction).

63. *See, e.g.*, Pennsylvania v. West Virginia, 262 U.S. 553, 581-82 (1923) (challenging a proposal by a neighboring state to restrict the interstate supply of natural gas).

64. California v. Texas, 437 U.S. 601, 602 (1978) (per curiam).

65. Delaware v. New York, 507 U.S. 490, 494-95 (1993).

66. *See* Virginia v. West Virginia, 209 U.S. 514, 535-36 (1908).

67. *See* HART & WECHSLER, *supra* note 35, at 299.

proof that [the complaining state] must carry in this case is much greater than that imposed on the ordinary plaintiff in a suit between private individuals."[68] The Court therefore has rejected any notion that the presence of a state as a party is dispositive proof that the case falls within its original jurisdiction.[69] The Court also has articulated that its original jurisdiction "is limited and manifestly intended to be sparingly exercised."[70]

Whatever the Court's intention to limit the scope and exercise of its original jurisdiction, under a theory of strict construction it cannot refuse to entertain cases falling within its original jurisdiction if no other forum is available.[71] The Court has, however, refused to grant leave to states to file cases it regards as picayune,[72] such as when the state of California filed a contract action against the state of West Virginia in 1981 based on the failure of a West Virginia state university football team to play a California state team.[73] The Court denied California leave to file its complaint, although the Court gave no basis for its denial, and it appears that no other forum was available to hear the suit.[74] Whether the Court has the constitutional authority to deny leave in such circumstances is open to dispute. Justice Stevens, dissenting from the denial of leave in *California v. West Virginia*, argued that the Court could not justify its

68. North Dakota v. Minnesota, 263 U.S. 365, 387 (1923).

69. *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 197, 207 (3d ed. 1993) (noting that 95% of the thousands of cases filed fall within the Court's appellate docket, with only approximately ten cases per term falling within the Court's original jurisdiction, including those carried over from prior terms due to their complexity).

70. California v. S. Pac. Co., 157 U.S. 229, 261 (1895).

71. *See* The Steamer St. Lawrence, 66 U.S. (1 Black.) 522, 526 (1861) ("[T]he court could not . . . refuse to exercise a power with which it was clothed by the Constitution and laws. . . ."); Fisher v. Cockerell, 30 U.S. (5 Pet.) 248, 259 (1831) ("As this court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it.").

72. Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972) (stating view that original jurisdiction is "obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim . . . .").

73. California v. West Virginia, 454 U.S. 1027 (1981); *see also* Complaint for Damages, California v. West Virginia (No. ___) at 3-4 (seeking damages for breach of "an agreement that the two [state] schools engage in two intersectional, inter-collegiate football games").

74. *See* California v. West Virginia, 454 U.S. at 1027-28 (Stevens, J., dissenting) (stating that the Court should not decline its exclusive jurisdiction).

denial where jurisdiction in cases between the two states was committed to the Court and was exclusive: "The fact that two sovereign States have been unable to resolve this matter without adding to our burdens does not speak well for the statesmanship of either party but does not, in my opinion, justify our refusal to exercise our exclusive jurisdiction . . . ."[75] Justice Stevens, incidentally, would have granted leave, but would have "refer[red] the case to a Special Master."[76]

As a basis for justifying refusals to entertain original jurisdiction cases, the Court has cited the burdens imposed by both its appellate docket and Section 1251, which the Court has interpreted "as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction."[77] Consistent with this discretion, in *Massachusetts v. Missouri*[78] the Court avowed its qualified authority to refuse to exercise its jurisdiction, given that "the broad statement that a court having jurisdiction must exercise it is not universally true."[79] As Justice Jackson once noted, the Court is "a tribunal of limited jurisdiction, narrow processes, and small capacity for handling mass litigation."[80]

II. CALLED TO WORK: THE SPECIAL MASTERS' ROLE IN ORIGINAL JURISDICTION LITIGATION

A. THE EMERGENCE OF THE SPECIAL MASTER

The first appearance of a person or body appointed by the Court to execute some of the Court's trial court functions in an original jurisdiction case occurred in the first case ever filed in the Supreme Court, the 1791 case of *Vanstophorst v. Mary-*

75. *Id.* at 1028.

76. *Id.*

77. Texas v. New Mexico, 462 U.S. 554, 570 (1983); *see also* Mississippi v. Louisiana, 506 U.S. 73, 77 (1992) ("We first exercised this discretion not to accept original actions in cases within our nonexclusive original jurisdiction. . . . But we have since carried over its exercise to actions between two States, where our jurisdiction is exclusive." (citations omitted)).

Between 1961 and 1991, the Court denied nearly half of the motions for leave to file a complaint by states seeking to invoke the Court's original jurisdiction. *See* McKusick, *supra* note 53, at 188-89.

78. 308 U.S. 1 (1939).

79. *Id.* at 19 (citation omitted).

80. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 25 (1955).

land.[81] The dispute arose over repayment of a loan obtained by the state of Maryland during the Revolution from creditors abroad.[82] In 1782, a Baltimore merchant named Matthew Ridley traveled to Europe on behalf of the state of Maryland to borrow funds to support Maryland's war effort against the British.[83] Unable to obtain a loan in France from Louis XIV's ministry, which was willing to lend to a national entity but not a state entity, Ridley traveled to Holland and obtained a loan from the van Staphorst brothers, who were Dutch sympathizers of the American Revolution.[84] By the time Ridley returned to Maryland, the British threat had waned, and the terms of the loan were met with disfavor.[85] When Maryland failed to live up to the terms of the agreement, the van Staphorsts issued a summons to the governor and council of Maryland, and the suit was heard by the Supreme Court on the first day that the Justices ever convened to hear cases.[86] When difficulty arose in contacting witnesses in the case, many of whom were located in Amsterdam, Attorney General Edmund Randolph moved for the establishment of a commission. The Court granted the motion and published its decision to appoint a commission to travel to Holland to take testimony from witnesses in the case.[87] The list of seven Court-approved commissioners was compiled by the Attorney General in conjunction with the counselor for Maryland.[88] The case was ultimately resolved by set-

81. 2 U.S. (2 Dall.) 401 (1791); *see* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 17-18 (Maeva Marcus ed. 1994) [hereinafter DOCUMENTARY HISTORY OF THE SUPREME COURT] (providing the historical background of the case).

82. DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 81, at 7.

83. *See id.* (explaining that the governor and assembly of Maryland had authorized the merchant to obtain a loan on which the interest would be paid in tobacco and flour).

84. *See id.* at 7-8 (citing the journal and correspondence of Matthew Ridley). About the same time, the Vanstophorsts concluded an agreement with ambassador John Adams to loan funds to Congress. *Id.* at 8.

85. *See id.* at 10-13. Ridley was authorized to provide that interest would be paid in tobacco up to a maximum amount; the agreement as executed provided that the Vanstophorsts were to receive this maximum, even if it exceeded the value of interest owed on the debt. *See id.*

86. *See id.* at 16-18 (stating that plaintiffs served a summons on the governor and council of Maryland to appear before the Supreme Court at the beginning of its 1791 term).

87. Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 401 (1791).

88. DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 81, at 19. Strangely, the group was comprised of persons all having close ties to the Vanstophorsts, although three commissioners were assigned to represent the

tlement, precluding any need for the Court to decide the suit on its merits.[89]

Commissioners were appointed at least one additional time before the close of the eighteenth century, though in this instance they were appointed to obtain the testimony of witnesses located in the various states.[90] In these early times, the appointment of persons other than the Justices to take evidence was necessary in original jurisdiction cases, given both the limited modes of transportation and travel necessary to gather evidence and the already burdensome circuit-riding responsibilities of the Justices.[91]

Commissioners continued to be appointed in a handful of original jurisdiction cases throughout the nineteenth and twentieth centuries, though acting not as often as fact-finder but more as technicians responsible for demarcating a border consistent with a Court decree.[92] This more technical role is consistent with the role of state-appointed commissioners who established boundaries in pursuit of or in pursuance to state compacts entered into with respect to state boundaries.[93]

Vanstophorsts' interests and four were assigned to represent Maryland's interests. *Id.*

89. *See id.* at 19-20.

90. *See, e.g.*, Huger v. South Carolina, 3 U.S. (3 Dall.) 339, 342 (1797) ("Complainant . . . moved for and obtained Commissions, to take the examination of witnesses in several of the States.").

91. *See* 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 114 (1981) ("[T]he almost unbearable hardships of circuit riding, which were caused in part by the scarce and primitive transportation facilities in undeveloped portions of the country, continued to result in accidents, delays, and fatigue.").

92. *Compare* Pennsylvania v. Wheeling & Belmont Bridge Co., 50 U.S. (9 How.) 647, 656-58 (1850) (appointing a commissioner to obtain further evidence and draft a report to the Court), *and* Oklahoma v. Texas, 257 U.S. 621 (1922) (per curiam) (appointing a commissioner "to take and return testimony in this cause"), *with* Missouri v. Iowa, 51 U.S. (10 How.) 1, 1-2 (1850) (appointing a commissioner "to run and mark the boundary line between said states, according to our decree"), *and* Indiana v. Kentucky, 159 U.S. 275, 277 (1895) (appointing commissioners "to ascertain and run the boundary line between the said states of Indiana and Kentucky as designated in the said opinion of this court").

93. *See* Georgia v. South Carolina, 497 U.S. 376, 380-81 (1990) (noting that commissioners appointed by each state convened in 1787 and produced the Treaty of Beaufort, which established boundaries of the states and was subsequently ratified by the state legislatures); *see also* New Jersey v. New York, 523 U.S. 767, 772-73 (1998) (noting that New Jersey and New York jointly appointed commissioners to resolve their boundary dispute); Virginia v. Tennessee, 148 U.S. 503, 505 (1893) (discussing the historic role of commis-

Early in the twentieth century, the fact-finding functions that the Court initially charged to a commission or commissioner instead came to be vested in a "Special Master."[94] This transition began in the Virginia suit brought against West Virginia for the apportionment of Virginia's debt as it existed at the time of West Virginia's secession during the Civil War.[95] Even after the creation of the role of Special Master, however, the distinction between the roles of a commissioner as compared with a Special Master remained murky.[96] In some instances, for example, an order appointing a commissioner differed little from an order appointing a Special Master, making any distinction untenable.[97]

B. THE IDENTITY OF THE SPECIAL MASTER

The selection and appointment mechanism for Special Masters is not publicly known.[98] When a vacancy occurs while the Court is in recess, the Chief Justice alone is granted the authority to appoint a Special Master or commissioner,[99] although

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sioners appointed by the respective states to locate boundaries between Virginia, Tennessee, and North Carolina).

94. *See* Mississippi v. Arkansas, 415 U.S. 289, 297 n.1 (1974) (Douglas, J., dissenting) ("While commissioners were appointed in the early years, the practice this century has been to use Special Masters.").

95. *See* Virginia v. West Virginia, 209 U.S. 514, 534-37 (1908) (referring the matter to a Special Master); *see also* Texas v. New Mexico, 462 U.S. 554, 566 n.11 (1983) ("On occasion in the past, before the device of appointing Special Masters in original jurisdiction cases became common, we have gone so far as to appoint a commission with broad powers to resolve factual questions in a controversy between two States . . . .") (citation omitted).

96. A commissioner serving in the capacity of executing the decree and demarcating the boundary is often an engineer or surveying expert appointed because of his expertise to demarcate the actual boundary. *See, e.g.*, Arkansas v. Tennessee, 399 U.S. 219 (1970) (a surveyor); New Mexico v. Texas, 276 U.S. 558, 559 (1928) (a geodetic and astronomic engineer). In at least one case, the commissioner was a judicial officer authorized to engage a surveyor to demarcate the boundary as set forth in the Court's decree. *See* Arkansas v. Tennessee, 397 U.S. 88, 90 (1970).

97. *Compare* United States v. Louisiana, 318 U.S. 743, 743 (1943) (appointing a commissioner "for the purpose of perpetuating testimony, with authority to summon witnesses at the request of the parties, to issue subpoenas, and to take such evidence as may be introduced and such additional testimony as he may deem it necessary to call for"), *with* Colorado v. Kansas, 361 U.S. 645, 645 (1942) (appointing a Special Master "with authority to summon witnesses, issue subpoenas, and to take such evidence as he may deem it necessary to call for").

98. Telephone Interview with Francis J. Lorson, Chief Deputy Clerk, Supreme Court of the United States (Mar. 31, 2000).

99. *See* Illinois v. Kentucky, 480 U.S. 903, 903 (1987) ("It is further or-

this appears to have occurred only once.[100] By inference, then, the majority of appointments likely result from some degree of joint decision or assent among the Justices. Logically, one might expect persons appointed as Special Master to have applied for the position or have been nominated or solicited to fill the role. The Court's early appointment memoranda, however, occasionally provided for the appointment of a different Special Master if the initial appointment was "not accepted," suggesting that the appointment was not always a product of mutual understanding.[101]

While no special qualifications have been set for the Special Master role, Special Masters today often are appointed from the ranks of senior or retired federal judges,[102] which, given the underrepresentation of women on the federal bench,

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dered that if the position of Special Master in this case becomes vacant during a recess of the Court, the Chief Justice shall have authority to make a new designation which shall have the same effect as if originally made by the Court."); Kansas v. Colorado, 478 U.S. 1018, 1019 (1986) (same); New Jersey v. Nevada, 474 U.S. 1045, 1045 (1986) (same); California v. Texas, 459 U.S. 963, 964 (1982) (same); Arkansas v. Mississippi, 458 U.S. 1119, 1119 (1982) (same); Texas v. New Mexico, 454 U.S. 1076, 1076 (1981) (same); Texas v. Oklahoma, 448 U.S. 905, 905 (1980) (same); Maryland v. Louisiana, 445 U.S. 913, 913 (1980) (same); United States v. Alaska, 444 U.S. 1065, 1065 (1980) (same); California v. Arizona, 441 U.S. 959, 959 (1979) (same); Kentucky v. Indiana, 441 U.S. 941, 941 (1979) (same); New York v. Illinois, 441 U.S. 921, 921 (1979) (same); Colorado v. New Mexico, 441 U.S. 902, 902 (1979) (same); Tennessee v. Arkansas, 439 U.S. 1061, 1061 (1979) (same); Arizona v. California, 439 U.S. 419, 419, 436-37 (1979) (per curiam) (same); Georgia v. South Carolina, 434 U.S. 1057, 1058 (1978) (same); United States v. Maine, 433 U.S. 917, 918 (1977) (same); California v. Nevada, 433 U.S. 918, 918 (1977) (same); Idaho *ex rel.* Evans v. Oregon, 431 U.S. 952, 952 (1977) (same); Texas v. New Mexico, 423 U.S. 942, 943 (1975) (same); Mississippi v. Arkansas, 402 U.S. 926, 927 (1971) (same); Nebraska v. Iowa, 392 U.S. 918, 918-19 (1968) (same); Arkansas v. Tennessee, 389 U.S. 1026, 1026 (1968) (same); Michigan v. Ohio, 386 U.S. 1029, 1029 (1967) (same); Illinois v. Missouri, 386 U.S. 902, 902 (1967) (same); Ohio v. Kentucky, 385 U.S. 803, 803 (1966) (same); Illinois v. Missouri, 384 U.S. 924, 924 (1966) (same); Nebraska v. Iowa, 380 U.S. 968, 968 (1965) (same); Nebraska v. Iowa, 379 U.S. 996, 996-97 (1965) (same); Illinois v. Indiana, 321 U.S. 752, 752 (1944) (same); Colorado v. Kansas, 316 U.S. 645, 645 (1942) (same); Washington v. Oregon, 288 U.S. 592, 592 (1933) (per curiam) (same).

100. *See* Missouri v. Iowa, 51 U.S. (10 How.) 1, 2 (1850) ("[T]he said [Commissioner] Brown having died, the Hon. Robert W. Wells was appointed in room and stead of said Brown by the Chief Justice of this court, in vacation.").

101. *E.g.*, Louisiana v. Mississippi, 278 U.S. 557, 558 (1928) (per curiam) (stating that "[i]f the appointment herein made of a Special Master is not accepted . . . the Chief Justice shall have authority to make a new designation").

102. *See* BAUM, *supra* note 60, at 11; STERN ET AL., *supra* note 31, at 496; *see also* Appendix.

helps explain why no Special Master in an original jurisdiction case has been a woman.[103] On three occasions, even retired or former Supreme Court Justices have sat as Special Masters.[104] Former Associate Justice Charles Evans Hughes was the first former Court member appointed Special Master, to serve as Special Master in 1926 to preside over the protracted litigation against Illinois by other states bordering the Great Lakes.[105] A former governor of New York,[106] Hughes had sat on the Court from 1910 to 1916,[107] but left the Court when he obtained the Republican Party's nomination for President.[108] Interestingly, Hughes was reappointed to the Court as Chief Justice in 1930,[109] the same year that the Court entered its decree in the Illinois dispute.[110] Retired Justice Stanley Reed was appointed in 1958 to handle a dispute between Virginia and Maryland over marine life in the Potomac River,[111] and Retired Justice Tom Clark was appointed Special Master in 1973 in a boundary dispute between New Hampshire and Maine.[112]

The practice of appointing senior or retired judges was formalized by Chief Justice Warren Burger beginning in the late 1960s.[113] This unwritten rule was relaxed over time as the resources of federal judges were deemed more worthy of devo-

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103. *See* Coughenour et al., *supra* note 13, at 788 n.1; Seltman, *supra* note 13, at 8.

104. *See, e.g.,* New Hampshire v. Maine, 414 U.S. 996, 996-97 (1973) (appointing retired Justice Clark as Special Master); Virginia v. Maryland, 355 U.S. 946, 946 (1958) (appointing retired Justice Reed as Special Master); Wisconsin v. Illinois, 271 U.S. 650, 650 (1926) (appointing former Justice Hughes as Special Master).

105. *See* Wisconsin v. Illinois, 271 U.S. 650 (1926).

106. *See* Lino A. Graglia, *Is Antitrust Obsolete?*, 23 HARV. J.L. & PUB. POL'Y 11, 13 (1999).

107. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW lxxxiv-lxxxv (3d ed. 1996).

108. *See* Buckley v. Valeo, 424 U.S. 1, 98 n.132 (1976) (per curiam) (describing the Progressive Party's reintegration into the Republican Party at the time of Hughes' nomination); Michael J. Goldberg, *Law, Labor, and the Mainstream Press: Labor Day Commentaries on Labor and Employment Law, 1882-1935*, 15 LAB. LAW. 93, 125 (1999) (noting Justice Hughes was the Republican nominee for President against Woodrow Wilson).

109. *See* STONE ET AL., *supra* note 107, at lxxxv.

110. *See* Wisconsin v. Illinois, 281 U.S. 696 (1930) (per curiam). During his service as Special Master, Hughes authored a book on the role of the Supreme Court in American history and politics. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 1-42 (1928).

111. *See* Virginia v. Maryland, 355 U.S. 946, 946 (1958).

112. *See* New Hampshire v. Maine, 414 U.S. 996, 996-97 (1973).

113. Telephone Interview with Francis J. Lorson, *supra* note 98.

tion to the rapidly expanding federal caseload.[114] This shift away from the appointment of senior and retired judges might also have had the incidental effect of preserving consistency within individual cases, given that a number of senior or retired judges appointed as Special Masters died during the course of their service as Special Master, requiring appointment of new Special Masters in what usually were lengthy and complex litigations.[115] Consider, for example, that one of the oldest cases in the Court's original docket is also one of its most current: *Arizona v. California*,[116] an original jurisdiction suit filed in the Court in 1930 and refiled in 1953 after being dismissed without prejudice.[117] Since first instituted, five Special Masters have been appointed, two appointments owing to the death of the Masters' respective predecessors.[118]

The presence of repeat players in the role of Special Master may indicate that the Court selects from a short-list repertoire.[119] While some appointments appear to result from a Justice's personal familiarity with the person appointed, particularly among non-judges appointed, the reappearance of the same Special Masters in different original jurisdiction cases likely is attributable to the fact that certain original jurisdiction cases coincide or bear a strong resemblance to one another, either factually or legally.[120] In appointing non-judges, an increasing trend over the past two decades has been to appoint deans or professors at nationally recognized law schools,[121] possibly because many Special Masters in this category performed

114. *See id.*

115. *See* Appendix.

116. 373 U.S. 546 (1963). This case has a tormented history. While initially instituted by Arizona against California over rights to and apportionment of the Colorado River, time has brought the two states to the same side of the litigation as against the United States and various Native American tribes, with many of the adjacent states joined as intervenors. *See* Arizona v. California, 460 U.S. 605, 611-12 (1983).

117. *See* Arizona v. California, 344 U.S. 919 (1953) (per curiam); Arizona v. California, 283 U.S. 423, 449, 464 (1931) (per curiam).

118. *See* Appendix *infra* at 704-15; *see, e.g.*, Arizona v. California, 350 U.S. 812 (1955) (appointing Simon H. Rifkind Special Master to replace the deceased Justice George I. Haight).

119. *See* Appendix (showing, among other repeat appointments, that McKusick was appointed three times; Jasen, two times; Van Pelt, six times; Breitenstein, two times; and Maris, six times).

120. *See, e.g.*, Wisconsin v. Illinois, 441 U.S. 921 (1979) (appointing Albert B. Maris as Special Master); Michigan v. Illinois, 441 U.S. 921 (1979) (same); New York v. Illinois, 441 U.S. 921 (1979) (same).

121. *See* Appendix, *infra*, at 704-15.

government service, were familiar to the Court as advocates, or had demonstrated specialized expertise with respect to the issues central to the dispute.

One of the primary areas in which the Court has appointed non-judges having specific substantive expertise is in cases involving disputes over water appointment and diversion. Arthur Littleworth, a respected California lawyer with developed expertise in water rights,[122] was appointed to preside over a century-old dispute between Kansas and Colorado over apportionment and diversion of the Arkansas River, which was resolved by the Court, at least for the time being, just last year.[123] Another well-qualified water rights scholar, Jerome C. Muys, was appointed in *Oklahoma v. New Mexico* to serve as Special Master in a water apportionment dispute in the western states.[124] Muys has been described as "perhaps the most authoritative author on the subject of compacts" to resolve water rights disputes.[125] Muys had experience with original jurisdiction cases, too, having acted as one of the deputy attorneys general representing the defendant states in the 1960s in the original jurisdiction case of *Arizona v. California*.[126] Owen Olpin, another private practitioner, applied his knowledge of water rights in the case of *Nebraska v. Wyoming (Nebraska II)*.[127] Even one of the appointed judges assigned as Special Master, Jean Sala Britenstein, had substantial water rights experience that aided him in his Special Master tasks. During the 1920s, Britenstein assisted in drafting Colorado's water rights statutes and was later identified as "the preeminent authority on water law in the entire West."[128] One of the few, if not the only, subject-area

122. *See* Arthur L. Littleworth, *The Public Trust vs. The Public Interest*, 19 PAC. L.J. 1201, 1201 n.* (1988); *see also* Robert T. Stephan, *Water Rights to the Arkansas River: The Status of* Kansas v. Colorado, 4 KAN. J.L. & PUB. POL'Y 65, 66 (1994). In 1995, Littleworth coauthored a book about California water law. ARTHUR L. LITTLEWORTH & ERIC L. GARNER, CALIFORNIA WATER (1995).

123. *See* Kansas v. Colorado, 121 S. Ct. 2023 (2001); *see also* Kansas v. Colorado, 484 U.S. 910 (1987).

124. Oklahoma v. New Mexico, 484 U.S. 1023 (1988).

125. E. Leif Reid, Note, *Ripples from the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights*, 14 STAN. ENVTL. L.J. 145, 162 (1995). Muys has authored studies and scholarship on interstate compacts. *See* JEROME C. MUYS, INTERSTATE WATER COMPACTS 323 (1971).

126. Arizona v. California, 383 U.S. 268 (1966).

127. Nebraska v. Wyoming, 507 U.S. 584, 589-90 (1993).

128. 832 F.2d LXXIX, LXXIX; *see also* 732 F.2d CIX-CXX (transcribing the convening of the Tenth Circuit Court of Appeals in honor of Judge Breiten-

specialists appointed as Special Master in a case unrelated to water rights was Professor John A. Carver. Carver, former Assistant Secretary of the Interior, was appointed Special Master in a state boundary dispute, *Texas v. Oklahoma*.[129]

A surprising number of Special Masters, particularly of the non-judge Masters, had close personal or professional ties either to the Court's Justices (current or former) or to other Special Masters in prior cases, suggesting that Special Masters, at least occasionally, are plucked from a short list of the Court's intimate associates. The relationship both between Special Masters and Justices and between Special Masters and other Special Masters deserves mention as it suggests that Special Master appointments likely evolve as much from personal communications as from democratic processes.[130] Even for those Special Masters not intimately connected with the Court, the majority of non-judges appointed as Special Masters in the last few decades have argued cases before the Supreme Court,[131] making their faces at least familiar to the Justices.

Among the Special Masters having close ties to the Court were Harvard Professor Samuel Williston, constitutional historian Charles Warren, Judge Walter Armstrong, and attorney Monte Lemann. Professor Williston, the Special Master to preside over a dispute between Missouri and Iowa,[132] was a well-known contracts law expert responsible for drafting the Uniform Sales Act,[133] serving as reporter on the Restatement of Contracts,[134] and authoring a leading treatise on contract law.[135] Williston had an inside track to the Court, having been a revered professor to and colleague of future Justice Felix

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stein).

129. Texas v. Oklahoma, 448 U.S. 905 (1980).

130. This is not to suggest that the Special Masters are not qualified or esteemed lawyers or that they are undeserving beneficiaries of their associations with the Justices. The fact that many are close colleagues of the Justices, who hold highly reputable positions within the legal system, serves implicitly to credit their many accomplishments.

131. *See* Appendix.

132. Missouri v. Iowa, 304 U.S. 549 (1938).

133. SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY 221-22 (1940)).

134. *See* Thomas C. Grey, *Modern American Legal Thought,* 106 YALE L.J. 493, 499 (1996) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)).

135. RICHARD A. LORD, WILLISTON ON CONTRACTS (4th ed. 1990); SAMUEL WILLISTON, THE LAW OF CONTRACTS (1920).

Frankfurter,[136] who was appointed to the Court one year after Williston's appointment as Special Master,[137] and having clerked in October Term 1888 for Justice Horace Gray, the first Supreme Court justice to hire law clerks.[138]

Charles Warren, appointed to the Special Master post twice in the 1920s, had co-authored the instrumental law review article *Right to Privacy* in 1890 with Justice Brandeis.[139] Warren was a rising legal historian at the time of his appointments who eventually authored a preeminent two-volume text on the history of Supreme Court,[140] which won the Pulitzer Prize,[141] and historical articles and texts on the drafting of the Constitution,[142] the federal judiciary,[143] the American bar and legal profession,[144] and bankruptcy.[145] During World War I,

136. *See* Felix Frankfurter, *In Memoriam: Samuel Williston: An Inadequate Tribute to a Beloved Teacher*, 76 HARV. L. REV. 1321, 1321 (1963).

137. Frankfurter taught on the Harvard Law faculty with Williston when Williston was appointed Special Master in 1938. Frankfurter was appointed to the Supreme Court by President Franklin D. Roosevelt in 1939. *See* STONE, *supra* note 107, at lxxxii.

138. *See* Richard W. Painter, *Open Chambers?*, 97 MICH. L. REV. 1430, 1453 n.84 (1999) (reviewing EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998)).

139. In the famed case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), Justice Brandeis, writing for the Court, supported the Court's result abolishing federal common law with reference to Warren's published examination of a previously unknown draft of the Judiciary Act of 1789, citing Warren's work as the "recent research of a competent scholar." *Id.* at 72-73 & n.5. *See also* Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 389-90 (1964) (discussing Warren's influence on the *Erie* outcome); Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 389 (1998) (same); Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 356 & n.4 (1977) (same); Glenn M. Willard, *Courts of General Jurisdiction: Judicial Power Extending to Cases Arising Under the "Laws of Nature and of Nature's God,"* 7 REGENT U. L. REV. 1, 50-51 (1996) (same).

140. CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1926).

141. Martin Shapiro, *The Charles River Bridge Case*, 3 GREEN BAG 2D 75 (1999).

142. CHARLES WARREN, THE MAKING OF THE CONSTITUTION (1928).

143. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923); Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 347-48 (1930).

144. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR (1911); CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA (1908).

145. CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935).

Warren became an Assistant Attorney General, a position that brought him before the Court.[146]

Other Special Masters had ties to the Justices through their participation in professional organizations. Retired Judge Walter P. Armstrong, Jr., Special Master in *Mississippi v. United States*[147] and *United States v. Louisiana*,[148] was appointed together with former Justice Charles E. Whittaker and ten other prominent legal professionals to draft the first ABA Model Code of Professional Responsibility.[149] Monte M. Lemann, appointed as Special Master in the early twentieth century cases of *Arkansas v. Tennessee*[150] and *Wisconsin v. Illinois*,[151] was a respected Louisiana advocate who argued a series of cases before the Court and was appointed by Chief Justice Hughes in 1935 to the Advisory Committee charged with drafting the first Federal Rules of Civil Procedure.[152] As he was nominated to the United States Court of Appeals for the Fifth Circuit by President Franklin D. Roosevelt, Lemann turned down the appointment.[153]

The biographies of several Special Masters also demonstrate fraternization among many of the men appointed to the role. Special Masters Simon Rifkind and Lloyd Garrison, for example, were both name partners and colleagues in the New York-based firm Paul, Weiss, Rifkind, Wharton & Garrison. Rifkind had close association with another Special Master, Charles Meyers.[154] Rifkind chose Meyers as his assistant when he was appointed as Special Master in 1955 in the case of *Ari-*

146. *See, e.g.*, Lim v. United States, 246 U.S. 674, 674 (1918); Hamburg v. United States, 246 U.S. 662, 662 (1918).

147. Mississippi v. United States, 487 U.S. 1215, 1215 (1988).

148. United States v. Louisiana, 395 U.S. 901, 901 (1969).

149. *See* MODEL CODE OF PROF'L RESPONSIBILITY (1980) (naming the members of the original committee).

150. Arkansas v. Tennessee, 310 U.S. 563, 564 (1940); Arkansas v. Tennessee, 301 U.S. 666, 666 (1937).

151. Wisconsin v. Illinois, 313 U.S. 547, 547 (1941); Wisconsin v. Illinois, 311 U.S. 107, 107 (1940); Wisconsin v. Illinois, 309 U.S. 569, 571 (1940) (per curiam).

152. *See* Felix Frankfurter, *A Legal Triptych*, 74 HARV. L. REV. 433, 445-47 (1961) (providing a brief biography of Lemann as a professor, advocate, founder of Louisiana's first legal aid society, and as a member of the Advisory Committee); *see also* Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 490 n.110 (1998).

153. *See* Frankfurter, *supra* note 152, at 447.

154. Simon H. Rifkind, *Charles J. Meyers*, 34 STAN. L. REV. vi, vi (1981).

zona v. California.[155] Meyers went on to be appointed Special Master twice in the 1980s, presiding over the cases of *Louisiana v. Mississippi*[156] and *Texas v. New Mexico*.[157]

While the ranks of Special Masters appear to consist largely of Caucasian males,[158] at least one minority, Wade McCree, Jr., has served as Special Master.[159] McCree, an African-American, was appointed Special Master in three of the Court's original jurisdiction cases in the 1980s.[160] At the time of his first appointment, he had served as a trial judge in the Michigan state court system and as a federal judge at both the district court level and the appellate level—he was Michigan's first elected black judge and the first black to be appointed to the federal bench in Michigan.[161] McCree also acted as Solicitor General during the Carter Administration, after which he left to join the faculty at the University of Michigan Law School.[162]

These brief portraits hardly do justice to the illustrious careers of many—if not all—of the Special Masters appointed to the Court. They do, however, demonstrate the varied skills and areas of expertise that various Masters have brought to the role and indicate that many of the Masters, even if lacking in judicial experience, were skilled in the law. In addition, for the

155. Arizona v. California, 350 U.S. 812, 812 (1955).

156. Louisiana v. Mississippi, 454 U.S. 937, 937 (1986).

157. Texas v. New Mexico, 468 U.S. 1202, 1202 (1984).

158. Seltman, *supra* note 13, at 8.

159. Another Special Master, Walter A. Huxman, while not a minority, participated in the appellate court predecessor to the monumental *Brown v. Board of Education*, which influenced the future path for minorities in this country. As a federal circuit judge, Huxman sat on a three-member district court panel and authored the lower court opinion in *Brown v. Board of Education*, 98 F. Supp. 797 (D. Kan. 1951), which was overruled by the Court in its famous 1954 decision. The decision haunted Huxman, but he felt bound to the rule of law established in *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896). *See* Brown v. Board of Education, 892 F.2d 851, 895 (10th Cir. 1989) (Baldock, J., dissenting); *see also In Memoriam: Walter A. Huxman*, 474 F.2d preface at 14 (statement by Hon. Robert H. Kaul) (noting that Huxman "was torn between his own philosophical beliefs and judicial responsibility dictated by the rules of stare decisis").

160. *See* Kansas v. Colorado, 478 U.S. 1018, 1018 (1986); New Jersey v. Nevada, 474 U.S. 1045, 1045 (1986); California v. Texas, 459 U.S. 963, 963 (1982).

161. *See* William Clifford, *Fast Lane for Lawyers: Black Lawyers in the Auto Industry*, 13 NBA NAT'L B. ASS'N MAG. 19, 20 (1999); *see also* Brian C. Kalt, *Wade H. McCree, Jr., and the Office of the Soliciter General, 1977-1981*, 1998 DETROIT C.L. AT MICH. ST. U. L. REV. 703, 708.

162. See Kalt, *supra* note 161, at 704-08.

non-judges appointed to the role, the close associations between the Masters and the Court suggest that the Court selects Special Masters from the crowd of associates who have gained the Court's confidence.

C. THE MASTER PROCEEDINGS

The appointment of a Special Master may be initiated either on motion, which the Court may refuse to grant,[163] or at the Court's own prerogative. After appointing a Special Master, the Court provides little supervision of the master's proceedings. Even as a preliminary matter, no rule governing Supreme Court practice expressly provides for the appointment of Special Masters, as contrasted with the appointment mechanism for special masters in the lower federal courts set forth in Rule 53 of the Federal Rules of Civil Procedure.[164]

Prior to 1954, procedures for original cases were conducted and defined on an *ad hoc* basis, with counsel relying upon direction from the Court.[165] Under current practice, two sources direct the Special Master in the discharge of his duties: Rule 17 of the Supreme Court Rules,[166] a one-page delineation of rules governing original actions, and the boilerplate language used in the appointment memorandum.[167] Rule 17 provides that the Federal Rules of Civil Procedure govern the form of pleadings and motions.[168] With regard to proceedings before the Master, however, no authoritative mandate directs that the Federal Rules of Evidence govern, though they are to be taken as guides.[169] This flexibility allows the Special Master to craft the proceedings and to define the scope of discovery in a manner unlike the rules that govern litigation in the lower federal courts. For example, in addition to presiding over the direct examination and cross-examination of witnesses, the Master may himself direct witnesses and call his own witnesses,[170] a

163. *Compare* Maryland v. Louisiana, 445 U.S. 913, 913 (1980) (motion granted), *with* New Jersey v. New York, 50 S. Ct. 84, 85 (1929) (motion denied).

164. *See* FED. R. CIV. P. 53(a).

165. *See* STERN ET AL., *supra* note 31, at 486.

166. *See* SUP. CT. R. 17.

167. *See infra* note 172 and accompanying text.

168. SUP. CT. R. 17(2).

169. *See id.* The remainder of Rule 17 is devoted to setting forth the requirements for filing an initial pleading, serving the opposing party, and other specifications relating to process. *See* SUP. CT. R. 17.

170. *See* Joint Abstract of Record (Vol. 1, Testimony) at 11-12, Wisconsin v.

practice in tension with the adversarial process generally honored in the federal courts.

In its appointment memoranda, the Court often directs the Master to receive evidence, make findings of fact and conclusions of law, and draft a proposed decree.[171] In so providing, the Court grants the Master the authority "to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for."[172] Since 1965, the scope of the Master's control has extended to the "authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings."[173] On some occasions, however, the Court has instructed specially that the Master receive and report evidence, but without conclusions of law or findings of fact,[174] or report findings of fact without advancing any conclusions of law.[175]

The precedent that guides the Special Master, particularly in boundary dispute cases, is a fragile body of specialized federal common law, pasted together from international law treatises, property concepts, contract law, and sovereignty principles.[176] In his book discussing the role of the Supreme Court,[177] Justice Jackson noted that "[t]he Court has no escape in many cases of this character from the undesirable alternatives of refusing to obey its duty to decide the case or of devising some rule of decision which has no precedent or positive law author-

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Illinois, 281 U.S. 179 (1940).

171. *See* Vermont v. New Hampshire, 282 U.S. 796, 796 (1930).

172. *See, e.g.*, New York v. New Jersey, 513 U.S. 924, 924 (1994); Louisiana v. Mississippi, 510 U.S. 1174, 1174-75 (1994); Connecticut v. New Hampshire, 503 U.S. 1002, 1002 (1992); Arizona v. California, 498 U.S. 964, 964 (1990); Washington v. Oregon, 288 U.S. 592, 593 (1933).

173. Nebraska v. Iowa, 379 U.S. 996, 996 (1965); *accord* Louisiana v. Mississippi, 510 U.S. 1174, 1174 (1994); Connecticut v. New Hampshire, 503 U.S. 1002, 1002 (1992); Arizona v. California, 498 U.S. 964, 964 (1990).

174. Georgia v. South Carolina, 253 U.S. 477, 478 (1920); Pennsylvania v. West Virginia, 252 U.S. 563, 564 (1920).

175. *See* Vermont v. New Hampshire, 46 S. Ct. 16, 16 (1925) (naming commissioners "for taking of testimony and documentary evidence"); New Mexico v. Texas, 266 U.S. 586, 586-87 (1924) (directing Special Master to "make special findings on all material questions of fact").

176. The *Erie Railroad Co. v. Tompkins* abolition of federal common law in diversity jurisdiction cases does not affect the "specialized" common law that has developed to treat the distinctly federal cases between states, where application of state law principles of sovereignty over the other potentially creates deep conflict. *See* HART & WECHSLER, *supra* note 35, at 314.

177. JACKSON, *supra* note 80.

ity."[178] For example, Jackson observed that Justice Cardozo, in formulating an opinion in *New Jersey v. Delaware*,[179] turned to ancient law, international law, and American and foreign conventional authorities—and found them all lacking.[180]

In the exercise of their duties, Special Masters today entertain motions to intervene,[181] motions for leave to file a counterclaim,[182] and other motions that have been explicitly referred to Special Masters by the Court. Trials in original jurisdiction cases, if held, are presided over by the Special Master,[183] and a summary of the proceedings is relayed in the report. In 1794, the Court did impanel a jury before it, but the Court has only done so again twice during the last two centuries.[184] The Court's distance from the process of trial was best exemplified in *Arizona v. California*, where the trial was presided over by Simon Rifkind in the federal courthouse in San Francisco, California, far from the Justices.[185]

Once the Special Master's report is transmitted to the Court, the Court exercises its authority in reviewing the report and revising or approving the Master's' findings, conclusions, or recommendations in whole or in part.[186] Practice and time have shown that the Court generally adopts the Special Masters' reports, even when those reports make conclusions of law

178. *Id.* at 73.

179. New Jersey v. Delaware, 291 U.S. 361 (1934).

180. *See id.*

181. *See, e.g.*, Arizona v. California, 513 U.S. 803 (1994).

182. *See, e.g.*, Arkansas v. Mississippi, 458 U.S. 1122, 1122 (1982).

183. *See, e.g.*, Special Master Report, *supra* note 7, at 14 n.16 (stating that a trial was presided over by Special Master in the West Conference Room of the United States Supreme Court); Report by Special Master Simon H. Rifkind, *Arizona v. California*, No. 8, Orig. (Dec. 5, 1960) (reporting that a Special Master presided over a trial held at the United States Courthouse in San Francisco, California).

184. Mississippi v. Arkansas, 415 U.S. 289, 296 n.1 (1974) (Douglas, J., dissenting) (noting that a jury was impaneled in the case of *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), though the practice was soon discontinued); 1 HAMPTON L. CARSON, HISTORY OF THE UNITED STATES SUPREME COURT 169 n.1 (1902); HART & WECHSLER, *supra* note 35, at 299 & n.1.

185. *See* Report by Special Master Simon H. Rifkind, Arizona v. Califoria, No. 8, Orig. at 3 (Dec. 5, 1960); Arizona v. California, 373 U.S. 546, 564 (1963).

186. *See* Washington v. Oregon, 288 U.S. 592 (1933) ("The findings, conclusions, and recommendations of the Master shall be subject to consideration, revision, or approval by the Court."); Vermont v. New Hampshire, 282 U.S. 796, 796 (1930) ("The findings, conclusions, and recommendations of the Special Master shall be subject to consideration, revision, or approval by the Court.").

in addition to resolving issues of fact. Chief Justice Rehnquist has articulated a need for the Court to examine independently the evidence.[187] Rehnquist admits, however, that the Court's deference to the Special Master is necessary because the task of fact-finding in original jurisdiction is too consuming for the Justices, who are simultaneously charged with the responsibility of disposing of cases arising under its appellate jurisdiction, a task that would be impeded substantially by fact-finding in complex original jurisdiction cases.[188] Believing that the Court cannot successfully juggle the responsibilities of its appellate docket and its original docket, Rehnquist would commit many, if not all, original jurisdiction cases to the district courts through the establishment of concurrent original jurisdiction.[189]

The delegation of trial tasks to a Special Master, followed by review by the Supreme Court, allows the Court to operate facilely in the manner in which it is most accustomed—that of an appellate court scrutinizing the facts and conclusions of an inferior actor or body. That the Court defers to the Master in setting the stage for the proceedings is evident from other orders directed to the Master from the Court, including that the Master "may in his discretion" receive an amicus curiae brief filed in the Court with his permission.[190] Further, while the Special Master's reports and recommendations are advisory only, the Court usually enters the Master's recommendation as its order if neither of the state parties file a formal objection.[191] If the Court adopts the recommendations of the Special Master, it may invite him to draft and submit a decree implementing his recommendations[192] if a proposed decree has not been appended to the report.

The Master's costs and expenses, including those of his

187. *See* Maryland v. Louisiana, 451 U.S. 725, 762-63 (1981) (Rehnquist, J., dissenting) (stating that "justice is far better served by trials in the lower courts, with appropriate review, than by trials before a Special Master whose rulings this Court simply cannot consider with the care and attention it should").

188. *Id.*

189. *Id.*

190. *See* New Mexico v. Texas, 267 U.S. 583, 583 (1925).

191. *See* STERN ET AL., *supra* note 31, at 495 (stating that if "no exceptions are filed, the Court normally will enter the decree recommended by the Master").

192. *See, e.g.,* Tennessee v. Arkansas, 454 U.S. 809, 809 (1981) ("Report and Recommendations of the Special Master adopted. The Special Master is invited to prepare and submit a proposed decree.").

support staff, are borne equally by the state parties to the dispute, unless the Court provides that they shall be otherwise apportioned.[193] When the Special Master is a federal judge, his salary is usually covered by the judicial payroll.[194] As the Court increasingly supplants federal judges with private practitioners in the role of Special Master, the costs of the dispute can rise significantly; this fact has not escaped some justices, such as former Chief Justice Burger, Chief Justice Rehnquist, and former Justice Blackmun, each of whom has voiced vociferous dissents to the award of fees at the conclusion of litigation.[195]

The size of the Special Master compensation awards in many instances runs into the hundreds of thousands of dollars for private practitioners, raising the question of whether the cost of a Special Master would ever impede a state's ability to bring suit. The respective costs of original jurisdiction suits where a federal judge is appointed as contrasted with cases in which a private practitioner is appointed[196] also raises the

193. *See, e.g.*, Nebraska v. Wyoming, 530 U.S. 1259, 1259 (2000) (ordering the Special Master's compensation and reimbursement to be paid "as follows: 40% by Nebraska, 40% by Wyoming, 3% by Colorado, 12% by the United States, and 5% by Basin Electric Power Cooperative"); *see also* Kansas v. Nebraska, 528 U.S. 1001, 1001 (1999); Louisiana v. Mississippi, 510 U.S. 1174, 1174 (1994); Connecticut v. New Hampshire, 503 U.S. 1002, 1002 (1992) (stating that expenses "shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct"); Vermont v. New Hampshire, 300 U.S. 636, 637 (1937) (stating that costs would be shared equally by the two parties); Washington v. Oregon, 288 U.S. 592, 592 (1933).

194. *See, e.g.*, Colorado v. Kansas, 316 U.S. 645, 645 (1942) (noting that "[i]n view of the fact that the Master is a retired judge, the Court accepts his offer to serve without compensation, but he shall be allowed his actual expenses"); *see also* STERN ET AL., *supra* note 31, at 496 (stating that "for a number of years the Court usually appointed retired federal judges as Masters. Since their salaries continued, they received only disbursements, saving the parties substantial sums").

195. *See* Texas v. New Mexico, 485 U.S. 953, 953-56 (1988) (Blackmun, J., dissenting) (stating that Special Masters from "'establishment' law firms are doing themselves and the public a disservice by asserting fees of this magnitude so persistently over dissents from the Court"); Texas v. New Mexico, 475 U.S. 1004, 1004-05 (1986) (Burger, C.J., dissenting, joined by Blackmun and Rehnquist, JJ.) (finding hourly rates for "junior associates, some of whom were only 'summer law clerks,' were not supported and were unreasonable"); Louisiana v. Mississippi, 466 U.S. 921, 921-23 (1984) (Burger, C.J., dissenting) (finding fees excessive and noting "the public service aspect of the appointment is a factor that is not to be wholly ignored in determining the reasonableness of fees charged in a case like this").

196. *See* Frank J. Murray, *Ex-Judges Prove Masters of Long-Term Billing*, WASH. TIMES, Feb. 5, 1995, at A4 (noting that judges prior to the era of Chief

question of which sovereignty—federal or state—should bear the costs of inter-state disputes. By appointing Special Masters who are judges on the federal payroll, the federal government bears a large portion of the expense of the suit. Where private practitioners are appointed, the expenses instead are funneled directly to the states, and only the Court's minor intervention and oversight is covered by the federal budget.

III. THE MASTER AT WORK: *NEW JERSEY V. NEW YORK*

By reviewing the report of the Special Master presiding over the Ellis Island dispute in the mid to late 1990s, one can better appreciate the scope of the Special Master's role and the depth of his involvement. The report handed to the Court by the Special Master, Paul Verkuil,[197] numbered fewer than two hundred pages, but summarized a trial record comprised of more than four thousand pages of testimony and almost two thousand documents.[198] The report provides a good case study because it is the first and only Special Master report available on a public legal service.[199] The report may be particularly engaging to the public at large and the generalist lawyer because it meshes basic contract interpretation with well-known historic events in our nation's history, unlike reports in other cases that involve highly specialized topics.

A. THE HISTORY OF THE ELLIS ISLAND DISPUTE

New Jersey instituted the original action in the Supreme Court in 1993, seeking sovereignty rights to the portions of Ellis Island that were built up by the United States during the United States's primary era of immigration in the late nineteenth and early twentieth centuries.[200] While a compact en-

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Justice Burger were given only reimbursement for expenses, but that one recent case allowed a Special Master to bill $1.28 million in fees and expenses).

197. In the same year as his appointment as Special Master, Verkuil was named Dean of the Benjamin N. Cardozo School of Law at Yeshiva University in New York City. Verkuil has extensive experience in academia, having served as Dean at Tulane University and as Professor and President at The College of William & Mary. *See* Appendix, *infra* at 705; ASS'N OF AM. LAW SCH., THE AALS DIRECTORY OF LAW TEACHERS 1997-98, at 983 (1997).

198. Special Master Report, *supra* note 7, at tbl. of contents (showing the final report was 167 pages); *see* New Jersey v. New York, 523 U.S. 767, 821 n.8 (Stevens, J., dissenting) (identifying the length of trial record).

199. *See generally* Special Master Report, *supra* note 7.

200. *Id.* at *1-5. Ellis Island stands 1300 feet from Jersey City, New Jersey, and one mile from Manhattan in New York City, New York. New Jersey

tered into by New Jersey and New York in 1834 specified the rights of both states to Ellis Island, New Jersey sought delineation of a new boundary to cover those portions of the island that had been extended outward from the island's natural boundaries since the time of the compact. After the land-filled portions had been added by the federal government, Ellis Island measured more than nine times its size at the time of the compact.[201]

Acrimony between New York and New Jersey regarding Ellis Island rights long predated the initiation of the suit.[202] As the Master noted in his report, the boundary dispute dated back between 170 and 300 years: "Metaphorically, one could even place the beginning of the controversy almost four hundred years ago, when Henry Hudson . . . noticed the 'soft ozie [sic] ground' of several small islands while sailing into what would become New York Harbor."[203] New Jersey initiated the first boundary dispute with New York in 1829, a suit in which New Jersey conceded that New York had obtained jurisdiction over Ellis Island, Staten Island, and neighboring islands by adverse possession.[204] The suit served as the catalyst for the Compact of 1834, which defined the boundary at the island's protrusion from the water.[205] The Compact of 1834 provided for New York's "present jurisdiction" over Ellis Island, but gave New Jersey jurisdiction over the surrounding waters, including the submerged lands.[206]

Even prior to its entry into the Compact of 1834, New York granted jurisdiction over Ellis Island, strategically located on the ocean harbor of one of the nation's economic centers, to the

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v. New York, 523 U.S. 767, 771 (1998).

201. *See* Special Master Report, *supra* note 7, at *1. New York conceded that Ellis Island was roughly three acres in size at the time of the compact fixing the boundary. *Id.* at *2; *see also* New Jersey v. New York, 523 U.S. at 770-71.

202. *See* Special Master Report, *supra* note 7, at *3.

203. *Id.* at *16. The boundary dispute also implicates the Court's landmark decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), in which New Jersey challenged New York's steamboat monopoly in the Hudson River and the New York harbor. *See id.* at 7-8.

204. *See In re* Devoe Mfg. Co., 108 U.S. 401, 406-07 (1883); New Jersey v. New York, 28 U.S. (3 Pet.) 461, 467 (1830) (granting New Jersey's motion for a subpoena to be served on the governor and the attorney general of New York, thus allowing New Jersey's suit to proceed).

205. *See* Special Master Report, *supra* note 7, at *3-4.

206. *See id.* at *22.

federal government to use for fortification purposes.[207] New York retained the right, however, to reclaim the property if the federal government ceased to use it "for safety or defensive purposes."[208] Fort Gibson was erected on the island during the War of 1812 to house prisoners and was later used during the Civil War as a munitions arsenal for the Union army.[209]

Following the Civil War, the island stood vacant, until the federal government transformed it for use as an immigration station in the late 1880s.[210] Rapidly increasing immigration throughout the 1880s led to federal regulation and control over immigration, which had previously been left to the states.[211]

Despite the new use of the property by the federal government, resulting from a transfer of the property from the United States War Department to the Department of the Treasury, New York never exercised its right to reversion.[212] Instead, in 1890 the federal government purchased New Jersey's rights and title to the submerged lands surrounding the island, using landfill to expand the size of Ellis Island.[213] By 1934, the government had incrementally expanded the size of the land by twenty-four and a half acres, compared to the island's original three acres.[214]

The Ellis Island immigration station opened in 1892.[215]

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207. New Jersey v. New York, 523 U.S. 767, 772 (1998) (stating that New York, by an 1808 deed, granted "right, title and interest" to the federal government "for the purpose of providing for the defense and safety of the city and port of New-York" (citations omitted)).

208. Special Master Report, *supra* note 7, at *4 (quoting 1808 N.Y. Laws 279).

209. *Id.* at *4, *71.

210. *Id.* at *4.

211. New Jersey v. New York, 523 U.S. at 775.

212. Special Master Report, *supra* note 7, at *4.

213. *See id.* New York's prior immigration station, located on the tip of Manhattan, proved too small for the massive influx of immigrants and was closed in 1890. The federal government subsequently purchased the rights and title to an additional forty-eight acres of New Jersey territory surrounding Ellis Island for $1000. New Jersey v. New York, 523 U.S. at 776. This purchase was necessary because the New York City Health Department announced, in 1902, that New York City's hospitals would no longer accept immigrants needing treatment for contagious diseases. *Id.* The federal government was therefore required to expand the size of the small hospital located on Ellis Island to provide sufficiently isolated wards. *Id.* Landfill was added to create a "third island" off of Ellis Island to house the new hospital, which was constructed in 1909 and opened in 1911. *Id.*

214. Special Master Report, *supra* note 7, at *4.

215. *Id.* at *71.

Immigration officials at Ellis Island were charged with enforcing the Chinese Exclusion Act of 1882, the Contract Labor Law of 1885, and the Immigration Act of 1891.[216] At Ellis Island, which H.G. Wells after a 1906 visit to the island called a "filter of immigrant humanity,"[217] immigration officials used the immigration laws to weed out the "undesirables," including persons with mental disabilities; persons with contagious diseases; persons who had committed felonies, various misdemeanors, or other acts of moral turpitude; illiterates; anarchists; and persons having vision disorders, including cataracts.[218] Immigration officials also had the authority to issue warrants for the arrest and deportation of foreigners already residing in the United States who were suspected, especially during World War I and World War II, of being enemy aliens.[219] Immigration quotas enacted in 1924 were based on foreign representation existing in the United States at the time of the 1890 census and resulted in more favorable quotas for Western Europeans than for Italians, Jews, and Eastern Europeans.[220]

The federal government's Immigration and Naturalization Service closed the Ellis Island immigration station in the 1950s.[221] Between 1892, when the station opened, and its closure, the Ellis Island immigration station was the gateway for millions of immigrants into the United States.[222] By 1954, however, the rate of immigration had slowed to approximately two hundred persons per day, down from a peak of approximately five thousand persons per day in 1907.[223]

After the station's closure, the property passed through the hands of many federal governmental entities. These entities held the property partly to avoid a clash between New Jersey and New York; in the event title transferred to a private party, both states would seek to collect taxes.[224] In 1992, the Second

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216. Barry Moreno, *Foreward* to PETER MORTON COAN, ELLIS ISLAND INTERVIEWS: IN THEIR OWN WORDS xiii (1997).

217. ELLIS ISLAND: ECHOES FROM A NATION'S PAST preface (Susan Jonas ed., 1989) (excerpting H.G. WELLS, THE FUTURE IN AMERICA: A SEARCH AFTER REALITIES (1906)).

218. Moreno, *supra* note 216, at xiii-xv.

219. *Id.* at xiii.

220. *Id.* at xvi.

221. *Id.*

222. Paul Kinney, Chronology, *in* ELLIS ISLAND: ECHOES FROM A NATION'S PAST, *supra* note 217, at 140-42.

223. New Jersey v. New York, 523 U.S. 767, 777 (1998).

224. *See id.* at 777-78. The Secretary of the Interior in 1964 first suggested

Circuit in *Collins v. Promark Products, Inc.*[225] ruled that New York tort law governed injuries occurring on Ellis Island, including those occurring on the land-filled portions of the island built up from submerged lands transferred to the federal government by New Jersey. Perhaps fearing that its rightful sovereignty was being judicially threatened, New Jersey initiated the action in the Supreme Court fewer than two years later.

B. THE SPECIAL MASTER'S ROLE IN *NEW JERSEY V. NEW YORK*

The Master in *New Jersey v. New York*[226] defined his role in relation to the Court as one where he acted in two capacities: as the equivalent to a court of law and as a master of chancery.[227] The Master proposed a recommendation that transgressed from strict application of rules of law to include principles of equity.[228]

The Master was sensitive to the fact that the delineation of the boundary would have an expansive impact.[229] While the interests of defining a boundary located in a body of water might be fewer than those for inhabited land space, both have strong implications. The Master noted that the sovereignty rights sought by New Jersey were those affecting "taxation, zoning, environmental protection, elections, education, residency, insurance, building codes, historic preservation, labor and public welfare laws, civil and criminal law, and . . . all other purposes related to the jurisdiction of any state."[230] Concessions on Ellis Island alone generate almost $400,000 a year in state sales tax revenue.[231] The Master additionally declared that original jurisdiction cases often compel "full and liberal factual development . . . because of the lofty historical, territorial, and finan-

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that Ellis Island be designated and developed as a national historic site, in part to reduce conflict between New Jersey and New York. *Id.* The National Park Service was given jurisdiction over the island and began restoration in 1976. *Id.* at 778.

225. 956 F.2d 383, 384 (2d Cir. 1992).

226. New Jersey v. New York, 523 U.S. 767 (1998).

227. Special Master Report, *supra* note 7, at *16, *75.

228. *See id.* at *75-76 (reviewing the equity principles present in relevant cases and determining that the Special Master must "fashion a remedy that is just, fair, and convenient to the parties and the public").

229. *See id. passim.*

230. *Id.* at *2.

231. Thomas J. Fitzgerald, *Joint Custody Splitting Ellis Island is Best Solution in War Between States, Fact Finder Says*, REC. N. N.J., Apr. 2, 1997, at A1.

cial implications of these cases to the states involved."[232]

The Master also considered New York's pleas that the boundary preserve the historic and emotional significance of Ellis Island, quoting New York's proposition that New Jersey "has never suffused the hearts of every immigrant whose first, precious step onto United States soil caused a tear to spill on the card pinned to his or her lapel which read . . . destination 'New York.'"[233] Although not giving this sentimental value much credence, the Master nevertheless may have given it some equitable weight.[234]

Among the motions the Master considered or decided, the Master recommended, successfully, that the City of New York not be permitted to intervene, although the City was permitted to proceed as an amicus.[235] In addition, the Master denied cross motions for summary judgment,[236] issued an order and memorandum governing such pretrial issues as the examinations of expert witnesses[237] and objections to fact witnesses and documents,[238] and denied New York's motion to amend its pleading to raise the affirmative defense of laches, ruling that the laches defense was inapplicable to cases arising under the Court's original jurisdiction.[239] In many instances, the Master had unilateral authority to rule on the motions, although the Court had the "factual record" to determine the basis for his rulings on review.[240]

The pre-trial conference and the trial in *New Jersey v. New York* were both conducted at the Supreme Court.[241] The pre-trial conference and the twenty-three day trial were held in the West Conference Room, where the testimony of twenty-one witnesses was received together with volumes of presented evidence.[242] The Master sat without a jury,[243] and the trial was

232. Special Master Report, *supra* note 7, at *11.
233. *Id.*
234. *See id.*
235. *See id.* at *8.
236. *Id.* at *11. Both motions were denied without prejudice to renew at trial. *Id.*
237. *Id.* at *13.
238. *Id.*
239. *Id.*
240. *See id.*
241. *Id.* at *12, *14 n.16.
242. *See* Special Master Report, *supra* note 7, at *12-14.
243. *Id.* at *15.

open to the public.[244] Despite the open trial in the Court, much of the information gathered in the case was obtained through nonpublic proceedings. In reporting on the dispute, a major source of controversy in the New Jersey-New York area, national and local media confined themselves almost exclusively to reiterating portions of the Master's report, the arguments before the Court, or the Court's opinion.[245] The early proceedings in the case received little coverage notwithstanding the extensive coverage given to the overarching controversy.

On March 31, 1997, the Master submitted his report to the Court.[246] The report was an accumulation of the history of Ellis Island—going back to the early steamboat controversy and the Compact of 1834, summaries of positions and evidence, applications of common law and compact analysis, and conclusions of law apportioning the island between the two parties rather than granting full sovereign rights to one party to the exclusion of the other.[247] Eleven appendices, mostly maps, and a proposed decree were appended to the report.[248]

The Master concluded that New Jersey had sovereignty over the submerged lands upon which the landfill was added to erect land immediately above and upon submerged land, while New York would maintain sovereignty over the original three-acre portion of the island, consistent with the Compact of 1834.[249] Initially, the Master placed a transparent overlay of an 1857 Ellis Island map, the most accurate representation of New York's Ellis Island jurisdiction in 1834, over a 1995 Ellis Island map.[250] The Master found that "[t]his 'template' approach introduces impracticalities and inconveniences" that militated in favor of a different approach.[251] For example, the

244. Telephone Interview with Francis J. Lorson, *supra* note 98.

245. *See, e.g.*, Deborah Pines, *New Jersey Wins Control of Ellis Island, New York Loses Bid to Keep Sovereignty*, N.Y. L.J., May 27, 1998, at 1; David E. Rovella, *A Supreme Court Trial: States Fight Historic Battle for Ellis Island, Original Jurisdiction Invoked as New Jersey Seeks a Chunk of the Immigration Landmark*, NAT'L L.J., July 29, 1996, at A10.

246. Special Master Report, *supra* note 7, at *15.

247. *See generally* Special Master Report, *supra* note 7.

248. *Id.* at app.

249. *Id.* at *80-85. The Master held that New York could not establish ownership by prescription because the federal government, not New York, had held "almost continuous and uninterrupted ownership and control over Ellis Island pre-dating the Compact." *Id.* at *6.

250. *Id.* at *83.

251. *Id.*

"template approach" would place the boundary line directly and disproportionately through many of the buildings comprising the old immigration station, including the Main Building, which now serves as a museum.[252] The approach also would landlock New York's territory, denying New York access to the waters by which millions of visitors came to Ellis Island annually by ferries arriving from New York City.[253] The Master therefore determined that a just result required the application of equitable principles and his obligation was "thus to recommend a remedy to this Court that works as well as can be in light of the reality of divided sovereignty."[254]

The Master's ultimate conclusion and recommendation was to demarcate boundaries around buildings, rather than through them, adopting an approach that "rejects the false objectivity of the template approach and creates a workable boundary."[255] New York was granted jurisdiction over a portion of land providing access to the ferry landing at the water's edge and also over the entire Main Building, or museum.[256] The Master noted that this result would preserve "the time-honored connection between the Main Building—the immigration locus—on the original Island and the City of New York."[257] New Jersey was granted jurisdiction over the remainder of the island, which included the Baggage and Dormitory Building, the Boathouse, and the Railroad Ticket Office.[258] The Master published his report on March 31, 1997, recommending that the Court adopt his delineation of the New Jersey-New York boundary as a solution that was "technically skillful, politically wise and thoroughly just."[259] Two months later, the Master submitted a supplemental report setting forth in metes and bounds the boundary delineated in his prior report.[260] The final and sup-

252. *Id*; *see also* Fitzgerald, *supra* note 231, at A1.

253. Special Master Report, *supra* note 7, at *82-84.

254. *Id.* at *84. The Master stated that the "literal status of divided sovereignty" would be created if he were to establish a boundary line fully consistent with the application of the "'template' approach." *Id.* at *83. The Master also considered that the Preservation Amici "questioned the practicability of applying historic preservation laws to parts of historic buildings." *Id.* at *84.

255. *Id.* at *85.

256. *Id.* at *84-85.

257. *Id.* at *85.

258. *Id.* at *84-85.

259. *Id.* at *85 (quoting a letter from Charles Wyzanski Jr., Solicitor of Labor, to the Treasury Department (Oct. 6, 1934)).

260. Office of the Special Master, Supplement to the Final Report of the

plemental reports were filed in the Court on June 17, 1997.[261] When all was said and done, New Jersey and New York were ordered to share equally the Master's expenses and compensation, which totalled $713,924.25 over four years.[262]

C. THE COURT'S DECISION IN *NEW JERSEY V. NEW YORK*

Both New Jersey and New York filed exceptions, or objections, to the Master's report,[263] which entitled them to review by the Supreme Court. New Jersey challenged only the dimensions of the original portion of the island. New York challenged the Master's conclusions that it had not established greater prescriptive right to the island, submitting extrinsic evidence such as postal codes, marriage certificates, and registrations of vital statistics.[264] The Court allowed several different entities to file briefs as amici curiae, including the Acting Solicitor General,[265] the National Trust for Historic Preservation in the United States, the New York Landmarks Conservancy, and the New York Historical Society.[266]

The Court heard arguments from the parties and the Acting Solicitor General with regard to the exceptions, then issued its decision on the merits in May of 1998.[267] The Court found that the Master had appropriately applied principles of federal common law developed by the Court for resolution of boundary disputes, including those for submerged lands and controlling water marks, interpretation of state compacts, and adverse possession and discovery.[268]

The Court sustained only one exception to the report, that regarding "a miniscule detail of [the boundary] line"[269] on the

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Special Master, *New Jersey v. New York,* No. 120, Orig. (May 30, 1997).

261. New Jersey v. New York, 520 U.S. 1273 (1997).

262. New Jersey v. New York, 527 U.S. 1002 (1999) (ordering New Jersey and New York to share equally the Special Master's reimbursement expenses and compensation totaling $29,096.50); New Jersey v. New York, 521 U.S. 1116 (1997) (same for $263,488.89); New Jersey v. New York, 519 U.S. 1038 (1996) (same for $255,157.62); New Jersey v. New York, 516 U.S. 1026 (1995) (same for $81,649.50); New Jersey v. New York, 515 U.S. 1130 (1995) (same for $84,531.74).

263. *See* New Jersey v. New York, 523 U.S. 767, 780 (1998).

264. *See id.* at 813.

265. New Jersey v. New York, 522 U.S. 910 (1997).

266. New Jersey v. New York, 521 U.S. 1149 (1997).

267. *See* New Jersey v. New York, 523 U.S. at 767.

268. *See id.* at 783-89.

269. *Id.* at 808.

premise that the Court was without authority to fudge the line for the convenience of the parties, on the theory of equitable principles, where buildings would be left to stand across the two states.[270] The Court ruled that the boundary diversions, while proper, were within the province of Congress or the states—but not the Court—to amend.[271]

Justice Breyer, joined by Justice Ginsburg, concurred in the judgment, but wrote separately to establish more succinctly that the law and the record revealed a contradiction to public perception and historic sentiment:

> Many of us have parents or grandparents who landed as immigrants at "Ellis Island, New York." And when this case was argued, I assumed that history would bear out that Ellis Island was part and parcel of New York. But that is not what the record has revealed.... [O]ne [cannot] expect the immigrants themselves to have taken a particular interest in state boundaries, for most would have thought not in terms of "New York" or "New Jersey," but of a New World that offered them opportunities denied them by the Old.[272]

Justice Stevens in dissent yielded greater weight to the historic value of Ellis Island during the immigration era, pointing to steamship tickets and certificates of arrival declaring New York as the final destination of immigrants arriving there.[273] Combined with the birth and death records establishing New York as the domicile, New York's provision of police and fire protection, and numerous other pieces of evidence showing an understanding that Ellis Island *was* New York, this historic significance proved to Justice Stevens that New York had a prescriptive right that supervened the sterile terms of the compact.[274] Justice Scalia authored a separate dissent, writing that the clear, practical construction of the compact would grant sovereignty to New York.[275]

The division of the Court with regard to the weight of evidence, the interpretation and historic understanding of the Compact of 1834, and the role of the federal common law demonstrates the necessity of employing a fact-finder to accumulate, assemble, and summarize the massive volume of evidence

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270. *See id.* at 807-12.

271. *Id.* at 812.

272. *Id.* at 812-14 (Breyer, J., concurring).

273. *See id.* at 820 (Stevens, J., dissenting).

274. *See id.* at 816-28 (Stevens, J., dissenting). The majority countered that such evidence should not in any way be dispositive, as the New York Immigration District extended into northern New Jersey. *See id.* at 799 n.19.

275. *See id.* at 829-32 (Scalia, J., dissenting).

necessary to the resolution of this case. That great minds could find different evidence controlling and reach separate conclusions, however, might also counsel against placing such decisions in the hands of a single actor, such as a Special Master.

IV. THE MASTER PREDICAMENT

The Special Masters' powerful role in original jurisdiction cases is disquieting in many respects. Most fundamentally, the role of Special Master is one that—with the Court's permission—runs afoul of many of the characteristics of our American federal judicial system: adversarial testing, presentation of witnesses by parties, multilayered review, decisionmaking by constitutionally appointed judicial actors, and adherence to judicially created procedural safeguards. By presenting his own witnesses, employing his own discretionary rules of procedure and evidence, proposing conclusions of law, and acting under the authority of a secret appointment process, the Special Master lurks in the shadows of the judicial processes that Americans have come to view as synonymous with fair adjudication.

Encompassed within this broad criticism are two indispensable features forming the crux of the difficulty. First, Special Masters pose a constitutional difficulty in that they act in a fundamental judicial role both without the blessing of constitutional appointment jointly granted by the executive and legislative branches and without safeguards conferred upon federal judicial officers by Article III of the Constitution. While the modern system of government permits some non-Article III actors (such as magistrates, administrative law judges, or district court special masters) to perform judicial or quasi-judicial functions, those roles are fundamentally distinguishable from that of the Court's Special Masters.

Second, the authority granted to Special Masters in the absence of either delineated rules or a vast body of precedent creates both practical and theoretical predicaments. While the absence of precise rules governing original actions may prevent injustice stemming from rigid formalism, greater oversight and institutionalized procedures are necessary to ensure the integrity of proceedings. Oversight and procedures are necessary given both the absence of multilayered review and the overarching significance of the Special Master's determinations in cases affecting states, whose interests might often outweigh those of the more traditional party litigants (such as individual litigants, corporate litigants, or even class-action litigants).

Critics of such formalism might argue that the availability of a forum for final judgment is the critical feature of our judicial system, rather than adherence to open, adversarial processes and procedural safeguards. Thus, a final resolution might mitigate the risk of a call to arms, which was a critical concern of the Framers in boundary disputes,[276] because people would accept the ruling as an unassailable, final judgment. A final resolution that appears the result of an unjust process, however, might be the functional equivalent of an absent forum, potentially spurring a risk of armed revolt. Consider, however, that publicity of outcomes that result from processes not in conformity with the public's notion of fair adjudication thus can create as much danger of outcry as the absence of an adjudicatory forum.[277]

Finality also prevents a litigant who has been hailed into court from having to bear the shame, burden, or expense of relitigating issues. The appellate process in the bulk of cases acts to ensure the integrity of the findings and the conclusions before the judgment becomes final. Where the avenues of review are restricted, however, as in original jurisdiction cases, *particular* care should be taken to make sure that the findings and conclusions have been properly obtained. This objective can be reached with greater confidence when there is a record of adherence to the adversarial processes and procedures applicable in the lower federal courts.

Even members of the Court, including Chief Justice Rehnquist and Justice Frankfurter, have expressed their discontent with the Court as a forum in original jurisdiction and the use of Special Masters in original jurisdiction litigation. Justice Frankfurter was deeply critical of the Court's handling of its original docket, expressing doubts that litigation was the

276. *See* Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 96 (1998) (quoting Henry M. Hart, Jr., coauthor of the renowned casebook on federal courts, for the proposition that one governmental institution must have the final authority to decide substantive issues or else we would risk a "disintegrating resort to violence" (citation omitted)).

277. To counter this argument, consider the case of Rodney King. The Rodney King case was a prosecution by the state of California against four law enforcement officers. Nonetheless, the verdict of acquittal led to the eruption of violent protest riots. Litigation that does not implicate state-against-state concerns therefore also can be seen to cause revolt where civilians perceive "a breakdown of the legal order." Thomas M. Riordan, *Copping an Attitude: Rule of Law Lessons from the Rodney King Incident*, 27 LOY. L.A. L. REV. 675, 676 (1994).

appropriate route for resolving conflicting governmental interests:

> [T]here are practical limits to the efficacy of the adjudicatory process in the adjustment of interstate controversies. The limitations of litigation—its episodic character, its necessarily restricted scope of inquiry, its confined regard for considerations of policy, its dependence on the contingencies of a particular record, and other circumscribing factors—often denature and even mutilate the actualities of a problem and thereby render the litigious process unsuited for its solution.[278]

Like Frankfurter, Chief Justice Rehnquist has articulated his concern for the appropriateness of the Court as the forum for original jurisdiction disputes.[279] In addition, Rehnquist denounced the Court's practice of resolving original jurisdiction cases "by empowering an individual to act in our stead."[280] One commentator has argued in this vein that original jurisdiction cases are ill-suited for trial before the Court, even with the facilitation of a case by an appointed Special Master, because the Court has been structured as a multi-judge appellate court.[281]

Subscribing to a strict constructionist view, the Court's jurisdiction over disputes between state opponents is likely here to stay, the only remaining remnant of cases in the Original Jurisdiction Clause's whittled-down form. Within the sphere of the Court's original jurisdiction, the Special Master's role thus must be examined as one fraught with tension, but not beyond repair.

A. THE ARTICLE III DIFFICULTY

The delegation of judicial functions to Special Masters in original jurisdiction cases can be examined appropriately in the context of debates regarding the authority of judicial adjuncts, or non-Article III actors.[282] Like Special Masters, judicial adjuncts, such as magistrates and administrative law judges, also perform judicial functions without the salary and life tenure protections bestowed upon the Article III judiciary.

Article III of the Constitution, which defines and grants the powers of the federal judiciary, entitles the Article III judi-

278. Texas v. Florida, 306 U.S. 398, 428 (1939) (Frankfurter, J., dissenting).

279. Maryland v. Louisiana, 451 U.S. 725, 762-63 (1981) (Rehnquist, J., dissenting).

280. *Id.*

281. *See* STERN ET AL., *supra* note 31, at 482.

282. *See* HART & WECHSLER, *supra* note 35, at 437-41.

ciary—but not judicial adjuncts—to life tenure and salary protection.[283] These protections are bestowed only on federal judicial officers who withstand the constitutional appointment process. Article II provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court" as well as any judges appointed to inferior federal courts, which the Constitution permitted, but did not expressly establish.[284] However, like other judicial adjuncts, Special Masters are appointed by the Court beyond the reach of the appointment provisions to which federal judgeships must conform. There is no dispute that Special Masters are not subject to the tenure and salary protections of the Article III judiciary: They serve at the will of the court only for the duration of the suit over which they preside,[285] and their compensation is subject to approval and diminution by the Court.

Without injecting here the entire debate over the legitimacy of judicial adjuncts, to which an extensive body of scholarship has been exclusively devoted,[286] a synopsis of the debate

283. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); *see also* THE FEDERALIST NO. 78, at 508 (Alexander Hamilton) (Edward Mead Earle ed., 1937) (arguing that permanent tenure of Article III judges contributes to judicial independence and the preservation of courts "as the bulwarks of a limited Constitution against legislative encroachments"); THE FEDERALIST NO. 79, at 512 (Alexander Hamilton) (Edward Mead Earle ed., 1937) (remarking that the relation between salary protection and judicial independence derives from the maxim "a power over a man's subsistence amounts to a power over his will"); *see generally* REHNQUIST, *supra* note 2, at 236 (illustrating the expansion of jurisdiction in lower courts to reduce the Supreme Court's burden).

In some European nations, constitutional questions are committed to resolution by specialized judicial tribunals exclusively responsible for deciding constitutional questions. For a comparative analysis of institutionalized protections afforded to judges serving on the constitutional courts in other nations, see MARK TUSHNET & VICKI C. JACKSON, COMPARATIVE CONSTITUTIONAL LAW (Foundation Press 1999); Bojan Bugaric, *Courts as Policy Makers: Lessons from Transition*, 42 HARV. INT'L L.J. 247, 247-48 (2001); *see also* Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 840 (1991).

284. *See* U.S. CONST. art. II, § 2. For a discussion of the interplay between the appointment process and the protections designed to ensure the integrity of judicial decisionmaking, see STONE, *supra* note 107, at 77-81.

285. *See, e.g.*, Arizona v. California, 466 U.S. 144, 146 (1984) ("The Special Master appointed by the Court is discharged with the thanks of the Court.").

286. For a discussion on the origins and the rise of the administrative state, including administrative law judges, see Daniel J. Gifford, *Federal Ad-*

is nonetheless instructive. Critics of the increasing roles judicial adjuncts play in the federal judicial system argue that the lack of accountability of the judicial adjuncts to constituents and to citizens, because they are not appointed through the appointment provisions of the Constitution or through the electoral process, threatens the integrity of judicial proceedings.[287] Arguing that Article III was crafted carefully to institute a judiciary that could preserve balances between the federal branches and between the federal and state governments, many scholars and commentators point to Article III to argue that the Constitution contemplates that only judges who have achieved their positions through delineated dual-branch appointment mechanisms be available to adjudicate federal cases and controversies.

The use of persons without Article III life tenure and salary protections to adjudicate specified matters has been disputed throughout our nation's history.[288] Examples of such adjuncts have ranged from non-judges who resolved veterans' benefits and customs duties by the authority of the First Congress[289] to the more modern administrative law judges who

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ministrative Law Judges: The Relevance of Past Choices to Future Directions, 49 ADMIN. L. REV. 1, 4-10 (1997); W. Michael Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes?*, 20 J. NAT'L ASS'N. ADMIN. L. JUDGES 95, 95-109 (2000); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994); and Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 958-61 (2000).

Gillette argues that the delegation of judicial functions to administrative regimes was a product of the New Deal era. Gillette, *supra* 286, at 95-96. Further, while the Supreme Court in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1934), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935), first found this delegation of authority unconstitutional, from the end of the New Deal "until 1995, the Supreme Court declined to strike down any delegation of power." Gillette, *supra*, at 96.

287. *See, e.g.*, Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1053 (7th Cir. 1984) (Posner, J., dissenting).

288.

> The protections of life tenure and an irreducible salary reserved for the federal judiciary in article III safeguard two preeminent values that might be threatened by a delegation of authority to magistrates as class two adjuncts: (1) the maintenance of the constitutional separation of powers, and more specifically, the protection of the independent judiciary from influence by the other governmental branches; and (2) a litigant's right to an independent federal judiciary.

Raymond P. Bolanos, *Magistrates and Felony Voir Dire: A Threat To Fundamental Fairness?*, 40 HASTINGS L.J. 829, 845 (1989).

289. *See* Craig A. Stern, *What's a Constitution Among Friends?—*

preside over cases involving public rights.[290]

As the use of non-Article III actors exercising judicial or quasi-judicial functions has increased,[291] the Court has intervened to circumscribe their roles. In the landmark case of *Murray's Lessee v. Hoboken Land & Improvement Co.*,[292] the Court held that an executive official could, without offending Article III, permissibly audit a federal employee's accounts and impose a summary attachment if the audit revealed a deficit. The Court admitted that the actions of the executive official "may be, in an *enlarged* sense, a judicial act," but noted that the exercise of many governmental functions often will include performing quasi-judicial acts: "In this sense the act of the President in calling out the militia . . . or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial.[293]

The Court's consideration of non-Article III judicial authority expanded with the Depression-era case *Crowell v. Benson*.[294] In *Crowell*, an employee injured in United States navigable waters filed a private suit seeking compensation under the Longshoremen's and Harbor Workers' Compensation Act.[295] The employee challenged the determination of his rights by a Deputy Commissioner of the United States Employees' Compensation Commission, whose findings of fact, but not conclusions of law, were final.[296] The Court held that committing findings of fact to a non-Article III actor was permissible notwithstanding that the Constitution expressly commits "admiralty and maritime jurisdiction" to the federal courts.[297]

In reaching this holding, *Crowell* noted the important, yet somewhat amorphous, distinction between cases of "public right" and of "private right."[298] In cases of "public rights," in-

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Unbalancing Article III, 146 U. PA. L. REV. 1043, 1045 (1998).

290. 5 U.S.C. §§ 551-559 (1994).

291. *See* Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2605 (1998) [hereinafter Resnik *The Federal Courts and Congress*] (citing HART & WECHSLER, *supra* note 35, at 438; *Federal Courts' Caseload Continues Upward Spiral*, 29 THIRD BRANCH 4, 6 (Mar. 1997)).

292. 59 U.S. (18 How.) 272 (1855).

293. *Id.* at 280 (emphasis added).

294. 285 U.S. 22 (1932).

295. *Id.* at 36.

296. *Id.*

297. *Id* at 39-40, 45-46, 53.

298. *Id.* at 50.

volving disputes "between the government and persons subject to its authority" pursuant to a legislative or administrative scheme, the findings of fact can be made in the first instance by "legislative courts," or tribunals of administrative agencies.[299] So, too, in cases of "private right," involving liability of one individual to another under the law as defined,"[300] can non-judges make findings of fact. The Court noted that "it is historic practice to call to the assistance of the courts, without the consent of the parties, masters, and commissioners and assessors, to pass upon certain classes of questions."[301] The only exception to this general premise would be suits brought to enforce constitutional rights, where "the judicial power of the United States" necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.[302] Thus, *Crowell* placed the Court's imprimatur on the practice of using non-Article III actors to make final determinations as to fact issues in many suits, to the extent that the determinations are "supported by evidence and within the scope of his authority."[303]

During the 1950s, the Court undertook review of a case involving the proper scope of functions committed to a special master in the district court.[304] In *La Buy v. Howes Leather Co.*, the Court disapproved the use of a special master in a complicated antitrust proceeding where the special master had been assigned full fact-finding authority by the lower court.[305] The Court rejected the argument that such delegation to the special master was necessary given the complicated nature of the antitrust issues and the congested court docket.[306] The Court did not, however, disapprove of the use of special masters in complicated litigation, provided their authority was strictly constrained.[307] In reaching this conclusion, the Court resorted solely to the authority granted to special masters through Rule 53 of the Federal Rules of Civil Procedure, without ever reaching the Article III issue.

299. *Id.*
300. *Id.* at 51.
301. *Id.*
302. *Id.* at 60.
303. *Id.* at 46.
304. La Buy v. Howes Leather Co., 352 U.S. 249 (1957).
305. *Id.* at 257.
306. *Id.* at 259-60.
307. *Id.*

Approximately twenty-five years later, the Court examined the roles of two categories of judicial or quasi-judicial actors granted new authority under two acts passed by Congress in 1978: magistrates and bankruptcy judges.[308] The Court in *United States v. Raddatz* approved the expanded use of magistrate judges to entertain certain pretrial motions, noting that the magistrate judges' authority was circumscribed by the district court, which referred the motions to the magistrate judges and which controlled their appointment and removal.[309] The district courts' authority over the magistrate judges in these circumstances limited the threat of incursion by other branches.[310]

The Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, however, held that bankruptcy judges unlawfully exercised authority that "carries the possibility of . . . an unwarranted encroachment" into Article III power.[311] Under the new Bankruptcy Act of 1978, bankruptcy judges, who were considered "adjunct[s] to the district court," were vested with "all of the powers of a court of equity, law and admiralty," subject to few restrictions.[312] The bankruptcy judges could exercise this authority notwithstanding that they were not entitled to Article III's tenure protections, serving instead for 14-year appointments.[313] The Court found that there was no justification for allowing a specialized tribunal or adjunct to determine rights "when the right being adjudicated is not of congressional creation."[314] More specifically, the bankruptcy judge was permitted to act as adjudicator not only over claims arising under federal bankruptcy laws, but also over state law claims, demonstrating "assignment of historically judicial functions to a non-Art. III 'adjunct,' [whose authority] plainly must be at a minimum."[315] The Court further distinguished the

308. *See generally* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); United States v. Raddatz, 447 U.S. 667 (1980).

309. 447 U.S. 667 (1980).

310. *Id.* at 683 (stating that "although the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations" as much weight as the district court, acting in its discretion finds appropriate, "that the delegation does not violate Art. III so long as the ultimate decision is made by the district court").

311. 458 U.S. 50, 84 (1982).

312. *Id.* at 95 (citing 28 U.S.C. § 1481).

313. *Id.*

314. *Id.* at 84.

315. *Id.*

bankruptcy judges from other adjuncts on the grounds that their determinations were subject to a higher threshold "clearly erroneous" standard of review on appeal and that they could issue judgments that could be final, even in the absence of appeal.[316] Thus, the Court concluded that "the 'adjunct' bankruptcy courts . . . exercise jurisdiction behind the façade of a grant to the district courts and are exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*."[317]

Raddatz and *Northern Pipeline* marked the beginning of a wave of decisions scrutinizing the authority of non-Article III actors performing judicial or quasi-judicial roles, marked most notably by the Court's decisions in *Commodity Futures Trading Commission v. Schor*[318] and *Thomas v. Union Carbide Agricultural Products Co.*[319] In *Schor*, the Court held that an agency, to the extent granted by Congress, was permitted to adjudicate related state law counterclaims.[320] The *Schor* Court reasoned that to require a bifurcated examination of the single dispute "would be to emasculate if not destroy the purposes" behind the act committing resolution of certain issues to the agency.[321] Finally, in *Thomas*, the Court upheld the use of arbitrators to resolve certain compensation disputes between pesticide manufacturers under the Federal Insecticide, Fungicide, and Rodenticide Act. Although the arbitrators' decisions were subject to review only for "fraud, misrepresentation, or deceit," Article III was not contravened because the disputes that were required to be arbitrated arose under a complex administrative scheme and therefore possessed "many of the characteristics of a public rights dispute."[322] Thus, *Thomas* partly weakened the "public rights-private rights" distinction as a means of determining when a non-Article III actor could perform judicial or quasi-judicial functions. To some, *Thomas* also demonstrated the liberalization of the rule restricting functions that could be performed by non-Article III judges, adding to the "case law

316. *Id.* at 85.

317. *Id.* at 85. (stating, with respect to *Crowell*, that "while the agency in *Crowell* engaged in statutorily channeled fact-finding functions, the bankruptcy courts [here] exercise 'all of the jurisdiction' conferred by the Act on the district courts").

318. 478 U.S. 833 (1986).

319. 473 U.S. 568 (1985).

320. *See generally* 478 U.S. 833 (1986).

321. *Id.* at 844.

322. 473 U.S. at 569-70.

and other judicial commentary by life-tenured judges [showing that the Article III judiciary] approve[s] and encourage[s] congress to expand the non-Article III judiciary, which now decides a host of cases at both the trial and appellate levels."[323]

The Court has made the demarcation between permissible delegation and impermissible delegation to non-Article III actors less than clear. But the result of the Court's decision in this area is, as one commentator aptly put it, that

> the delegation of essential judicial functions to personnel who are not judges appointed under Article III, with life tenure and protected salaries, violates the separation of powers doctrine and perhaps the due process clause unless the benefits of such delegation—efficiency and expertise—outweigh the diminution of Article II value—neutrality, and adjudication.[324]

B. OTHER JUDICIAL "ADJUNCTS"

There are three principal judicial adjuncts to whom the Court's Special Masters might be compared: administrative law judges, magistrate judges, and federal district court special masters. The role of the Court's Special Masters is distinct enough from each of these actors to compel grave concerns, particularly in light of the paramount importance of states' rights and the single layer of judicial review.

1. Administrative Law Judges

Beginning in the late eighteenth and early nineteenth centuries, designated employees within regulatory agencies were assigned to preside over hearings involving determination of an individual's rights.[325] As regulatory agencies grew in size and authority, particularly as a result of New Deal programs implemented in the 1930s, the duties of investigation, prosecution, and adjudication became increasingly unwieldy.[326] Re-

323. Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657, 661 (1999) [hereinafter Resnik, *Judicial Independence*] ("Both case law and other judicial commentary by life-tenured judges approve and encourage Congress to expand the non-Article III judiciary, which now decides a host of cases at both the trial and appellate levels." (citations omitted)); Resnik, *The Federal Courts and Congress, supra* note 291, at 2605.

324. Margaret G. Farrell, *Special Masters*, *in* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 596 (1994).

325. *See generally* Gifford, *supra* note 286, at 4-10; Gillette, *supra* note 286, at 958-62; Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 251-253 (1996).

326. *See* Gifford, *supra* note 286, at 6.

sponding to concerns of institutional bias resulting from the agency's primary involvement in these three stages of an adjudication, Congress enacted the Administrative Procedures Act (APA) in 1946.[327] The APA imposed procedural requirements on agency hearings, including, most importantly, the requirement of an internal separation of powers between a tenured administrative law judge (ALJ) and other agency officials.[328] In addition, unlike magistrates and Special Masters in the district courts, who have limited tenure, as discussed below, ALJs' tenure is not restricted to set terms.[329]

ALJs are seen as Article I adjudicators vested with authority under the executive, rather than the judicial, branch. ALJs decide matters affecting rights under regulatory schemes enacted by Congress, or "public rights," rather than matters affecting private rights that stem from other sources of law, including common law and the Constitution.[330] More aptly, ALJs "are the face of federal justice for countless litigants whose problem lies with the federal government in some fashion."[331] An ALJ's findings of non-constitutional issues and jurisdictional issues can be final, absent error of constitutional proportions, but conclusions of law are appealable to an agency commission and ultimately to an Article III court.[332] On Article III review, a reviewing court may "hold unlawful and set aside" essentially only those findings and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, power, privilege, or immunity," or granted without due process of

327. 5 U.S.C. §§ 551-559, 701-706 (1994).

328. *Id.*

329. 5 U.S.C. § 7521(a) (1982). *See also* Frank H. Easterbrook, *"Success" and the Judicial Power*, 65 IND. L.J. 277, 279 (1990) (noting that an administrative law judge's tenure "is not formally 'life,' but then neither is that of article III judges," who serve only during "good behavior").

330. *See generally* HART & WECHSLER, *supra* note 35, at 387-444 (exploring "Congressional Authority to Allocate Judicial Power to non-Article III Federal Tribunals").

331. Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1765-66 (1997).

332. HART & WECHSLER, *supra* note 35, at 396 (quoting Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1375 (1953)); Wood, *supra* note 331, at 1765 ("Social security cases, labor cases, immigration cases, railroad disability cases, and countless others begin before ALJs and often enter the Article III system only at the court of appeals level.").

law.[333]

Some argue that one danger of the ALJs is that, as officers of the executive branch, they are more prone or vulnerable to political influences, from which Article III judges are often perceived as being insulated.[334] Certainly, ALJs outnumber members of the Article III judiciary. As of the early to mid-1990s, 1100 ALJs were resolving approximately 350,000 adjudications per year.[335]

Like ALJs, Supreme Court Special Masters are subject to superintendence by Article III judges, but retain greater discretion to decide certain motions and make findings of fact. ALJs do have vast fact-finding authority in many circumstances, but they are subject to considerable oversight. Considering that Article III review is still possible, a case heard before an administrative law judge may be scrutinized on more levels of review than a case filed in a federal district court in the first instance. In addition, like district court special masters, ALJs usually have developed expertise with regard to the issues they adjudicate, particularly where their jurisdiction is closely circumscribed. Interestingly, like the Court's Special Masters, the administrative judiciary, at least as of 1995, was overwhelmingly comprised of non-minority males.[336]

Supreme Court Special Masters, one might argue, may only make proposed conclusions of law followed by recommendations and proposed decrees, but this distinction is one of form over substance. Given the deference of the Court to the Special Master's findings and conclusions, his recommendations bear substantially similar weight to entered—but appealable—

333. 5 U.S.C. § 706 (1994); *see also* Daniel J. Meltzer, *Congress, Courts,and Constitutional Remedies*, 86 GEO. L.J. 2537, 2570 (1998) ("[T]hat Article III generally requires judicial review of federal agency decisions []is a qualified, not a universal, rule. Beyond the fact that the required scope of review is not plenary, the rule is subject to numerous exceptions," including immigration matters.).

334. *See, e.g.*, Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 794-95 & n.184 (1999); *see also* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2 (1994) ("In exercising power, administrative agencies combine [executive, legislative, and judicial] powers that the Constitution separates . . . .").

335. *See* HART & WECHSLER, *supra* note 35, at 392-93 (citing STRAUSS ET AL., ADMINISTRATIVE LAW CASES AND COMMENTS 959 (9th ed. 1995)).

336. Elaine Golin, Note, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532, 1533 (1995) (stating that 94.59% of ALJs were male and 94.32% were white).

conclusions and orders. In original jurisdiction cases, the impact of fact-finding error can be exaggerated by the lack of review available to scrutinize findings, particularly those made by a Master in a subject matter outside of his legal expertise.

The more important distinction between ALJs and the Court's Special Masters is that original jurisdiction suits in the Court entail private litigation, not disputes over "public rights." Thus, following the lesson of *Crowell* and its progeny, the Court should be reluctant to permit the delegation of authority over quasi-judicial functions to a non-Article III actor. Moreover, the issues involved in such litigation are bound to affect a broad population, specifically the residents of the litigating states. Such distinctions demonstrate the fallacy of pointing to ALJ examples as a justifiable basis for the current Special Master practice in the Court.

2. Magistrate Judges

Congress passed the Federal Magistrates Act in 1968 to provide federal courts with assistance in the exercise of their administrative duties.[337] Through this Act, magistrates, who sit in federal courts but who are not Article III judicial actors, are vested with the authority "to administer oaths and affirmations," take "acknowledgements, affidavits, and depositions," sentence persons convicted of certain classes of misdemeanors, and decide certain nondispositive pretrial issues.[338] Full-time magistrate judges serve renewable eight-year terms, and part-time magistrates serve renewable four-year terms.[339] A magistrate judge may only be removed during his term for "incompetency, misconduct, neglect of duty, or physical or mental disability."[340]

Congress in 1979 granted magistrates the authority to preside over civil trials upon the consent of both parties.[341] District courts may direct a magistrate to submit a report of proposed findings and recommendations of law to the district court

337. *See* 28 U.S.C. § 636(b)(1)-(3) (1994); *see also* HART & WECHSLER, *supra* note 35, at 437-41; Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge System*, 1999 FED. CTS. L. REV. 4, III.1-10 (1999).

338. 28 U.S.C. § 636(b)(3) (1994).

339. 28 U.S.C. § 631(e).

340. 28 U.S.C. § 631(i).

341. Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643.

overseeing his functions.[342] An Article III court's review of a magistrate's decision is *de novo*.[343]

The Court has been careful to circumscribe magistrate functions that are not explicitly delineated in the Federal Magistrate Act. While the Act provides that magistrates may exercise "additional duties" not identified,[344] the Court in *Gomez v. United States*[345] stated that a magistrate who impaneled a jury, conducted voir dire, and instructed the jury on various points of law[346] exceeded the scope of his authority as magistrate.[347] The Court reasoned that the criminal defendants were entitled to have an Article III judge preside over critical stages in their trial, which included those acts unlawfully carried out by the magistrate.[348] In attempting to define those judicial acts outside the bounds of a magistrate's authority, the Court stated that "Congress intended a magistrate to be a 'supernotary,' assuming only the district judge's 'irksome, ministerial tasks' . . . [not a] 'para-judge.'"[349]

The role of the Supreme Court Special Master resembles that of the magistrate officer in the federal district courts in many respects. He can be called upon by the Court to collect evidence and, in theory, is assigned primarily to assist with the "ministerial" aspects of federal adjudication. However, the

342. 28 U.S.C. § 636(b)(1)(B) (1994) (A district court may "designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition.").

343. 28 U.S.C. § 636(b)(1) (1994). Judge Posner argues that this statute gives an almost complete set of Article III powers to hundreds of non-Article III judges.

> And it is not true that just because the latter are appointed by Article III judges they are independent from Congress. They are not nearly so independent as Article III judges are. They serve limited terms . . . at the expiration of which Congress can reduce their salaries, or abolish their offices (selectively if it wishes) so that the judges cannot reappoint them.

Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1052-53 (7th Cir. 1984) (Posner, J., dissenting). Of note, many magistrate judges are elevated to positions in the Article III judiciary after serving as magistrate judges. Foschio, *supra* note 337, at III.7.

344. 28 U.S.C. § 636(b)(3); *see also supra* note 291 and accompanying text.

345. 490 U.S. 858 (1989).

346. *Id.* at 860-61.

347. *See id.* at 872, 875-76.

348. The defendants made timely objections to the use of the magistrate to perform these functions. *See id.*

349. *Id.* at 864-65 (quoting Brief for Petitioner at 8, Mathews v. Webber, 423 U.S. 261 (1976) (No. 74-850)); *Mathews*, 423 U.S. at 268).

Special Masters' role in the Court's original jurisdiction litigation extends beyond "ministerial" tasks. Most notably, Special Masters preside over trials without the express consent of the parties and control the admission of evidence that shapes the record for the Court for the only subsequent review. The Special Master can also be distinguished from a magistrate based on the layers of review, the degree of oversight, and the fact that a magistrate's actions, unlike a Special Master's, are constrained by an extensive body of statutes, case law, and applicable rules and procedures. Most importantly, the limitations placed on magistrates, which prevent them from impaneling a jury or presiding over trials without the consent of the parties, are not placed on a Supreme Court Special Master. Not since the nineteenth century has the Court presided over an original jurisdiction trial; Supreme Court Special Masters are thus expected to carry out the critical trial functions in an original jurisdiction case.

3. Special Masters in the Federal District Courts

As suggested by the denotation of district court "special masters," the role of special master is not unique to the Court's original jurisdiction. The appointment of special masters in district courts to provide specialized expertise is authorized by Rule 53 of the Federal Rules of Civil Procedure, which sets forth the appointment mechanism for special masters in the district courts.[350] Despite the commonality of special masters in the federal district courts, the use of special masters in the Court's original jurisdiction cases is distinguishable in terms of review, scope, and expertise.

Rule 53 of the Federal Rules of Civil Procedure provides that a special master be appointed in lower court litigation to act as "a referee, an auditor, an examiner, and an assessor."[351] The Rule further allows a master to "exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order."[352]

350. FED. R. CIV. P. 53; MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.52 (1995) ("Special Masters have increasingly been appointed for their expertise in particular fields.... Hence the distinction between Special Masters under Rule 53 and court-appointed experts ... has become blurred." (citation omitted)).

351. FED. R. CIV. P. 53(a).

352. *Id.* at (c).

In this respect, the provisions governing the authority of the special master in the lower federal courts appear to mirror the authority granted to Special Masters in the Court's original jurisdiction cases. Rule 53 goes on, however, to describe the master's duties as they relate to the production of evidence, rulings on admissibility, the putting of witnesses under oath, and the examination of witnesses.[353] While the special master in the district court "shall make a record of the evidence offered and excluded,"[354] Rule 53 also allows the district court special master to make findings of fact and conclusions of law if required.[355]

A Rule 53 special master is often used when a district court entertains highly complex claims involving extensive scientific or technical facts so that the special master may elucidate key issues for the court. For these reasons, Rule 53 masters are often persons skilled in a particular field.[356] The Court's Special Masters, by contrast, are most often senior or retired federal judges who themselves do not have specialized learning or training with respect to the litigated claims.[357] As Simon Rifkind noted, speaking of the combined efforts of himself and his assistant as Special Master, "Both of us started at point zero. Neither of us knew western water law."[358]

The use of special masters in the district courts has drawn some of the same criticisms as those noted herein with respect to the Court's use of Special Masters.[359] As noted earlier, the Court in *La Buy*[360] made clear that the district court must retain tight control over special masters and that overloaded dockets and complicated legal issues alone do not legalize the practice of extending broad quasi-judicial functions to a special master.[361]

For many of the same reasons that Supreme Court Special

353. *Id.*

354. *Id.*

355. *Id.* at (e)(1).

356. *See, e.g.*, Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 395 (1986) (noting that district court special masters are sometimes appointed to address the judiciary's general "lack of expertise in esoteric or technologically sophisticated areas").

357. *But see* text accompanying notes 122-129.

358. Rifkind, *supra* note 154, at vi.

359. *See* Farrell, *supra* note 324, at 587-98.

360. 352 U.S. 249 (1957).

361. *Id.* at 259-60.

Masters are distinguishable from ALJs and magistrates, Special Masters in the Court are also distinct from court-appointed experts. Federal judges have the authority to appoint their own experts, either mutually agreed upon experts or experts of their own choosing, under Federal Rule of Evidence 706.[362] Even in highly technical or complex litigation, however, Rule 706 is rarely invoked.[363] Instead, the judge, acting as a neutral adjudicator in an adversarial system, overwhelmingly balances the competing claims advanced by experts put forth by the respective parties.[364] Even in view of the similarities between special masters in the Court and in the district courts, the cautionary language of *La Buy* seems particularly appropriate, although it must be remembered that Rule 53, the basis for the Court's *La Buy* decision, does not apply to the Court's Special Masters. The expansive, broad fact-finding disapproved by the Court in *La Buy* is highly analogous to the broad mission undertaken by the Court's Special Masters, with the Court's consent. The Court, then, should consider whether it should heed its own admonition, as set forth by the *La Buy* Court.

V. MASTER SOLUTIONS

The role of the Special Master in the Court's original jurisdiction cases should be recrafted to resolve the difficulties currently posed. Various solutions to one or more of the problems articulated with respect to the Court's use of Special Masters are available. The most obvious of these, and the one that

362. *See* FED. R. EVID. 706. Rule 706 provides,

> The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.

Id.

363. A 1988 study reported that only 20% of all judges had ever appointed an expert; among those who had appointed experts, most had only made such an appointment once during the course of their judicial careers. Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining A Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1004-05 (1994).

364. Justice Breyer surmises that judges hesitate to appoint experts for fear that such exercise will "inappropriately deprive the parties of control over the presentation of a case." Stephen Breyer, The Interdependence of Science and Law, Address at the 1998 AAAS Annual Meeting (Feb. 16, 1998), *at* http://www.aaas.org/meetings/1998/breyer98.htm.

would eliminate most or all of the problems identified, would be to restore the trial functions inherent in original jurisdiction cases to the Court. Other possible solutions include creating a specialized federal court, establishing concurrent original jurisdiction in the federal district courts, delineating procedures applicable to original jurisdiction cases, and institutionalizing the prior practice of appointing senior or retired Article III judges.

The first two of these potential resolutions—restoring trial functions to the Court and creating a specialized federal court—must be rejected as overwhelmingly impractical, difficult to implement, and unlikely to occur. Establishing concurrent original jurisdiction in the federal district courts, as Chief Justice Rehnquist previously has advocated,[365] should not be implemented because such jurisdiction would be susceptible to creating serious and avoidable interstate tensions, given that the geographical jurisdiction of the federal district courts is coterminous with existing state boundaries. The federal courts of one state, therefore, would sit in judgment of two or more coequal sister states, and judgments of that court could be imputed to the state in which such court sat, with unfortunate consequences to the relationship between the state of the court and one or more state litigants.

The two most practical and effective solutions that could be implemented, in light of practical considerations, would be to delineate a body of procedures applicable to original jurisdiction cases and to institutionalize the prior practice of appointing senior or retired Article III judges. A clearer, more developed set of procedures governing original jurisdiction cases should be implemented, regardless of whether or not any of the other measures are employed, to ensure consistency across and among judgments constituting the federal common law applicable to original jurisdiction cases. The practice of appointing exclusively senior or retired Article III judges to the role of Special Master, in turn, would resolve the problems of Article III accountability associated with the current role of the Special Master.

A. RESTORE MORE TRIAL FUNCTIONS TO THE SUPREME COURT

The simplest and most readily apparent approach to resolving many of the concerns regarding the Court's delegation

365. Maryland v. Louisiana, 451 U.S. 725, 762-63 (1981) (Rehnquist, J., dissenting).

of extensive trial functions to a Special Master is by restoring these functions to the Justices themselves. If the Court accepted responsibility for many of the tasks formerly undertaken by prior Courts in original jurisdiction cases, such as the duty to rule on motions and preside over trials, the role of a Special Master would present less of an incursion on the Court's constitutional province in this area.

As noted by some scholars, however, this implicates concerns over the suitability and necessity of a panel of nine Justices to function as a trial court.[366] To alleviate the pressures that additional original jurisdiction responsibilities would impose on the Justices in excess of their current workload, the Justices could preside over the proceeding in three-judge panels. This would partially eliminate the practical difficulty of having "too many cooks in the kitchen" attempting to preside over the trial, without fully eliminating the structure that the justices are most familiar with—sitting as part of a multi-judge tribunal. The Court could thus pare down the scope of the Master's authority to the receipt of evidence.

The Justices would likely balk at the prospect of an increased workload, primarily because they have continually reiterated that their duties with respect to original jurisdiction cases shall not interfere with the attention that must be heeded to cases on their appellate docket, which they deem a higher priority.[367] The Court—which identifies its "paramount role" as that of the "supreme federal appellate court"[368]—already justified the "sparing" exercise of its original jurisdiction as necessary "so that our increasing duties with the appellate docket will not suffer."[369] Chief Justice Rehnquist, writing as a then-Associate Justice in *Maryland v. Louisiana*, has already said of original jurisdiction cases that "justice is far better served by trials in the lower courts, with appropriate review, than by trials before a Special Master whose rulings this Court simply cannot consider with the care and attention it should."[370] The

366. *See* STERN ET AL., *supra* note 31, at 482; *see also* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 498 (1971) (stating that the Court is "ill-equipped for the task of fact-finding and so forced, in original cases, awkwardly to play the role of fact-finder without actually presiding over the introduction of evidence").

367. *See, e.g.*, Utah v. United States, 394 U.S. 89, 95 (1969).

368. Wyandotte Chems. Corp., 401 U.S. at 505.

369. Illinois v. City of Milwaukee, 406 U.S. 91, 93-94 (1972) (quoting Washington v. Gen. Motors Corp., 406 U.S. 109 (1972)).

370. Maryland v. Louisiana, 451 U.S. 725, 763 (1981).

burden of the Court's appellate docket, however, has lightened considerably over the course of the last decade, leaving the Court with greater opportunity to devote resources to the original docket than was available in the 1970s and 1980s. The Court then heard close to two hundred cases per term, a figure that dropped to fewer than one hundred cases per term throughout the 1990s, despite the rapid growth of petitions.[371] Further, the original caseload is light. Motions for leave to file a complaint to commence an original jurisdiction suit, not all of which are granted, average only three and one-half per year, and the Court issues an average of only two to three opinions in original jurisdiction cases per year.[372]

Restoring authority to the Court would likely best resolve the difficulties, particularly the Article III difficulties, posed by the Court's use of Special Masters in its original docket. Nonetheless, the Court's articulated preference for its appellate docket makes the proposal so unlikely as to place it beyond consideration. Moreover, it is unclear how a party would launch a challenge to the Court's use of Special Masters that would ultimately force or persuade the Court to consider the constitutional dimensions of the Special Master.

B. ESTABLISH A SPECIALIZED FEDERAL COURT

A second proposal is the formation of a specialized federal court, or court of specialized or limited jurisdiction, which would share concurrent original jurisdiction with the Supreme Court. A specialized federal court could aid in the administration of original jurisdiction cases for several reasons. First, appointment of judges to the court through the Article III appointment mechanism would ensure greater accountability and independence, if one believes that these aims are achieved, at least in part, by the life tenure and salary protections. Second, the specialized federal common law that applies to boundary and water rights disputes, which constitute the bulk of original jurisdiction disputes, would be implemented and developed with a greater degree of consistency because a specialized court could better preserve institutional memory. Third, a specialized court likely would be better equipped to standardize the procedures applicable to original jurisdiction cases, given their continued exposure to cases raising similar procedural difficul-

371. BAUM, *supra* note 60, at 122-26.

372. *See* McKusick, *supra* note 53, at 188.

ties. Finally, judicial review by the Supreme Court would be available in the more traditional sense because the Court could review a decision entered with the full force of Article III judicial authority, thereby arguably granting the benefits of another layer of review.

The original jurisdiction caseload has been steady enough to make the establishment of a specialized court for original jurisdiction cases feasible. Supporters of greater development of specialist courts—not necessarily in the original jurisdiction context, but in a variety of circumstances—argue that specialization increases efficiency.[373] Creation of a specialized federal court to handle original jurisdiction disputes, even if one were to presume the constitutionality of concurrent jurisdiction in an inferior federal court, is unlikely to occur, chiefly because the resources required to create and support such a court are too great. The federal judiciary has stated that its long-range plan does not include "proposals to create new specialized or subject-matter courts in the judicial branch" because in most instances "the well-known dangers of judicial specialization outweigh any such benefits."[374]

A historic view of specialized courts illustrates the benefits and drawbacks of centering specialized subject matter jurisdiction in a single federal court. The first specialized federal court was the Court of Customs Appeals, which was established by Congress in 1909 to hear cases relating to the administration of tariff laws.[375] The second specialized court, the Commerce Court, was established just one year later in order to handle the vast litigation relating to interstate commerce, a consequence of rapid industrialization and transportation advances.[376] The Commerce Court had a short-lived tenure. An age of distrust of the courts, particularly of older judges to resolve disputes so sharply colored by modernization, led to the

373. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 250 (1996) ("Specialization often enhances efficiency.").

374. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 43 (1995).

375. FELIX FRANKFURTER & JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 148-52 (1927).

376. *Id.* at 153-62. The Commerce Court reviewed adjudication from the Interstate Commerce Commission, and its decisions were reviewable by the Supreme Court. In the establishment of the Commerce Court, the federal circuits were divested of their authority to review cases falling within the jurisdiction of the Commerce Court. *See id.*

demise of the Commerce Court in 1913.[377] A specialized district court for resolving land disputes, together with an "appellate land court," was proposed in the Senate on three occasions during the first decade of the 1900s,[378] and a specialized court for resolving patent issues was proposed in the 1910s and 1920s.[379] The travails of the Commerce Court likely hindered the establishment of both of these tribunals.

The United States Court of Appeals for the Federal Circuit currently is the only specialized Article III appellate court, and the Court of International Trade is the only specialized Article III trial court. The United States Court of Federal Claims[380]

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377. *Id.* at 162-68, 173. Consequent to the abolition of the Commerce Court, Congress debated what was to be done with the judges who had been appointed to the Court. While some argued that the Commerce Court had been established as an Article III court, providing the judges with life tenure in times of good behavior, and thus the judges could not be removed, others argued that the judgeships were dissolved together with the court. *Id.* at 168-73. Frankfurter and Landis quote Roscoe Pound, who articulated the resentment aroused by the judges sitting on the Commerce Court:

> [C]ourts are less and less competent to formulate rules for new relations which require regulation. They have the experience of the past. But they do not have the facts of the present. They have but one case before them, to be decided upon the principles of the past, the equities of the one situation, and the prejudices which the individualism of common law institutional writers, the dogmas learned in a college course in economics, and habitual association with the business and professional class, must inevitably produce.... It is a sound instinct that objects to an agricultural view of industrial legislation.

Id. at 162 n.84 (quoting Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403-04 (1908)).

378. *See* 45 CONG. REC. 2947. The proposal dealt largely with disputes between the United States and other parties over title to land and did not appear to address boundary disputes between states. *See id.*

379. *See* FRANKFURTER & LANDIS, *supra* note 375, at 174-86. Congress in 1920 voted against the establishment of a specialized court for patent litigation. The Court did not hinder the establishment of the Patent Court, the necessity of which was founded on the technical expertise required to evaluate the claims before it and in support of which it was stated that the body of law did not rely on general principles of common law. *See id.*

380. The current Court of Federal Claims is an Article I court derived from part of the former Court of Claims, which was an Article III court. The Court of Claims was originally established in 1855 to hear cases referred by Congress that alleged claims against the United States and was only authorized to issue advisory opinions. United States v. Mitchell, 463 U.S. 206, 212-13 (1983); Helen Herschkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1869 n.190 (2001).

While the Court of Claims was initially empowered only "to hear claims and report its findings to Congress and to submit a draft of a private bill in each case which received a favorable decision," President Lincoln in his 1861 State of the Union address announced the expansion of the Court of

and the United States Tax Court are specialized Article I courts;[381] the United States bankruptcy courts are specialized federal courts, but they are considered "units" of the federal district courts, and their judges are not subject to the appointment provisions or protections of Article III.[382] The Court of Appeals for the Federal Circuit was created by The Federal Court Improvements Act of 1982[383] and was granted appellate jurisdiction over patent appeals from federal district courts and from the Patent and Trademark Office.[384] The Federal Circuit court is only semi-specialized, however, because Congress also gave the Federal Circuit Court jurisdiction over cases appealed from The Board of Contract Appeals, The Court of International Trade, The United States Court of Federal Claims, The Court of Veterans Appeals, The International Trade Commission, The Merit Systems Protection Board, The Patent and Trademark Office, and unfair competition cases originating in the United States District Courts.[385] The Court of International Trade has jurisdiction over certain international trade disputes, including appeals of administrative decisions by the

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Claim's authority to include rendering final judgments, abolishing the role of Congress as an intermediary. *Mitchell*, 463 U.S. at 212-13 (citations omitted). In its 1962 decision in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), however, the Court held that this "referral" power by Congress was fundamentally incompatible with Article III, which expresses "the Framers' desire to safeguard the independence of the judicial from the other branches by confining its activities to 'cases of a Judiciary nature.'" *Id.* at 582.

After being converted into an Article III court following the *Glidden* decision, the trial and appellate divisions were divided in the Federal Courts Improvement Act of 1982. *See* Pub. L. No. 97-164, 96 Stat. 25 (1982). The trial court division became the current Court of Federal Claims, while the appellate division was merged with the Court of Customs and Patent Appeals to become the current Court of Appeals for the Federal Circuit. *See* Elizabeth Wallace Fleming, *Practice in the Court of Federal Claims*, 35 PROCUREMENT LAW. 3, 5 n.9 (2000).

381. 28 U.S.C. § 171(a) (1994) (The Court of Federal Claims "is declared to be a court established under article I of the Constitution of the United States."); 26 U.S.C. § 7441 (1994) ("There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.").

382. 28 U.S.C. §§ 151-153 (1994); 26 U.S.C. §§ 7441-7443A (1994).

383. Pub. L. No. 97-164, 96 Stat. 25.

384. 28 U.S.C. § 1295 (1994).

385. *Id.*; 35 U.S.C. §§ 141-146 (1994); *see also* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 4-5 & n.29 (1989). Dreyfuss suggests, based on a review of the legislative history, that the Supreme Court's lack of expertise over patent appeals served as an impetus for the creation of the Federal Circuit Court, as did a desire to eliminate forum shopping in patent cases. *Id.*

Department of Commerce, the International Trade Commission, and Customs Service rulings.[386] Interestingly, the statute providing for the appointment of judges to the Court of International Trade has a built-in anti-bias mechanism in that it allows not more than five of the nine appointed judges to be members of the same political party.[387]

On the whole, critics of specialized federal courts have posited that such courts "acquire the vices of specialization—narrowness and partiality."[388] In his book on the federal courts, Judge Richard Posner reports on speculation that judges appointed to specialized courts, as experts, "are more sensitive to swings in professional opinion than an outsider, a generalist, would be."[389] For those once-in-history cases involving disputes over billionaire estates, broken collegiate football schedules, or apportionment of post-War debt, fears that a single court would always side the same way in cases in which two competing theories are at issue are unfounded. But the most common types of cases—border disputes and water rights—might be susceptible to Posner's criticism. In border dispute cases that rely on waterway boundaries, waterways may be split as between a border demarcated by the "thalwag," or the deepest point in the waterway, or a border demarcated by the center of the waterway. Creation of a specialized court might allow one "theory" to prevail over another in a series of cases, at least until the composition of the court changed.

The concern that specialized courts would create a monopoly within a field is more valid if "specialized court" is understood as a court of specialists. Some commentators have ar-

386. 28 U.S.C. § 1581 (1994); 28 U.S.C. § 2643(a)(2) (1994). In his article on specialized courts for patent litigation, John B. Pegram offers the following brief history of the Court of International Trade:

> The Board of General Appraisers was established in 1890 to supervise appraisements and classifications for customs purposes. It replaced federal trial courts in customs matters in 1909 and became the United States Customs Court, an Article I court, in 1926. In 1956, it became an Article III court and was renamed the United States Court of International Trade ("CIT") in 1980. The CIT currently has all the powers in law and equity of a federal district court.

John B. Pegram, *Should There Be a U.S. Trial Court with a Specialization in Patent Litigation?*, 82 J. PAT. & TRADEMARK OFF. SOC'Y 765, 782 (2000).

387. 28 U.S.C. § 251(a) (1994).

388. FRANKFURTER & LANDIS, *supra* note 375, at 151 (discussing early twentieth-century Senate debate over the establishment of the specialized Court of Customs).

389. POSNER, *supra* note 373, at 251.

gued that a "specialized court" need not be filled by specialists or experts because the purpose "is not to create a court of experts or specialists but to maximize coherence and predictability in federal law through continuity and stability of decision makers."[390] Given the danger that exposure to a volume of cases of narrow scope might increase the narrowness of decisions, semi-specialized courts might be more effective and protect against some of the vices of fully specialized courts.[391] This semi-specialization in original jurisdiction might be achieved naturally, given the range of cases that arise under the original jurisdiction. Another alternative would be to merge a specialized court for original jurisdiction cases with another specialized federal court, either the Federal Circuit or another not-yet-created specialized federal court, to provide additional variety to the primarily boundary dispute and water rights cases in the Court's original jurisdiction.

Three additional criticisms of specialized judicial systems are worthy of mention. First, some argue that federal specialized courts are more susceptible to legislative or executive control through appointments because it "is easier to predict how judges will decide cases in their specialty than how they will decide cases across the board."[392] The President and Congress might then use their predictive capabilities in making appointments to the court, shaping the direction of the court and depriving it of the independence achieved by generalist federal courts.[393] Second, review by the Court might additionally be hampered if members of the Court, as generalists, are prone to defer to the decisions of specialist judges, as the Court's review of Federal Circuit decisions suggests the Justices might be.[394] Finally, judges on a specialized court generally attain less prestige than do their generalist counterparts.[395] Whether this

390. The Honorable S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853, 864 (1990) (quoting Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Court of Appeals*, 56 U. CHI. L. REV. 603, 611-12 (1989)).

391. Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 71-72 (1995).

392. POSNER, *supra* note 373, at 254.

393. *Id.*

394. *Id.* (citing Mark J. Abate & Edmund Fish, *Supreme Court Review of the United States Court of Appeals for the Federal Circuit, 1982-1992*, 2 FED. CIR. B. J. 307 (1992)).

395. *Id.* at 250; Stempel, *supra* note 391, at 83 ("[T]here is stigma in specialization.").

diminution in prestige results in poorer quality decision-making is subject to debate.[396]

Because the judges on a specialized court would be appointed through the constitutional appointment process and would therefore have Article III salary and tenure protection, the establishment of such a court would achieve greater accountability than currently exists. The primary drawbacks of specialized courts, however, might nonetheless counsel against the creation of a specialized court: learned dependence of other courts, the accretion of control by a handful of judges over all disputes arising in the Court's original jurisdiction, and the vast resources necessary to carve out a new judicial body within the Article III construct. Whether greater expertise could be obtained likely is a draw: An "original jurisdiction" court could attract specialists in the area of boundary disputes and water rights, the two primary subjects of original jurisdiction suits, but, as evidenced by the brief biographies of Special Masters who have served in original jurisdiction suits, there is no question but that most, if not all, are talented and capable attorneys.

C. ESTABLISH CONCURRENT JURISDICTION IN THE FEDERAL DISTRICT COURTS

As noted earlier, then-Associate Justice Rehnquist has stated that he would prefer that the exclusive nature of original jurisdiction be stripped by Congress so that the federal district courts could act as courts of original jurisdiction.[397] Congress has already vested *concurrent* original jurisdiction in the district courts for each of the other enumerated original jurisdiction categories: actions involving ambassadors, public ministers or other foreign consulate officers, controversies between the United States and a state, and all actions or proceedings by a state against non-citizen persons.[398] Given that concurrent original jurisdiction has been vested in other federal courts by Congress in other categories of original jurisdiction cases, cre-

396. *See* POSNER, *supra* note 373, at 250 (noting that even if a specialized judiciary attracted less able lawyers than the generalist judiciary, "it does not follow that the specialized judiciary would do a worse job than the present generalist judiciary"); Stempel, *supra* note 391, at 83 ("Specialization is troubling when it appears to produce second-rate adjudication.").

397. Maryland v. Louisiana, 451 U.S. 725, 762-63 (1981) (Rehnquist, J., dissenting).

398. 28 U.S.C. § 1251 (1994).

ating a federal forum with concurrent original jurisdiction would not pose a constitutional difficulty. The provision granting the Court *exclusive* original jurisdiction is one effected by congressional mandate, not constitutional mandate.

Should Congress grant concurrent jurisdiction to the district courts, two results would be almost certain: The Court would uniformly refuse to act as the court of first instance, but would be available for appellate review. Specifically, where the district court has concurrent original jurisdiction, the Court often refuses to grant a motion for leave to file a complaint on the grounds that another suitable forum is available. However, the Court, if it later hears the case, can function in the capacity of an appellate tribunal, as it is better accustomed to doing, ensuring greater protection of state interests through multilayered appellate review.

While vesting concurrent jurisdiction in the district courts may be appropriate for cases against ambassadors, however, it may prove unsatisfactory for handling disputes between states, as it would involve concerns of parochial partiality and friction between states as separate sovereigns. The primary reason that district courts will be unsuitable for disputes between states is that jurisdiction in the district courts—whose own boundaries have from the beginning been coterminous with the borders of states in which they sit—would implicate concerns of bias that led to the establishment of federal courts in the first place.[399] For example, in a dispute between the states of Mississippi and Arkansas, venue and jurisdiction seem most proper in both Mississippi and Arkansas, although only one can exercise jurisdiction over the case.

The risk of geographical partiality of the judges and jurors also creates a basis for concern. Many of the judges are drawn from the region in which they adjudicate, raising at least a minimum level of concern for their partiality with regard to preserving borders in the district where venue is appropriate, even if their insulation from other state prejudices is a valid claim. Jurors, too, in federal district courts are cut from the same cloth as their state court counterparts and are therefore likely to display the same biases, particularly on issues that regard state services, taxes, etc.[400] In sum, district courts are not

399. *See* FRANKFURTER & LANDIS, *supra* note 375, at 10.

400. JACKSON, *supra* note 80, at 33 ("It is difficult today to judge whether in 1789 the fear that state courts might do less than justice to out-of-state litigants was warranted. Since the jurors for either federal or state courts would

well-suited to preside over original jurisdiction disputes between states, weighing against the creation of concurrent original jurisdiction over state-against-state disputes.

D. DELINEATE PROCEDURES APPLICABLE TO ORIGINAL JURISDICTION CASES

As discussed in Part II, the Supreme Court Special Masters are required to adhere to few set rules when presiding over original jurisdiction proceedings. Creation and imposition of rules governing these proceedings are central to ensuring the integrity of the proceedings. A procedural framework is necessary to ensure the uniformity of judgments both across cases and within cases, particularly when the extended nature of the litigation may require the appointment of successive Special Masters. In addition, the integrity of the fact-finding process must be protected in a manner that does not raise additional concerns about unfair processes or procedures, given the sensitive and pervasive issues stemming from the interests of state parties and the lack of multilayered review. The Court's minimal oversight, the piecemeal precedent in most cases, and the lack of experience of the majority of Special Masters in officiating over original jurisdiction cases also militate in favor of increased procedures. The benefits of such rules would parallel those that have evolved from the development of federal rules of civil procedure and evidence. The Federal Rules of Civil Procedure and the Federal Rules of Evidence reflect the view that litigation in the federal courts requires court-fashioned procedures and rules in order to ensure the uniformity of civil judgments.[401] This uniformity is an articulated principal goal of the lower federal courts and the Supreme Court.[402] Uniformity should also be a principal goal in original jurisdiction cases, leaning in favor of new procedural rules governing the ap-

be drawn from the same locality, they would seem to carry the same prejudices into the jury box of either court.").

401. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L.J. 887, 888-93 (1999).

402. Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules"); *see also* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 780-82 (1995); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002-05 (1989).

pointment of Special Masters and the related Special Master proceedings.

The push to develop the Federal Rules of Civil Procedure preceded that favoring the Federal Rules of Evidence. Many commentators criticized the numerous common law procedures for both law and equity, arguing that the rules were too cumbersome and were threatening the integrity of judgments rendered in the federal system because of the lack of uniformity across jurisdictions.[403] These critics additionally argued that the lack of rules was responsible for backlog, litigation delay, and high litigation costs, and they urged new rules that would liberalize discovery.[404] Proponents of new procedural rules for the federal courts sought to achieve this uniformity by pushing for *court*-created rules with four fundamental characteristics: flexibility, simplicity, clarity, and efficiency.[405]

For more than twenty years, beginning in 1911, Congress failed to pass a bill that would authorize the Supreme Court to promulgate rules for the federal courts.[406] The bills were re-

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403. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 426-32 (citations omitted).

404. Bone, *supra* note 401, at 889-90 (stating that the Advisory Committee was prompted "by concerns about case backlog, litigation delay, and high litigation costs"); *see* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691-92 (1998) (stating that the Federal Rules discovery provisions "dramatically increased the potential for discovery").

405. *See* WRIGHT, *supra* note 403, at 429; *see also* Bone, *supra* note 401, at 895 (citations omitted).

Controversy arose over whether Congress, which was charged with creating substantive law, should be divested of its rulemaking power in order for the courts to draft new procedural laws. Many argued that *court*-made procedures for civil litigation were necessary because Congress, while competent to craft substantive law, was too unfamiliar with the administrative functions of the federal judiciary to craft useful procedural rules to guide the courts. *See* Bone, *supra* note 401, at 896 ("From these premises, it followed that a democratic process was not necessary to the legitimacy of procedure, for procedure involved no substantive value choices.").

Some critics of court rulemaking argue that greater authority should be granted to the legislative branch for the purposes of achieving greater accountability. *See id.* at 888-89 (citing Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 754-59 (1993)). The courts also had greater insulation from political pressures and special interests that might have tainted either the rulemaking process or the substance of the rules themselves. Bone, *supra* note 401, at 896.

406. WRIGHT, *supra* note 403, at 427. Wright notes that Congress's serious consideration of developing uniform federal rules of procedure began after the American Bar Association in 1911 adopted a resolution advocating the adop-

jected partly out of fear that the sophisticated common law rules that had developed in the eastern states would overrun the newly developed rules being instituted in the western states.[407] Finally, in 1934, a bill was passed authorizing promulgation of uniform federal rules by the Supreme Court;[408] the Supreme Court the following year appointed an Advisory Committee, whose Federal Rules of Civil Procedure became effective in 1938.[409] Strangely, while the Court had oversight authority, none of the persons appointed by Chief Justice Hughes to the original Advisory Committee, including two-time Special Master Monte Lemann, had ever been judges.[410] Nonetheless, the committee reacted to feedback from the judiciary, and the resulting rules governed the multifarious aspects of civil procedure, from the form of filings and service to dictates for the discovery process.

The Supreme Court Rules currently mandate that the Federal Rules of Civil Procedure govern the form of pleadings in original jurisdiction cases.[411] Other procedural rules, aside from those applicable to pleadings, however, would be helpful in the Court's original jurisdiction cases. Discovery rules, for example, do not apply in the current original jurisdiction regime. Application of the Federal Rules of Civil Procedure would not only promote the fairness and integrity of the proceedings, two goals of the rules, but would also promote predictability throughout the course of the proceedings. The predictability of the proceedings is particularly important in original jurisdiction cases because they can last for decades and require numerous Special Masters. Greater application of civil procedure rules would help minimize the variances that occur across different Special Master appointments.

The Federal Rules of Evidence were fashioned for many of the same reasons as the Federal Rules of Civil Procedure. Federal Rule of Evidence 102 provides that the rules aim "to secure fairness in administration, elimination of unjustifiable expense

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tion of a system of federal rules. *Id.*

407. *See id.*

408. The act, the Rules Enabling Act, currently is codified at 28 U.S.C. § 2072 (1994) and provides continued authority to the Court to promulgate federal court rules.

409. *See* WRIGHT, *supra* note 403, at 428.

410. *See* Drahozal, *supra* note 152, at 490 & n.110 (1998); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 232 (1998).

411. *See* SUP. CT. R. 17.

and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[412] An Advisory Committee was constituted in 1965, but the Federal Rules of Evidence were not enacted until 1975 after considerable controversy and the passage of a statute that gave Congress the right of authority over the rules' ultimate enactment.[413]

Original jurisdiction cases are not fundamentally different from the gamut of cases subject to the Federal Rules of Evidence. Some of the rules arguably would never apply to an original jurisdiction proceeding, but that is true for many of the rules that do not apply in all categories of cases, particularly those rules specific to criminal proceedings. For example, rules related to evidence of character or impeachment by prior crime[414] are provided as protections to criminal defendants and thus probably would not be relevant to the vast majority of original jurisdiction cases. Rules designed to protect the interests of a criminal defendant, such as rules circumscribing character and credibility evidence, however, can be sifted out from rules designed to protect the integrity of the judicial process, such as the rules regarding the admissibility of expert evidence and the Best Evidence Rule.[415] The Court should examine the utility of other evidentiary rules, including those that protect legitimate party interests but that might nevertheless obstruct the fact-finding mission of a Supreme Court Special Master's processes, such as self-incrimination and privileges.

Given the overarching importance of and limited review in original jurisdiction cases, rules regarding authentication, identification, and "best evidence" should play a crucial role in determining the admissibility of evidence.[416] Authentication and identification rules, patterned on the need for authentication as "an inherent logical necessity," are designed to establish relevance and prevent fraud.[417] The Best Evidence Rule is also designed to prevent fraud, in addition to securing for the fact-

412. FED. R. EVID. 102.

413. *See* WRIGHT, *supra* note 403, at 430.

414. *See* FED. R. EVID. 608, 609.

415. *See* FED. R. EVID. 702-705, 1001-1008.

416. *See* FED. R. EVID. 901 (Requirement of Authentication or Identification), 902 (Self-authentication), 1001-1008 (Best Evidence Rule).

417. FED. R. EVID. 901(a) advisory committee's note (quoting 7 WIGMORE 564, at § 2129).

finder the most reliable evidence available.[418] In boundary dispute cases the outcome may very well turn on compacts, deeds, land records, and conflicting written interpretations, the resolution of which would be better insured by strict adherence to these rules. Adherence to the Federal Rules of Evidence, therefore, might help guarantee a necessary level of confidence in the evidence.

The rules governing expert testimony also might prove useful given the critical role experts play in the Court's original jurisdiction cases.[419] Despite the growing complexity of federal cases, many cases in the district courts proceed without experts. In original jurisdiction cases, by contrast, experts have proved to be a practical necessity, particularly in cases in which the Special Master has no formal expertise in the substance of the dispute. In boundary disputes, a surveyor can be beneficial; in water diversion disputes, an expert in natural resource law or water law is needed; in a case over escheated securities, a securities expert will testify. Again, the need to secure sound expertise for the Special Master is as—or more—important in original jurisdiction cases than in federal district court litigation. No strong interest therefore appears for deviating from the Federal Rules of Evidence regarding the admission of expert testimony.

The set of evidentiary rules that could potentially frustrate the fact-finding process in original jurisdiction cases would be rules relating to hearsay, which are designed to prevent the admission of unreliable out-of-court statements. The rules governing hearsay are intricate and complex; Rule 803 maintains twenty-four categorical exceptions, and Rule 804 maintains six.[420] The need to discover evidence in many original jurisdiction cases that run historically deep, as many boundary disputes do, for example, may require modification of some hearsay rules. More specifically, the hearsay rules attempt to ensure reliability of testimony by allowing only a speaker to testify as to his statements, unless one of select indicia of reliability, enumerated in the hearsay exceptions, is present. In

418. *See* FED. R. EVID. 1001 advisory committee's note.

419. *See* FED. R. EVID. 702-706. The rules regarding expert testimony have been explicated in a triad of Court cases, each of relatively recent vintage. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); General Elec. Co. v. Joiner, 522 U.S. 136 (1997); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

420. FED. R. EVID. 803, 804.

many original jurisdiction cases, which may span many decades and even centuries, the availability of witnesses will be highly curtailed. Accordingly, the interest in the availability of relevant evidence might justify deviation from strict application of hearsay rules. Relaxed hearsay rules—or expanded exceptions—in original jurisdiction cases thus might be necessary.

Standardized rules of procedure and evidence are not without their critics. Criticisms of uniform laws in the federal courts likely mimic those justifications for the bare rules available in original jurisdiction cases. Chief among these criticisms is that cases need individualized, tailored procedures that cannot be exacted in the framework of extensive rules. Others may argue that uniform procedures memorialize one particular set of rules that may not reflect the interests of the various parties that will come before the Court.[421] The latter criticism largely challenges the ability of rule drafters to understand sufficiently the litigation interests of parties of different statures and of different geographic regions to create rules that will be fair to those litigants. The need for predictability and for ensuring uniformity—as much within a case as between cases—is substantial enough to outweigh heavily these criticisms.

E. INSTITUTIONALIZE THE PRIOR PRACTICE OF APPOINTING SENIOR OR RETIRED ARTICLE III JUDGES

If the Article III difficulty posed by Special Masters is the matter of chief concern, this problem could be remedied largely by reversion to the practice of appointing senior or retired federal judges as Special Masters. Although the practice of appointing senior or retired federal judges was abandoned in order to allow senior judges to devote greater time to the increasing district court dockets or appellate caseloads,[422] it appears unlikely that duties of senior judges, who have reduced job requirements under their senior status, would preempt appointment to an original jurisdiction case. A senior judge, for example, needs only to complete in each twelve-month period the workload that an active non-senior judge would accomplish in a three-month period.[423] In addition, numerous vacancies are available on the federal bench that, if filled, would allow

421. *See* Bone, *supra* note 401.

422. *See* Telephone Interview with Francis J. Lorson, *supra* note 98.

423. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS 44 tbl. 1-10 (2d ed. 1996).

senior judges to lighten their caseloads.

Senior or retired judges might also be better able to isolate an original jurisdiction case from other competing duties. Such judges, as a consequence of their lighter caseload, would not have to be subject to the pull of other cases on appeal or to other responsibilities of the workaday world. Senior or retired judges might also be more accustomed to, and thus more likely to implement and adhere to, the procedures and rules that govern litigation in an Article III forum. Thus, if one accepts the premise that original jurisdiction cases would benefit from increased uniformity through increased application of rules, this result might more likely be obtained through the use of senior or retired justices intimately familiar not only with the rules, but how they play out in practice. Although appointing senior or retired judges might reduce the ability to appoint subject-matter specialists, such as in cases involving water rights disputes, procedures for court-appointed experts—or even the use of party experts—should resolve sufficiently the need for expertise. In any event, the need for subject-matter expertise in a given lawsuit likely does not outweigh the need for Article III accountability in a suit between states.

While this reversion to appointing senior or retired federal judges would alleviate some concerns of accountability, given that this class of judges would have withstood the constitutional appointment mechanisms, it leaves other difficulties unresolved. Consider, for example, the argument articulated earlier that retired and senior judges, due to their age, are more likely to resign or pass away during service as a Special Master. This vulnerability is particularly important given both the multi-year proceedings in many original jurisdiction suits and the absence of set procedures to guide such a judge's successor, which could potentially disrupt the proceedings.

Moreover, as long as the class of senior and retired federal judges is heavily represented by older white males, critics might argue that the role of Special Master fails to benefit from the perspectives that youth, women, and minorities can bring to bear on the rights of citizens falling across the racial and socioeconomic spectrum. As women and other racial and ethnic minorities are increasingly represented in the federal judiciary they presumably, over time, would find themselves standing in the role of Special Master with greater frequency than has occurred in the past. Further, even if underrepresented at present, the ranks of senior and retired federal judges already

have greater representation of women and minorities than the ranks of Special Masters appointed in the Supreme Court.

Despite the drawbacks of appointing senior or retired federal judges as the Court's Special Masters, the benefits triumph. The Article III difficulties posed by the Court's use of Special Masters at present are not to be taken lightly. In an era when the Court appears willing to accept the delegation of many Article III functions or quasi-judicial functions to judicial adjuncts, the Special Masters option in original jurisdiction litigation between states is an area deserving of special protection. Such suits are almost always between states acting as private litigants, which have not consented to the delegation of rights to a non-Article III actor. At bottom, the use of senior or retired federal judges as Special Masters mimics, in a sense, dual-tiered judicial review and places power to decide motions and preside over trials in an actor who, importantly, has achieved Article III accountability.

CONCLUSION

For a court that takes seriously its duties as an appellate court overseeing the nation's countless state and federal courts, the Supreme Court undoubtedly views the duty to function as a trial court in the handful of original jurisdiction cases that enter its docket each year as an onerous task. But in recognizing its limitations as a fact-finding body, the Supreme Court has delegated away primary responsibilities in original jurisdiction cases to Special Masters, who may exercise great discretion over suits without the accountability or protections of the Article III judiciary.

Given the Framers' interest in precluding states from exercising jurisdiction over disputes with sister states, the Court's exercise of original jurisdiction with the use of Special Masters is at least consistent with providing states with a neutral forum. The fundamental reasons the role of the Special Master is disconcerting, however, are attributable to the broad scope of his authority, the significance of the interests involved in state-against-state litigations, and the lack of multilayered judicial review.

The primary need in Special Master proceedings is the adoption of a set of procedures that would increase consistency and reduce incongruous results among and within cases. While sensibility also counsels that the Court retract some of the authority granted to Special Masters, the more workable ap-

proach would be to reinstate the practice of appointing only retired or senior federal judges to the Special Master position, who have attained their positions through the constitutional appointment process and who are entitled to life tenure and salary protection. This alternative would alleviate the pressures original jurisdiction cases add to the Court, which the Court likely is unwilling to take back, while still ensuring greater accountability in the role of the Special Master.

APPENDIX

ORIGINAL JURISDICTION CASES IN WHICH A SPECIAL MASTER HAS BEEN APPOINTED

This Appendix seeks to summarize basic information regarding the Supreme Court's original jurisdiction cases in which Special Masters were appointed and provide brief biographical data for the Special Masters. The biographical data presented for the Special Masters set forth the position held by the Special Master at the time of appointment, as well as relevant governmental service. All data contained in this appendix are based on a reasonable inquiry of the following sources: the Supreme Court Reporter; the Federal Reporter Series; the Federal Supplement Series; Lee Seltman, Working Paper of the Ninth Circuit Gender Bias Task Force: Appointments to the Supreme Court and the Ninth Circuit (1992); Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 669 (1959); and sources cited *infra* notes 98-162.

Legend:
— insufficient data
† commissioner appointed to take evidence
D died in position
R resigned from position
* date not based on Court's order granting motion for leave to file

Case	Subject of Suit	Suit Begun	Final Resolution	Special Master (year appointed) Position at Time of Appointment and Relevant Experience
Kansas v. Nebraska	water apportionment	1999	pending	Vincent L. McKusick (1999) Retired Chief Justice, state supreme court
New York v. New Jersey (New York and New Jersey Boundary Case)	state boundary dispute	1994	1999 (final decree)	Paul Verkuil (1994) President, private corporation; Dean, Cardozo Law School; President Emeritus, William & Mary; former Dean, Tulane University
Louisiana v. Mississippi	state boundary dispute/ suit to quiet title to land and water	1993	1995 (final decree)	Vincent L. McKusick (1994) Retired Chief Justice, state supreme court
Connecticut v. New Hampshire	dispute over state tax on nuclear plant property	1992	1993 (case dismissed)	Vincent L. McKusick (1992) Retired Chief Justice, state supreme court
Delaware v. New York	dispute over escheated securities	1988	1994 (case dismissed)	Thomas H. Jackson (1988) Dean and professor, University of Virginia School of Law; former professor, Stanford Law School
Wyoming v. Oklahoma	Commerce Clause challenge	1988	1992	Philip W. Tone (1989) Private practitioner; former judge, federal court of appeals
Oklahoma v. New Mexico	water apportionment	1987	1993 (modified decree)	Jerome C. Muys (1988) Private practitioner; Supreme Court advocate

Illinois v. Kentucky	state boundary dispute	1986	1995 (final decree)	Robert Van Pelt[D] (1987) Senior judge, federal district court Matthew J. Jasen (1988) Private practioner; retired judge, state supreme court
Nebraska v. Wyoming (Nebraska II)	water apportionment	1986	pending	Owen Olpin (1987) Private practitioner
New Jersey v. Nevada	Commerce Clause challenge	1985	1988 (case dismissed)	Wade H. McCree, Jr.[D] (1986) Professor, University of Michigan Law School; former Solicitor General; former judge, federal court of appeals and federal district court, state trial court Ralph I. Lancaster, Jr. (1987) Private practitioner
South Carolina v. Baker (formerly South Carolina v. Regan)	challenge to IRS provision	1984	1988 (opinion)	Honorable Samuel J. Roberts[D] (1984) Justice, state supreme court Matthew J. Jasen (1987) Private practitioner; retired judge, state supreme court
Arkansas v. Mississippi	state boundary dispute	1982	1985 (final decree)	Paul C. Reardon (1982) Retired justice, state supreme court
California v. Texas	dispute over right to estate taxes	1982	1985 (case dismissed)	Wade H. McCree, Jr. (1982) Professor, University of Michigan Law School; former Solicitor General; former judge, federal court of appeals and federal district court, state trial court
Louisiana v. Missisippi	state boundary dispute	1980	1984 (final order)	Charles J. Meyers (1981) Private practitioner

Texas v. Oklahoma	state boundary dispute	1980	1982 (final decree)	John A. Carver (1980) Professor, University of Denver College of Law; former Assistant Secretary of the Interior
California v. Arizona	state and federal boundary dispute	1979	1981 (final decree)	Roy W. Harper (1979) Senior judge, federal district court
Kentucky v. Indiana	state boundary dispute	1979	1985 (final decree)	Robert Van Pelt (1979) Senior judge, federal district court
Maryland v. Louisiana	commerce clause challenge	1979	1981 (final decree)	John F. Davis (1980) Former Clerk of the Court, United States Supreme Court; former Assistant Solicitor General
United States v. Alaska	dispute over mineral rights/ suit to quiet title to land	1979	Pending	J. Keith Mann (1980) Associate Dean and Professor, Stanford Law School Gregory E. Maggs (2000) Professor, George Washington National Law Center
Colorado v. New Mexico	water apportionment	1978	1984 (case dismissed)	Ewing I. Kerr (1979) Senior judge, federal district court
Oklahoma v. Arkansas	state boundary dispute	1978	1985 (final decree)	William H. Becker (1979) Senior judge, federal district court
Tennessee v. Arkansas	state boundary dispute	1978	1981 (final decree)	Earl R. Larson (1979) Senior judge, federal district court
California v. Nevada	state boundary dispute	1977	1982 (final decree)	Robert Van Pelt (1977) Senior judge, federal district court
Indiana v. Kentucky	state boundary dispute	1977	1985 (final decree)	Robert Van Pelt (--) Senior judge, federal district court

Idaho *ex rel.* Evans v. Oregon	dispute over apportionment of migrating fish	1976	1983 (opinion)	Jean Sala Breitenstein (1977) Senior judge, federal court of appeals
South Dakota v. Nebraska	state boundary dispute	1976	1982 (final decree)	Oren Harris (1976) Senior judge, federal district court
Texas v. New Mexico	water apportionment	1975	1993 (amended decree)	Jean Sala Breitenstein[R] (1975) Senior judge, federal court of appeals Charles J. Meyers[D] (1984) Private practitioner; Dean Emeritus, Stanford Law School D. Monte Pascoe (1988) Private practitioner
New Hampshire v. Maine	state boundary dispute	1973	1977 (final decree)	Tom C. Clark (1973) Retired Justice, United States Supreme Court
United States v. Florida	dispute over right to restrict foreign vessels in coastal waters (foreign policy/ foreign relations)	1972	1978 (case dismissed)	Charles L. Powell[D] (1972) Senior judge, federal district court Olin Hatfield Chilson (1975) Senior judge, federal district court
Vermont v. New York	suit to abate public nuisance (air pollution)	1972	1974 (case dismissed)	R. Ammi Cutter (1972) Retired justice, state supreme court
Mississippi v. Arkansas	state boundary dispute	1971	1974 (amended decree)	Clifford O'Sullivan (1971) Senior judge, federal court of appeals

Pennsylvania v. New York	dispute over escheated funds	1970	1972 (final decree)	John F. Davis (1970) Former Clerk of the Court, United States Supreme Court; former Assistant Solicitor General
Texas v. Louisiana	state boundary dispute	1970	1977 (final decree)	Robert Van Pelt (1970) Senior judge, federal district court
United States v. Maine	suit to quiet title to seabed	1969	1986 (opinion)	Albert B. Maris (1970) Senior judge, federal court of appeals; former judge, federal district court; former Chief Judge, federal Emergency Court of Appeals Walter E. Hoffman (1977) Senior judge, federal district court
Michigan v. Ohio	state boundary dispute	1967	1973 (final decree)	Albert B. Maris (1967) Senior judge, federal court of appeals
Missouri v. Nebraska	state boundary dispute	1967	1974 (case dismissed)	Gilbert H. Jertberg (1967) Senior judge, federal court of appeals
Utah v. United States	suit to quiet title to lake and relicted land	1967	1976 (final decree)	J. Cullen Ganey[D] (1967) Senior judge, federal court of appeals Charles Fahy (1972) Senior judge, federal court of appeals
Ohio v. Kentucky	state boundary dispute	1966	1985 (final decree)	Phillip Forman (1966) Senior judge, federal court of appeals Robert Van Pelt (—) Senior judge, federal district court

Illinois v. Missouri	state boundary dispute	1965	1970 (final decree)	Sam E. Whitaker[R] (1966) Senior judge, federal Court of Claims Harvey M. Johnsen (1967) Senior judge, federal court of appeals
Nebraska v. Iowa	state boundary dispute	1965	1973 (final decree)	Joseph W. Madden[R] (1965) Senior judge, federal Court of Claims Honorable Walter L. Pope[R] (1965) Senior judge, federal appellate court Honorable Charles J. Vogel[R] (1968) Senior judge, federal appellate court Joseph P. Willson (1968) Senior Judge, federal district court
Louisiana v. Mississippi	state boundary dispute	1963	1966 (final decree)	Marvin Jones (1964) Chief Judge, federal Court of Claims
Texas v. New Jersey	dispute over escheated debt	1962	1965 (final decree)	Walter A. Huxman (1963) Senior Judge, federal appellate court
Virginia v. Maryland	dispute over fishing and crabbing rights in Potomac River	1957	1963 (case settled)	Stanley F. Reed (1958) Retired Justice, United States Supreme Court
Mississippi v. Louisiana	state boundary dispute	1953	1955 (final decree)	D. K. McKamy (1953) Private practitioner
Texas v. New Mexico	—	1952	1957 (case dismissed)	John Raeburn Green (1952) —

United States v. Louisiana (Louisiana Boundary case)	federal-state boundary dispute	1950	1982 (final order)	Walter P. Armstrong, Jr. (1969) Private practitioner; Supreme Court advocate Albert B. Maris (1971) Senior Judge, federal court of appeals
Georgia v. Pennsylvania RR	dispute over harm to citizens from railroad rate fixing	1945	1950 (case dismissed)	Lloyd K. Garrison (1945) Chair, War Labor Board; Dean and professor, University of Wisconsin Law School; former Solicitor General; former Special Assistant to the Attorney General
United States v. California	federal-state boundary dispute	1945	1952	William H. Davis (1949) Private practitioner; Supreme Court advocate
United States v. Wyoming	suit to quiet title to land	1944	1948 (final order)	Nat U. Brown (1945) Private practitioner
Illinois v. Indiana	—	1943	1950 (final order)	Luther Ely Smith (1944) Public interest lawyer (ACLU)
Missouri v. Iowa	—	1937	1939 (case dismissed)	Samuel Williston (1938) Professor, Harvard Law School
Texas v. Florida	dispute over estate taxes	1937	1939 (final decree)	John S. Flannery (1937) Private practitioner; Supreme Court advocate
Nebraska v. Wyoming (Nebraska I)	water apportionment	1934	1945 (final decree)	Michael J. Doherty (1935) Private practitioner; Supreme Court advocate
Wisconsin v. Michigan	state boundary dispute	1932	1936 (final decree)	Frederick F. Faville (1933) Private practitioner

Washington v. Oregon	water apportionment	1931	1936 (opinion)	William W. Ray (1933) Private practitioner [represented state of Utah in *Arizona v. California*]
Arizona v. California	water apportionment	1930 1953	1931 (dismissed without prejudice) 2001 (supp. decree)	George I. Haight[D] (1954) Private practitioner; Supreme Court advocate Simon Rifkind (1955) Private practitioner; former judge, federal district court; Supreme Court advocate Elbert P. Tuttle (1979) Senior judge, federal court of appeals Robert B. McKay[D] (1989) Private practitioner; Professor Emeritus, New York University School of Law; Supreme Court advocate Frank McGarr (1990) Private practitioner; former judge, federal district court; Supreme Court advocate
United States v. Oregon	suit to quiet title to land	1930	1935 (final decree)	Garret W. McEnerncy (1931) —
New Jersey v. City of New York	suit to enjoin water pollution	1929	1935 (final decree)	Edward K. Campbell (1933) —
New Jersey v. Delaware	state boundary dispute	1929	1935 (final decree)	William L. Rawls (1930) Private practitioner; Supreme Court advocate
New Jersey v. New York	water apportionment	1929	1954 (final order)	Charles N. Burch (1930) Private practitioner; Supreme Court advocate Kurt F. Pantzer (1952) Private practitioner; Supreme Court advocate

Michigan v. Illinois	water apportionment	1926	1980 (final order, *sub nom. Wisconsin v. Illinois*)	Albert B. Maris (1979) Senior Judge, federal court of appeals; former judge, federal district court; former Chief Judge, federal Emergency Court of Appeals
Wisconsin v. Illinois	water apportionment	1926 (*sub nom. MI v. IL*)	1980 (final order, *sub nom. Wisconsin v. Illinois*)	Charles Evans Hughes (1926) Former Justice, Supreme Court of the United States Albert B. Maris (1979) Senior Judge, federal court of appeals; former judge, federal district court; former Chief Judge, federal Emergency Court of Appeals
Louisiana v. Mississippi	state boundary dispute	1925	1931	Thomas G. Haight (1928) Private practitioner; former judge, federal court of appeals
Oklahoma v. Texas	state boundary dispute	1920*	1930 (final decree)	Ernest Knaebel† (1920) — Frederick S. Tyler (1921) — Joseph M. Hill (1925) —
Georgia v. South Carolina	state boundary dispute	1919 1977	1922 (final decree) 1990 (opinion)	Charles S. Douglas (1920) Private practitioner; Supreme Court advocate Walter E. Hoffman (1978) Senior judge, federal district court
Pennsylvania v. West Virginia	Commerce Clause challenge	1919	1923 (final decree)	Levi Cooke† (1920) Private practitioner; Supreme Court advocate

Arkansas v. Tennessee	state boundary dispute	1917 1935 1968	1918 (opinion) 1941 (final decree) 1970 (final decree)	Monte M. Lemann (1937) Private practitioner; member, Supreme Court's Advisory Committee on the Rules of Civil Procedure; former professor, Tulane Law School; Supreme Court advocate Gunnar H. Nordbye (1968) Senior judge, federal district court
Vermont v. New Hampshire	state boundary dispute	1915*	1937 (final order)	Edmund F. Trabue (1930) —
New Mexico v. Texas	state boundary dispute	1913*	1931 (final decree)	Charles Warren (1924) Constitutional historian; lecturer, numerous universities; former Assistant Attorney General
Colorado v. Kansas	water apportionment	1901* 1928	1944 (final decree) 1995	Charles C. Cavanah (1942) Retired judge, federal district court
Kansas v. Colorado	water apportionment	1901* 1986 1999	1907 (dismissed without prejudice) 1995 (opinion) 2001 (opinion)	Wade H. McCree, Jr.[D] (1986) Professor, University of Michigan Law School; former Solicitor General; former judge, federal court of appeals, federal district court, and state trial court Arthur L. Littleworth (1987) Private practitioner Charles C. Cavanah (1942) Retired judge, federal district court
Pennsylvania v. Wheeling & Belmont Bridge Co.	Commerce Clause challenge	1849*	1855 (final order)	R. Hyde Walworth Former Chancellor of the State of New York (commissioner)

Huger v. South Carolina	undiscl.	1797	— (case dismissed)	commissions appointed to examine witnesses
Vanstophorst v. Maryland	suit for collection of debt	1791	— (case settled)	commissioners appointed to take evidence
Mississippi v. United States	federal-state boundary dispute	—	1990 (final decree)	Honorable Walter P. Armstrong, Jr. (1988) Retired judge; private practitioner; Supreme Court advocate; former President, ABA
New York v. Illinois	water apportionment	—	1980 (final decree)	Albert B. Maris (1979) Senior judge, federal court of appeals; former judge, federal district court; former Chief Judge, federal Emergency Court of Appeals
United States v. Louisiana	—	—	—	Streeter B. Flynn† (1943) Private practitioner; Supreme Court advocate
United States v. Louisiana (Alabama & Mississippi Boundary Case)	federal-state boundary dispute	—	1993 (supplemental decree)	Honorable Walter P. Armstrong, Jr.[R] (—) Retired judge; private practitioner; Supreme Court advocate; former President, ABA
Connecticut v. Massachusetts	water diversion	1928	1931 (case dismissed)	Charles W. Bunn (1929) Private practitioner; Supreme Court advocate
United States v. Utah	suit to quiet title to riverbeds	—	1931	Charles Warren (1929) Constitutional historian; lecturer, numerous universities; former Assistant Attorney General