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The State versus Extraterritorial Pollution - States' Environmental Rights under Federal Common Law

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By virtue of their sovereign or quasi-sovereign status, states have the potential to play an active and influential role in the current campaign against environmental degradation. A state may bring an action as parens patriae in federal court against another state or party outside its jurisdiction to enforce its right to be free from pollution from sources outside its boundaries. The concept of such a "state's right" has until recently received little attention. The United States Supreme Court ruled only this year that a state does have a right, guaranteed by federal common law, to be protected against pollution arising outside its own borders. This Article analyzes this "state's right," examines its early precedents, discusses the unique characteristics of an action brought by a state to enforce this right, and indicates ways in which the courts could fashion a meaningful definition for this relatively new concept.

Much attention has been focused recently upon the matter of how legal processes and the legal system might be made to serve in what has become something of a national crusade to preserve the physical environment from contamination and despoliation. Much has been written about the use of federal and state governmental powers which are and which might be brought to bear and about the availability of remedies to the private citizen and interest groups. One path toward environmental protection through litigation which deserves thorough

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exploration, but which until recently has largely escaped attention, is
the concept that a state has a right to be free from pollution from
sources outside its own borders. Considering the significant quantities
of air and water pollution which are interstate in character it would
seem that the concept of a state’s right, if developed to the limits of
its logic, and pressed aggressively by the various states, could have a
dramatic effect upon the quality of the American environment.

I

BASIS OF THE RIGHT

A. Early Decisions

The concept that a state has a right to be free from pollution from
outside its own borders is not new. However, it lay dormant in the
recent environmental campaign until the 1971 case of Texas v. Pan-
key. In that case, the State of Texas sued in a federal district court in
New Mexico for an injunction against New Mexico ranchers who were
applying a pesticide upon their range lands, in an attempt to control in-
sect pests. The State of Texas alleged that the range lands in question
were situated within a watershed that drained into a river that was used
as a source of water supply by several Texas municipalities. It was
further alleged that the application of the pesticides would ultimately
result in contamination of the water, making it unusable as a source
of municipal supplies. Jurisdiction was based upon 28 U.S.C.
§ 1331(a), and thus depended upon whether the rights which the
State of Texas sought to have protected were matters under the consti-
tution or laws of the United States. The district court dismissed for
lack of jurisdiction, and on appeal the tenth circuit court of appeals re-
versed. The case represents direct authority for the proposition that
under federal common law, a state has ecological rights “against im-
proper pollution or impairment by outside sources of its appropriate
environment and resource conditions.”

Two United States Supreme Court cases decided more than sixty
years ago provide the background for the court’s holding. In the first
case, Missouri v. Illinois, the state of Missouri sought to enjoin the
pollution of the Illinois River, which was being used as a conduit of
sewage by the City of Chicago. The Illinois flowed into the Missis-

3. See, e.g., Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Missouri
4. 441 F.2d 236, 2 ERC 1200 (10th Cir. 1971).
5. Id. at 238, 2 ERC at 1201.
6. Id. at 237, 2 ERC at 1200-01.
7. Id. at 240, 2 ERC at 1202.
8. 200 U.S. 496 (1906).
sippi River, from which the City of St. Louis obtained its water supply. The Court indicated that in a proper case a state might have a right to relief from this type of environmental degradation, but on the merits denied relief for three reasons: first, that similar discharges of pollution into the Mississippi were permitted within Missouri itself, and constituted a standard by which the wrongfulness of the conduct of the defendant might be measured; second, that plaintiffs own conduct thus was an important factor in causing the harm alleged; and third, that treatment of the water supplies was necessary to eliminate pollution other than that caused by the defendant, thus the defendant’s alleged pollution caused little if any additional burden upon the plaintiff.

The second case, Georgia v. Tennessee Copper Co., provides direct authority for the court’s holding in Texas v. Pankey. There the Court held that the State of Georgia was entitled to an injunction enjoining the defendant copper company from discharging noxious gas in Tennessee which blew over the plaintiff’s territory. The fumes were found to cause and threaten damage on a vast scale to the forests, orchards, and crops of individual citizens within Georgia. The Court stated the controlling principle in the following terms:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.

B. Recent United States Supreme Court Pronouncements

Although Texas v. Pankey seemed a logical and consistent application of precedent, the United States Supreme Court beclouded the

9. "It is decided that a case such as is made by the bill may be a ground for relief." *Id.* at 520.

10. Where, as here, the plaintiff has sovereign powers, and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff’s own conduct does not produce the result, or at least so conduct to it that courts should not be curious to apportion the blame. *Id.* at 522.

11. *Id.*

12. *Id.* at 525. This case is discussed in Gindler, *Water Pollution and Quality Controls*, in 3 WATERS AND WATER RIGHTS 326-28 (E. Clark ed. 1967).


14. *Id.* at 238.
picture with its dictum in *Ohio v. Wyandotte Chemical Corp.*,\(^\text{15}\) decided shortly after the decision in *Texas v. Pankey* was handed down. In deciding that the plaintiff state should not be granted leave to file a complaint invoking the original jurisdiction of the Supreme Court, where the state was complaining of harm from extraterritorial pollution, the Court included the following obiter dictum in a footnote:

> Nor would federal question jurisdiction exist under 28 U.S.C. § 1331. So far as it appears from the present record, an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law.\(^\text{16}\)

The conflict between the *Pankey* decision and the *Wyandotte* footnote was not lost on the commentators,\(^\text{17}\) and the Court has now resolved the matter, in *Illinois v. City of Milwaukee*,\(^\text{18}\) in favor of the *Pankey* position. The State of Illinois sought leave to file an original complaint in the Supreme Court seeking relief for pollution of Lake Michigan by the defendants. Mr. Justice Douglas, writing for a unanimous Court,\(^\text{19}\) denied the motion and said the parties could invoke federal question jurisdiction in an appropriate federal district court. The Court explicitly declared that “[28 U.S.C.] § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin,”\(^\text{20}\) and approvingly cited the *Pankey* decision that a state’s complaint against extraterritorial pollution is governed by “federal common law.”\(^\text{21}\)

On the authority of *Illinois v. City of Milwaukee*, it can be definitely said that a state has a right, guaranteed by federal common law, to be protected against pollution arising outside its own borders. The implications and ramifications of that holding, with respect to such issues as standing, and the scope and definition of the right under consideration, remain to be examined.

II

STANDING: THE STATE AS PARENS PATRIAE

In the state-instituted lawsuit against extraterritorial pollution, the

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16. Id. at 498 n.3, 2 ERC at 1337 n.3.
19. Justice Douglas dissented in *Wyandotte*, contending that the Court should assume original jurisdiction, but did not explicitly reach the question of whether the case should be decided according to federal, rather than state, law.
20. 406 U.S. at 100, 4 ERC at 1003.
21. Id.
problem of standing is relatively easy. While the battle for recognition of standing on the part of private individuals and interest groups has been fiercely contested, with mixed results, the right of a state to maintain an environmental action is subject to few restrictions. A state may bring an action against another state or party outside its own jurisdiction as parens patriae or representative of the health, safety, or welfare interests of its citizens. In doing so, it seeks to protect a legitimate state interest. It cannot, however, maintain an action against another state merely to prosecute the private claims of the citizens themselves, either as a representative or as assignee of those rights. Such an attempt was made in New Hampshire v. Louisiana, where the states of New Hampshire and New York sought to invoke the original jurisdiction of the Supreme Court to entertain a suit against Louisiana, should be interpreted also to forbid suits on their behalf by were based upon their rights as assignees, for collection purposes, of the private rights of their citizens who had purchased the bonds. The Court dismissed the actions, holding that the Eleventh Amendment, which forbade a suit by the individuals themselves against the state of Louisiana, should be interpreted to also forbid suits on their behalf by the states of their citizenship. Similarly, in North Dakota v. Minnesota, which was an action brought to redress damage caused by officials in Minnesota who allegedly altered the course of a stream in Minnesota to the detriment of North Dakota lands, the Court held that the plaintiff state could not press the private claims of its landowners. The Court said:

The right of a State as parens patriae to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another State, by prayer for injunction, is to be differentiated from its lost power as a sovereign

22. The case of Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 609, 1 ERC 1084 (2d Cir. 1965) is generally regarded as the initial major breakthrough in standing in environmental lawsuits, and has gained wide acceptance. See, e.g., Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1 ERC 1347 (D.C. Cir. 1970); Honchok v. Hardin, 326 F. Supp. 988, 2 ERC 1573 (D. Md. 1971).


25. In Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), the Court traced the origin and development of the state's role as parens patriae, although concluding that the doctrine could not be applied in an action brought under § 4 of the Clayton Act (15 U.S.C. § 15 (1970)).


27. Id. at 91.

28. Id.

29. 263 U.S. 365 (1923).
to present and enforce individual claims of its citizens as their trustee against a sister State. 80

In environmental litigation against another state, the right of the plaintiff state to sue as parens patriae based upon its role as protector of health, safety, and welfare of its citizens is well established. In overruling a demurrer filed in the case of Missouri v. Illinois, 81 the Court remarked, "[I]t must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." 82 In Pennsylvania v. West Virginia, 83 the Court held that the plaintiff's interest in preventing serious detriment to the health, comfort and welfare of its citizens gave it standing to contest the action of West Virginia which would limit the supply of natural gas transported from West Virginia for use in Pennsylvania. In interstate water allocation cases, the Court has most heavily relied on a state's sovereign interest in the well-being of its inhabitants, rather than any proprietary interests of its own, in granting standing to the plaintiff state. 84

In litigation against a private defendant, the right of a state to bring an action as parens patriae appears to be grounded upon the same considerations as those that apply when the defendant is a state. In Georgia v. Tennessee Copper Co., 85 the Court stated that the plaintiff's standing need not rest upon its claim of damage to state-owned property:

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied

30. Id. at 375-76. On the other hand, in South Dakota v. North Carolina, 192 U.S. 286 (1904), the plaintiff state had itself become absolute owner of certain bonds issued by the defendant state. The bonds had been donated to the plaintiff by one of her citizens. Over a strong dissent which protested that the suit was within the spirit, if not the letter, of the Eleventh Amendment, and that the Court ought not to participate in what amounted to a scheme to avoid a constitutional provision, the Court assumed jurisdiction and gave judgment for the plaintiff.

32. Id. at 241.
33. 262 U.S. 553 (1923).
34. Beyond its property rights it [plaintiff] has an interest as a State in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest.


As respects Wyoming the welfare, prosperity and happiness of the people of the larger part of the Laramie valley, as also a large portion of the taxable resources of two counties, are dependent upon the appropriations in that State. Thus, the interests of the State are indissolubly linked with the rights of the appropriators.

Id. at 468.
35. 206 U.S. 230 (1907).
upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a make-weight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads.36

The parens patriae action is based upon the consideration that such procedure is necessary as a means of reconciling the quasi-sovereign rights of the states with the needs of our federal system, particularly the need to provide a means of resolving disputes without resort to physical force. In overruling demurrers filed in Missouri v. Illinois,37 the Court stated:

[I]t must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions [relating to the jurisdiction of the Supreme Court] we are considering.38

A similar view was expressed by Mr. Justice Holmes in the Georgia v. Tennessee Copper Co. decision:

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.39

There have been numerous instances in which a state has brought suit in a federal court against a party outside its borders to prevent or redress some environmental harm caused by activities over which the complaining state does not have immediate control. An important line

36. Id. at 237.
37. 180 U.S. 208 (1901).
38. Id. at 241.
39. 206 U.S. at 237.
of cases deals with the allocation of waters of interstate streams, but there is also significant case authority regarding interstate pollution. The environmental cases break down into two types—those in which relief is sought against another state and those in which the defendant is a private party. Where the defendant is a state, the Supreme Court has original and exclusive jurisdiction, and where the defendant is an individual, the plaintiff may proceed in either the Supreme Court or in a federal district court, although the Court has seemingly adopted the position that it will not hear such cases if an alternative forum is available.

III

THE DEFINITION OF THE STATE RIGHT

The decision in Texas v. Pankey rested upon "the environmental rights of a State against improper impairment by sources outside its domain." Illinois v. City of Milwaukee confirmed that principle, but neither case fully explains the scope and definition of the right being recognized. There are adequate precedents, however, for the courts to fashion a meaningful definition of this state right.

A. The Question of "Federal Common Law"

The court in Texas v. Pankey stated in the context of its discussion of federal question jurisdiction under 28 U.S.C. § 1331(a) that the rights of the plaintiff state were "a matter having basis and standard in federal common law. . . ." In Illinois v. City of Milwaukee, the Supreme Court affirmed this proposition, and indicated that the doctrine of Erie R.R. v. Tompkins has no application in this

45. 441 F.2d at 241, 2 ERC at 1204.
46. Id. at 240, 2 ERC at 1203.
47. 304 U.S. 64 (1938).
area.\textsuperscript{48} In so doing, the Court was not being inconsistent with the theory of "federal common law" as it has developed since \textit{Erie}. When \textit{Erie} overruled \textit{Swift v. Tyson},\textsuperscript{49} with the pronouncement that "[t]here is no federal common law,"\textsuperscript{50} it did not herald the demise of all federal common law. Rather, it opened the way to what has been referred to as "specialized federal common law."\textsuperscript{51}

In \textit{Clearfield Trust Co. v. United States},\textsuperscript{52} it was held that "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law,"\textsuperscript{53} and in \textit{Textile Workers Union v. Lincoln Mills},\textsuperscript{54} it was held that federal courts were authorized to fashion a body of federal substantive law relating to collective bargaining agreements, in the application of section 301 of the Labor Management Relations Act of 1947.\textsuperscript{55} These cases have given rise to fields in which "specialized" federal common law has taken root and prospered. The \textit{Clearfield} doctrine and the \textit{Lincoln Mills} doctrine are the best-known illustrations of the continued existence of a substantial body of federal common law notwithstanding the holding in \textit{Erie}.\textsuperscript{56}

The federal common law referred to in \textit{Texas v. Pankey} and \textit{Illinois v. City of Milwaukee} is, in a sense, different from the federal common law represented by the aforementioned doctrines. State law could have been allowed to govern instead of federal law in the \textit{Clearfield} and \textit{Lincoln Mills} situations. In the context of interstate environmental damage, the law of each state could be deemed controlling as to the propriety of all conduct within its borders, but this would inhibit the right of recovery of those injured outside the state as a result of environmentally damaging conduct. At best, this practice would place the complaining state on the level of a private plaintiff; it would strip away the garment of quasi-sovereignty. Alternatively, the law of the state in which the injury occurs could be deemed controlling, but this result might be objectionable as allowing a state to set very strict anti-pollution requirements which would in effect prohibit a vital enterprise in another state.\textsuperscript{57} If the concept of a state's environmental right to be

\begin{itemize}
\item 48. See 406 U.S. at 105 n.7, 4 ERC at 1004 n.7.
\item 49. 41 U.S. (16 Pet.) 1 (1842).
\item 50. 304 U.S. at 78.
\item 52. 318 U.S. 363 (1943).
\item 53. \textit{Id.} at 366.
\item 54. 353 U.S. 448 (1957).
\item 56. \textit{See} Friendly, \textit{supra} note 51, at 408-21.
\item 57. \textit{See} Note, \textit{supra} note 17, at 193-94 for a brief discussion of choice-of-law problems in this type of case.
\end{itemize}
free from outside pollution is to have any real importance, that right must be based on federal law. This body of law has been referred to as "interstate common law," and it is clear that the *Erie* doctrine does not derogate the validity of the principles developed thereunder. The opinion in *Illinois v. City of Milwaukee* makes it clear that such precedents as *Missouri v. Illinois* and *Georgia v. Tennessee Copper Co.* remain unaffected by the *Erie*-inspired reevaluation of the concept of federal common law.

**B. International Law Principles**

The Supreme Court has said:

> For the decision of suits between States, federal, state, and international law are considered and applied by this Court as the exigencies of the particular case may require.

In *Kansas v. Colorado*, the Supreme Court dealt with a case of original jurisdiction concerning the disputed rights of the two party states to the use of the water of the Arkansas River, which rises in the mountains of Colorado and flows through Kansas on its way toward the Gulf of Mexico. The Court treated the two parties as quasi-sovereigns, and suggested that the international law principle of equality of states might be referred to in deciding such a dispute. In its discussion of that principle the Court said:

> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri v. Illinois*, supra, the action of one state reaches, through the agency of natural laws into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this Court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

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59. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), decided the same day as *Erie*, the Court reaffirmed that "whether the water of an interstate stream must be apportioned between the two States is a question of federal common law" upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110. Cases involving interstate stream water apportionment decided since that time have continued to be guided by this principle. *See*, e.g., *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Colorado v. Kansas*, 320 U.S. 383 (1943).


61. 206 U.S. 46 (1907).

62. *Id.* at 97-98.
The principle of equality has often been cited in those cases involving the allocation among states of the waters of interstate streams, but has not been interpreted so as to require a decree awarding an equal quantity of water to each state.

Such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the "equal level or plane on which all the States stand, in point of power and right, under our Constitutional system" and that, upon a consideration of the pertinent laws of the contending States and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters.\(^3\)

Beyond reference to the principle of equality, the Court has not cited international law on matters involving interstate water allocation or pollution control. Indeed, the international law on this subject has been so ill-defined as to provide little basis for a rule of decision.\(^6\)

The most important decision by an international tribunal to date is the *Trail Smelter* case,\(^6\) decided in 1941. In *Trail Smelter*, the United States and Canada had submitted to arbitration the matter of American claims for agricultural losses sustained as the result of air pollution which flowed across the border from Trail, British Columbia, some seven miles north of the Washington border. The tribunal could find no precedent from any international tribunal regarding a claim for pollution damage, either air or water. The court therefore relied heavily upon such American cases as *Missouri v. Illinois*,\(^6\) *New York v. New Jersey*,\(^6\) and *Georgia v. Tennessee Copper Co.*\(^6\) in announcing its conclusion:

The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is

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66. 200 U.S. 496 (1906).
67. 256 U.S. 296 (1921).
68. 206 U.S. 230 (1907).
of serious consequence and the injury is established by clear and convincing evidence.\textsuperscript{69}

The \textit{Trail Smelter} case demonstrates the weakness of international law as a source of authority on questions of interstate pollution. The main source for international law on the subject appears to be the cases decided among the American states.\textsuperscript{70} Recent developments in international pollution law are consistent with the holding in \textit{Trail Smelter}, but they have taken the form of treaties and thus would seem to provide little basis for postulating general "common law" principles of international law.\textsuperscript{71}

\textbf{C. Nuisance Principles}

The law of nuisance is also an important basis for the decisions regarding a state's right to an injunction against pollution from without. In \textit{Georgia v. Tennessee Copper Co.} the Supreme Court referred to "injuries analogous to torts"\textsuperscript{72} and the "abatement of outside nuisances."\textsuperscript{73} The basis of liability for private nuisance is an interference

\begin{itemize}
\item \textsuperscript{69} 3 U.N.R.I.A.A. at 1965, 35 AM. J. INT'L L. at 716.
\item \textsuperscript{70} \textit{Id.} at 1964, 35 AM. J. INT'L L. at 714.
\item \textsuperscript{71} As is the case of treaties generally, it is difficult to determine the legal significance of international river agreements as prescriptions of international law. Thus it must be determined whether the instrument creates an obligation which would not otherwise exist in international law, whether it restates existing customary international law, whether it constitutes an application of municipal law, or indeed whether it has any juridical content. Analysis of a large number of international river treaties containing provisions concerning pollution has failed to disclose any general rules of international law.
\end{itemize}

\textbf{THE LAW OF INTERNATIONAL DRAINAGE BASINS} 103 (A. Garretson ed. 1967). The International Law Association adopted the following position in the Helsinki Rules on the Uses of the Waters of International Rivers:

\textbf{Article X}

1. Consistent with the principle of equitable utilization of the waters of an international drainage basin, a State
   \begin{enumerate}
   \item must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial injury in the territory of a co-basin State, and
   \item should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no substantial damage is caused in the territory of a co-basin State.
   \end{enumerate}

2. The rule stated in paragraph 1 of this Article applies to water pollution originating
   \begin{enumerate}
   \item within the territory of the State, or
   \item outside the territory of the State, if it is caused by the State's conduct.
   \end{enumerate}


\textsuperscript{72} 206 U.S. at 237.
\textsuperscript{73} \textit{Id.}
with the occupant’s use of his land. With only slight modification, this concept appears to be quite amenable to application in disputes involving a state as plaintiff. There, the claim would be based upon protection of the state’s rights not as “occupant,” but as sovereign.

In a nuisance action between private parties, remedies may be either in the form of damages or injunctive relief. The court may be reluctant to grant injunctive relief when the result would be a “burden” upon the defendant disproportionate to the “benefit” derived by the plaintiff. In such cases the court may award monetary damages only, allowing the defendant to continue his noxious conduct, in effect giving the defendant an easement or servitude upon the damaged land. In these instances the court is said to be balancing the “burdens” against the “benefits” and applying the law equitably to reach some form of larger justice.

The cases indicate that whether injunctive relief will be granted is influenced considerably by the identity of the parties as states. When both parties are states, the Supreme Court has developed the rule that equitable relief will be granted reluctantly, and only when quite substantial harm to the sovereign interests of the complaining state can be clearly shown. In balancing the benefits and burdens in this type of case, the Court seeks to recognize that quasi-sovereign status entitles a state to be treated with a dignity and respect greater than that accorded a private litigant. The quasi-sovereign rights of a state, exercised within its own borders, should not be interfered with lightly.

In *North Dakota v. Minnesota,* the Court dismissed a bill complaining that officials in Minnesota had caused damage in the plaintiff

74. Restatement of Torts § 822 (1939); Restatement (Second) of Torts § 821D (Tent. Draft No. 16, 1970).
75. Restatement of Torts § 822, comment b at 226 (1939); Restatement (Second) of Torts § 822 comment d (Tent. Draft No. 16, 1970).
76. See e.g., Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870 (1970); Koseris v. J. R. Simplot, 82 Ida. 263, 352 P.2d 235 (1960); Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904); Juergensmeyer, supra note 2, at 1130-34.
77. It is also arguable that the court is allowing the defendant to “take” plaintiff’s property, conditioned on payment of “just compensation,” thereby treating the action as one in “inverse condemnation.” See Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870 (1970) (dissenting opinion); Lester, Nuisance—As a “Taking” of Property, 17 U. Miami L. Rev. 537 (1963); Note, Environmental Law—Individual’s Right to Injunction in a Private Nuisance Suit, U. Kan. L. Rev. 549 (1971).
78. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.
79. 263 U.S. 365 (1923).
state by altering the flow of water from Minnesota into the plaintiff state, saying that the plaintiff had not sustained its burden of proof. The Court added: "Moreover, as already pointed out, the burden of proof that the state of North Dakota must carry in this case is much greater than that imposed on the ordinary plaintiff in a suit between private individuals."\(^8\)

In *Kansas v. Colorado*,\(^81\) the Court concluded that the diversion of water from the Arkansas River within the State of Colorado, making possible the farming of thousands of acres of land in Colorado which otherwise would have continued barren and unoccupied, did cause perceptible injury to portions of the Arkansas Valley in Kansas, although the greater part of the valley was not harmed.\(^82\) The Court nonetheless concluded that Kansas was not entitled to a decree which would prohibit the diversion of the waters in Colorado. Thus, even a "substantial" harm to the complaining state will not justify equitable relief *against another state* where the result of the action complained of is extremely beneficial to the defendant state. Because both parties were states, they were to be treated as having "equal" rights to the water. Thus, Kansas could not require that all, or substantially all of the waters be allowed to flow across the border from Colorado, because this would unduly restrict Colorado's "right" to have the waters used within its own borders. It would only be when the diversion of waters in Colorado passed the bounds of fairness to both states that equitable relief would be granted.

On the other hand, when the complaining party is a state, and the defendant is a party of lesser dignity, such as an individual, the traditional notions of equity balancing often applied to nuisance cases may be shifted in the other direction. That is, a state may more readily be granted injunctive relief than would a private plaintiff in similar circumstances. In *Georgia v. Tennessee Copper Co.*,\(^83\) the Supreme Court, per Mr. Justice Holmes, clearly indicated as much in the following passage:

> Some peculiarities necessarily mark a suit of this kind. If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The States, by entering the Union, did not sink to the position of private owners, subject to one system of private law. This court has not quite the same freedom

\(^80\) Id. at 387.
\(^81\) 206 U.S. 46 (1907).
\(^82\) Id. at 117.
\(^83\) 206 U.S. 230 (1907).
to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendants' business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place.84

The Court's views in this regard seem to be eminently sound.85 As Justice Holmes points out, these cases involve an infringement of the states' rights, not as mere occupants, but as sovereigns (or as he puts it, as quasi-sovereigns)86 in their capacity as guardians of the public health, safety, and welfare. Not only would such rights be extremely difficult to value, but to require the "forced sale" of them would seem inharmonious with well-established principles restricting the alienability of attributes of sovereignty. For example, in Northern Pac. R.R. v. Minnesota ex rel. Duluth,87 the Supreme Court held that a municipality could enact a regulatory measure, otherwise a valid exercise of the police power, notwithstanding the regulation might violate a contract the municipality had entered into. The Court said: "[I]t has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away..."88

If the extra-territorial pollution cases are viewed as involving the right of self-protection of the complaining state against outside sources of pollution, the language used by Mr. Chief Justice Fuller in New York & N.E.R. Co. v. Town of Bristol,89 seems remarkably apt: "The gov-

84. Id. at 237-38.
85. But cf. dicta in the Wyandotte case which states that the higher burden of proof may also be applied where the defendant is not a state. Ohio v. Wyandotte Chemical Corp., 401 U.S. 493, 501 n.4, 2 ERC 1331, 1334 n.4 (1971).
86. The fact that a state has limited sovereignty in relation to other states and the federal government should not in these circumstances limit its dignity as regards a private party. Cf. The Trail Smelter (United States v. Canada), 3 U.N.R.I.A.A. 1905 (1941), 35 AM. J. INT'L L. 684 (1941):

There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States.

Id. at 1964, 35 AM. J. INT'L L. at 714.
87. 208 U.S. 583 (1908).
88. Id. at 596.
89. 151 U.S. 556 (1894).
ernmental power of self-protection cannot be contracted away, nor can the exercise of the rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. 90

A recent decision of the Supreme Court indicates an additional basis for hostility toward money damages in parens patriae actions—the danger of double recovery inherent in such actions. In Hawaii v. Standard Oil Co. 91 the Court refused to allow Hawaii to sue as parens patriae in an antitrust action. While the technical holding of the case was that section 4 of the Clayton Act 92 did not authorize such a form of action, the Court made the following statement on the subject of double recovery:

A large and ultimately indeterminable part of the injury to the “general economy” as it is measured by economists, is no more than a reflection of injuries to the “business or property” of consumers, for which they may recover themselves under § 4. Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State. 93

D. Internal Law of Plaintiff State

In determining what the state will be allowed to complain of, the Court will refer to the plaintiff state’s internal law. 94 Thus, in Missouri v. Illinois, the Court looked to the practices of sewage disposal of Missouri municipalities and determined that Missouri could not complain of similar conduct by the City of Chicago. 95 In Kansas v. Colorado, the Court referred to the reasonable use doctrine adopted by the Kansas courts and applied an analogous doctrine in holding against the state, saying: “[S]he cannot complain if the same rule is administered between herself and a sister state”. 96 In Wyoming v. Colorado, the Court referred to the internal law of the two states involved to decide whether Wyoming might object to the practice in Colorado of diverting

90. Id. at 567. See also 6 E. McQuillin, Municipal Corporations § 24.07 (3d rev. ed. 1969) and cases collected therein.
91. 405 U.S. 251 (1972).
93. 405 U.S. at 264.
95. Where . . . the plaintiff has sovereign powers, and deliberately permits discharges similar to those of which it complains, it . . . offers a standard to which the defendant has the right to appeal. . . .
200 U.S. at 522.
96. 206 U.S. at 104-05.
water from the watershed in which it naturally flowed. Since Wyoming permitted such practice within its own borders, it was not allowed to object to the same practice in Colorado. In that case the Court also held that Colorado, having recognized the appropriation doctrine for its own citizens, would be bound under a similar interstate appropriation doctrine, and must respect the prior appropriative rights acquired by Wyoming settlers.97

It must, however, be borne in mind that as plaintiff the state is not limited to the rights of an individual. Therefore the applicability even of principles which it adopts for governing its own citizens are not necessarily binding on it in its controversies with outside defendants. A good illustration of this point is found in Connecticut v. Massachusetts.98 There Connecticut brought an action to enjoin the diversion of waters in Massachusetts, which waters would otherwise flow through Connecticut. Both states recognized the riparian doctrine that "each riparian owner has a vested right in the use of the flowing waters and is entitled to have them flow as they were wont, unimpaired as to quantity and uncontaminated as to quality."99 The Court, however, refused to enforce the common law principles of riparianism as between the states. It said:

[T]he laws in respect of riparian rights that happen to be effective for the time being in both States do not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented. . . .

. . . The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right. Kansas v. Colorado . . . . And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight.100

The Court chose instead to decide the case on the basis of "equality of right," and concluded that the diversion would not cause damage to the substantial interests of the plaintiff, which alone would justify injunctive relief.

E. Relation to Police Power

At the foundation of the right which has been recognized in Texas v. Pankey, as well as in the water allocation cases, is the principle that

97. 259 U.S. at 419.
98. 282 U.S. 660 (1931).
99. Id. at 669.
100. Id. at 670.
under our federal system, it is the state which has basic responsibility for the protection of the health, safety, and welfare of its inhabitants. Internally, these responsibilities are met through exercise of the state's police powers, which are recognized to be quite vast—they are limited only by the powers which the state has given up to the federal government, and by specific constitutional limitations, principally the concept of due process, which prohibits arbitrary regulations. Among the police powers of a state is the power to declare pollution to be a crime, or a public nuisance, and the power to abate that pollution.

It is elementary, however, that the state does not have the power to regulate extraterritorial activities which are harmful to the health, safety, and welfare of its inhabitants. Its legislative powers only extend to its own boundaries. Thus, if the state is to carry out its function of protecting the health, safety, and welfare of its citizens, the right to seek judicial redress of its grievances against outsiders must be recognized. Perhaps elements of this reasoning underlie Mr. Justice Holmes' opinion in *Georgia v. Tennessee Copper Co.*, where he said:

> This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power.

Future decisions may hold the right of the state to obtain abatement of outside pollution comparable—although not identical—to its power to prohibit pollution from within under its police powers. This would seem to be a reasonable result, inasmuch as it does very little good to eliminate pollution from within if the problem remains virtually as

101. The Supreme Court has often said that the police power is "one of the least limitable of governmental powers." *See*, e.g., Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1946); District of Columbia v. Brooke, 214 U.S. 138, 149 (1909). As to the permissible limits of the police power, see generally 6 E. McQuillin, *supra* note 90, at § 24.09; Dunham, *A Legal and Economic Basis for City Planning*, 58 Col. L. Rev. 650 (1958); Sax, *Taking and the Police Power*, 74 Yale L.J. 36 (1964).

102. *See* Restatement (Second) of Torts, Explanatory Notes § 821B at 12ff (Tent. Draft No. 16, 1970). Pollution control is regularly held to be within the police power: "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960). *See also* Pollack, *Legal Boundaries of Air Pollution Control—State and Local Legislative Purpose and Techniques*, 33 Law & Contemp. Prob. 331 (1968); Annot., 32 A.L.R.3d 215 (1970).

103. See text accompanying note 45 *supra*.

104. 206 U.S. at 237.
great as it was because of outside sources, and it appears a logical extension of the language of Justice Holmes that "[the state] has the last word as to whether . . . its inhabitants shall breathe pure air." It seems reasonable that just as the exercise of the police power of a state to combat pollution from internal sources receives sympathetic consideration in the courts, so also the other aspect of the same problem, control of pollution from outside the state, ought to receive equally sympathetic treatment.

Of course this analogy can not be carried beyond its logical limits. To give recognition to a state's environmental right to have relief against outside polluters would not necessarily be to allow one state to exert its police powers *qua* police powers in territory beyond its own borders. Such an attempt would not only be alien to our system of federalism, but destructive of the principle of equality of "sovereign" or "quasi-sovereign" states which the "environmental right" here under discussion seeks to recognize. But here the object of the action is remedial, rather than penal. The state right properly defined would only provide that, to the extent necessary to preserve its citizens' health, safety or welfare, a state could be heard, in a federal court, as a matter of federal right, to complain of activities which unreasonably interfere with the quality of its physical environment. If the relief sought would significantly interfere with the legitimate policies of the state in which the offensive activity occurred, the principle of equality would require that the courts be extremely reluctant to grant it. If no unreasonable interference were involved, then granting the equitable relief sought would not seem incompatible with rational and proper concepts of federalism and the freedom of states from internal interference by other states.

CONCLUSION

The notion that a state may in a proper case obtain judicial relief against pollution from outside its own boundaries has become firmly established as a principle of federal common law. In *Illinois v. City of Milwaukee*, the Supreme Court clearly affirmed that principle, cogently articulated in *Texas v. Pankey*, and put to rest any contrary implications suggested by *Ohio v. Wyandotte Chemical Corp.*

The state-instituted lawsuit, brought under federal law to obtain relief against extraterritorial pollution which interferes with the health, safety, and welfare of the citizens of the complaining state, has the potential to be a significant factor in the legal aspect of the struggle.

105. *Id.*

106. *See Garton, supra note 1.*
for environmental conservation.\textsuperscript{107} The state enjoys a special status when it sues as \textit{parens patriae} to protect the health, safety, and welfare of its citizens; it is not to be treated as though it were a mere individual seeking to protect personal or proprietary interests. As a result, its prospects for securing injunctive relief will ordinarily be better than those of a private plaintiff. This type of action will not raise the troublesome questions of standing which often bedevil private plaintiffs. There exists adequate precedent upon which can be built viable doctrines which will regulate conflicting state interests in pollution control. Although such doctrines will inevitably be based upon equity, rather than absolutes, they will provide an important basis for pollution control which is not presently to be found outside of federal common law. Recognition of such doctrines will enable a state to carry out anti-pollution objectives with less danger that its policies will be subverted by polluters in another state. The state-instituted lawsuit under such doctrines is a procedure which is essential if the state is to continue its historic role as protector of the health, safety, and welfare of its citizens.

\textsuperscript{107} But see Note, \textit{Federal Common Law and Interstate Pollution}, 85 \textit{Harv. L. Rev.} 1439 (1972) concluding that "it seems doubtful that federal courts fashioning this federal common law will create a body of law capable of making a distinctive contribution to the solution of environmental problems." \textit{Id.}, at 1439.