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The Original and Exclusive Jurisdiction of the United States Supreme Court

Wienczyslaw J. Wagner*

1. The Original Jurisdiction of the Supreme Court: Exclusive and Concurrent

The scope of the original jurisdiction of the Supreme Court\(^1\) is delimited by the Constitution itself.\(^2\) Art. III, Sec. 2 (2) provides that:

In 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.\(^3\)

It is interesting to note the close connection of these provisions with international law; the first class of cases submitted to the original jurisdiction of the Supreme Court involves the relations of the union with foreign countries; the second is not less vital for the nation: it concerns con-

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1. During the debates preceding the establishment of the union, suggestions were advanced that the Supreme Court have only appellate jurisdiction. The plan submitted by Virginia proposed "[t]hat the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort . . . ." On the contrary, the New Jersey plan conferred upon the federal judiciary "to consist of a supreme tribunal," original jurisdiction "on all impeachments of federal officers," but appellate jurisdiction "in all cases touching the rights of ambassadors." A. T. Prescott, Drafting the Federal Constitution (1941), 50-54.


3. Most discussions about the Supreme Court in the Constitutional Convention and in the ratifying conventions concerned just its original jurisdiction. H. Tweed, Supra note 2, at 6.
troversies in which the member states are parties; as they still retain their sovereignty or quasi-sovereignty, the Supreme Court assumes the role of a quasi-international tribunal and applies, in some instances, the principles of international law.

The provisions of Art. III, Sec. 2 (2) are clear in that they do not leave any power to Congress to limit the Court's original jurisdiction. On the contrary, the appellate jurisdiction of the Court is subject to the regulations of Congress, by virtue of the next provisions of Art. III, Sec. 2 (2):

In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

It has been held, in early years of the union, that Congress not only has no power to limit the original jurisdiction of the Supreme Court, but it also cannot extend this jurisdiction. Marbury v. Madison, which established the doctrine of judicial review of the acts of the legislature, is also an authority for the construction of the original jurisdiction clause of the Constitution. Chief Justice Marshall, speaking for the Court, stressed the fact that the Constitution enumerates the powers of the Supreme Court, "and proceeds so far to distribute them, as to define the

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4. "It is declared that 'in all cases affecting ambassadors, &c., . . . the supreme court shall have original jurisdiction.' Could congress withhold original jurisdiction in these cases from the supreme court? . . . the framers of the constitution used the words in an imperative sense." Justice Story, delivered the opinion in Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304, 352, (1816).

5. However, "[i]n the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot change it. In all other cases its power must be appellate." Note by Chief Justice Taney, inserted by order of the Court, following the opinion in the case of United States v. F. P. Ferreira, 13 How. (154 U.S.) 40, 53, (1851). The United States v. Yale Todd case, referred to by the Court, was decided by the Supreme Court in 1794 but not printed, as there was no official reporter at that time.

6. 1 Cranch (5 U.S.) 137 (1801).
jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction." He drew the inference “that in one class of cases its jurisdiction is original and not appellate; in the other it is appellate, and not original,” and held the provision of Sec. 13 of the Judiciary Act of 1789, which empowered the Supreme Court to issue writs of mandamus to “persons holding office under the authority of the United States,” unconstitutional.

The interpretation of the Constitution, expressed in the rule of *Marbury v. Madison*, that original jurisdiction of the Supreme Court cannot be either extended or limited, has been reaffirmed more than once, and is one of the fundamental restraints on Congress in its powers in respect to the regulation of the distribution of competence between the federal courts. Irrespective of the acts of Congress, the Supreme Court will not assume original jurisdiction of cases not enumerated in the Constitution.

However, it does not follow that the whole original jurisdiction of the Supreme Court must be exclusive; among the cases which, by virtue of the Constitution, may be brought before the Supreme Court as the court of first instance, two classes may be distinguished: one, comprizing cases the circumstances of which require them to be within the exclusive jurisdiction of the highest federal tribunal, and the other, which may be submitted to a lower federal court as well.

The distinction is based upon the principle that the dignity of some parties to a suit does not allow the United States to compel them to be sued before any lower court. These parties are: states, members of the union, which

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7. An Act to establish the Judicial Courts of the United States, 1 STAT. 73 (1789).
8. And this in spite of the fact that Chief Justice Marshall, in delivering the opinion in *Marbury v. Madison*, “used language . . . which might, perhaps, imply that such original jurisdiction as had been granted by the Constitution was exclusive.” *Ames v. Kansas ex rel. Johnston*, 111 U.S.449, 467, (1884). As understood by Circuit Justice Taney, the Court said “in general terms,” in *Marbury v. Madison*, “that the original jurisdiction conferred on the supreme court was exclusive.” *Gittings v. Crawford*, 10 Fed.Cas.447, 448, No. 5,465 (C.C.D.Md.1838).
9. Of course, in accordance with international law, a foreign state cannot be sued, even before the Supreme Court, without its consent.
retain—at least in theory—their “quasi-sovereignty;” and official representatives of foreign sovereign states. Therefore, cases in which they are defendants must be within the exclusive jurisdiction of the Supreme Court; whereas, in cases in which they are plaintiffs the choice of the court may be left to them.

The distinction between the two categories of cases within the original jurisdiction of the Supreme Court was drawn in the earliest days of the nation. From the very beginning of the American federal system the legislature interpreted the Constitution as giving it the power to submit some types of cases within the original jurisdiction of the Supreme Court to the concurrent jurisdiction of lower federal courts. Congress exercised this power in the first Judiciary Act of 1789. Sec. 13 of the Act provided:

That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations, and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party.

Sec. 9 granted to the district courts “jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls.”

The provisions of the Judiciary Act were checked early by the courts. The first reported case is that of United States v. Ravara, involving “a consul from Genoa.” The

10. About their domestics, see infra pp. 129-150.
11. “[T]o compel a state to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister, or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action would be, in many cases, to convert what was intended as a favor into a burden.” Ames v. Kansas ex rel. Johnston, 111 U.S.449, 464. (1884).
12. 2 Dall. (2 U.S.) 297 (C.C.D.Pa. 1793).
case was a criminal one in which the consul was indicted "for a misdemeanor, in sending anonymous and threatening letters to Mr. Hammond, the British Minister, Mr. Holland, a citizen of Philadelphia, and several other persons, with a view to extort money." The United States Circuit Court for the Pennsylvania District took cognizance of the case.

The defendant’s counsel argued that "on account of the defendant’s official character," the "exclusive cognizance of the case" belonged to the United States Supreme Court, and invoked the provisions of Art. III, Sec. 2 of the Constitution. His contentions persuaded Justice Iredell, to whom it appeared that "for obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court, upon all questions relating to the Public Agents of Foreign Nations." Besides, the context of the judiciary article of the Constitution seemed to him fairly to justify the interpretation, that the word original meant exclusive jurisdiction.

However, the two remaining Justices thought otherwise. Justice Wilson delivered an extremely short (nine lines) opinion, asserting that:

although the Constitution vests in the Supreme Court an original jurisdiction, in cases like the present, it does not preclude the Legislature from exercising its power of vesting a concurrent jurisdiction, in such inferior Courts, as might by law be established: And as the Legislature has expressly declared, that the Circuit Court shall have "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States," I think the indictment ought to be sustained.

Justice Peters concurred in Justice Wilson’s opinion, and the motion for quashing the indictment was rejected.13

In a later case, Gittings v. Crawford,14 Circuit Justice Taney’s opinion, delivered for the court, cited some previous cases (reported and unreported) and admitted that

13. The trial was postponed until the next term; the consul was tried in 1794 and found guilty; "but he was afterwards pardoned, on condition . . . that he surrendered his commission and Exequatur." Ibid., 299.
after *Marbury v. Madison* the courts hesitated and in a few dicta expressed the opinion that "the clause granting original jurisdiction to the supreme court was so far exclusive, that congress could not grant original jurisdiction, in the cases enumerated, to an inferior tribunal of the United States," but held that "[t]he original jurisdiction conferred on the supreme court [was] not inconsistent with the exercise of original jurisdiction on the same subjects by the inferior courts of the United States, and there [was] no necessity, therefore, for implying an intention to exclude them."\(^1\)

This reasoning has been repeated in other cases. In *Ames v. Kansas ex rel. Johnston*\(^2\) the Supreme Court stressed the fact that the Judiciary Act of 1789 was passed by the first Congress, "in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the States, and with the objections urged against it." This Congress "did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive." The Court did not find it possible to reject the construction of the Constitution given by a body which included many of its drafters.\(^3\)

The rules settled by the first Judiciary Act have remained in force ever since. The Judicial Code of 1911 repeated the provisions of previous Judiciary Acts practically without change.

Thus, it is now "well settled"\(^4\) that by congressional legislation, cases within original jurisdiction of the Supreme Court may be brought before other federal courts; and it can be added, that they may reach the Supreme Court as an appellate instance, in spite of the sweeping

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3. The persuasiveness of the arguments of the Court is diminished by the fact that another provision of the Judiciary Act of 1789 was held unconstitutional in *Marbury v. Madison* in spite of the prestige of the first Congress which enacted it.
rule of *Marbury v. Madison,*\(^{19}\) that if in some cases the Supreme Court's jurisdiction is original, it cannot be appellate.

By virtue of Sec. 13 of the Judiciary Act of 1789 and the provisions of later judicial codes, controversies of a civil nature where a state was a party were subjected to the original and exclusive jurisdiction of the Supreme Court (with the exception of cases where individuals were the other party). This principle was invoked by California in *United States v. California,*\(^{20}\) where a federal district court took jurisdiction of a controversy brought before it by the United States under Sec. 6 of the Safety Appliance Act, as amended in 1896. The Court held that the United States was entitled to recover a penalty for violation of the Act.

It seems that the case could not be classified as being of a "civil nature"; but the Supreme Court did not decide this question. It held that since the Act, a legislative enactment posterior to the Judicial Code of 1911, expressly provided for concurrent jurisdiction, it superseded the provisions of the Code. Similarly, in *Case v. Bowles*\(^{21}\) it was held that Sec. 205 (c) of the Emergency Price Control Act, specifically conferring upon the district courts jurisdiction of all enforcement suits, superseded the provisions of Sec. 233 of the Judicial Code, giving the Supreme Court "exclusive jurisdiction to try cases between a State and the United States."

The Judicial Code of 1948 limited the exclusive jurisdiction of the Supreme Court to controversies "between two or more States," and submitted suits between the United States and the states to the concurrent jurisdiction. Thus, no special statutory provisions are any longer required to authorize the bringing of such a suit before a federal district court instead of before the Supreme Court.

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19. "The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion." *Cohens v. Virginia,* 6 Wheat. (19 U.S.) 264, 401, (1821).
20. 297 U.S. 175 (1936).
The full text of the provisions of the Judicial Code now in force, relating to the original and exclusive jurisdiction of the Supreme Court, reads as follows:22

(a) The Supreme Court shall have original and exclusive jurisdiction of

(1) All controversies between two or more States;
(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

The next paragraph of the same section subjects other cases within the original jurisdiction of the Supreme Court to the concurrent jurisdiction of the Supreme Court and lower federal courts:

(b) The Supreme Court shall have original but not exclusive jurisdiction of

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;
(2) All controversies between the United States and a State;
(3) All actions or proceedings by a State against the citizens of another State or against aliens.

Before the examining of specific cases of which the Supreme Court has original and exclusive jurisdiction because of the quality of the parties, it should be pointed out that the Court will decline to pass on a case if the character of the controversy is not justiciable but political. This is a general principle limiting the jurisdiction of the courts, and its application to cases where the original jurisdiction of the Supreme Court is invoked has been stressed on various occasions by the Court. Questions

22. 28 U.S.C.A. (Judiciary and Judicial Procedure), Part IV, Chapter 81, Section 1251.
which are not justiciable will not be passed upon by the Court.  

On the other hand the Court will assume its original jurisdiction even in absence of any Congressional legislation regulating the process and mode of proceeding. The Constitution conferred a duty upon the Court, and the lack of any legislation on the subject cannot deprive it of its jurisdiction. Once the jurisdiction of the Supreme Court is established, it will exercise it irrespective of the amount in controversy, since the Constitution did not impose upon it any such limitation.

2. Actions against Ambassadors, other Public Ministers, their Domestic and Domestic Servants

The first class of cases which by virtue of the Constitution are within the original jurisdiction of the Supreme Court are those affecting ambassadors, other public ministers, their domestics and domestic servants.

23. The jurisdiction of the controversies between states "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." Louisiana v. Texas, 176 U.S. 1, 15, (1900). "Jurisdiction over controversies of that sort does not embrace the determination of political questions." Ibid., 23.

The Constitution made some things "justiciable which were not known as such at the common law; such, as controversies between States as to boundary lines, and other questions admitting of judicial solution . . . The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which on the settled principles of public law are not subjects of judicial cognizance, this court has often declined to take jurisdiction." Hans v. Louisiana, 134 U.S. 1, 15, (1890).

24. Florida v. Georgia, 17 How. (58 U.S.) 478, 491, (1855). The Court said that it was itself "authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given."

25. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 300, (1888). The Court added that "Congress has never imposed (if indeed it could impose) any such limitation"; and it seems that Congress could not thus limit the Supreme Court's jurisdiction.

26. A case brought against a person guilty of violating the diplomatic immunity of a foreign representative does not "affect" this representative, in the constitutional meaning, and is not within the original jurisdiction of the Supreme Court. In United States v. Ortega, 11 Wheat. (24 U.S.) 468 (1826), it was unsuccessfully contended that the case involving an assault on a public minister was covered by the constitutional clause. As early as in 1790, persons guilty of "offering violence" to an ambassador or other public minister were subjected to imprisonment not exceeding three years and fined (An Act for the Punishment of certain Crimes against the United States, 1 Stat. 112, 118, Sec. 28). By virtue of the Federal Criminal Code now in force, the crime of "assaulting public minister" is punishable by a fine not more than $5,000 or imprisonment for not more than three years, or both. In Farnsworth v. Sanford, 33 F.Supp. 400 (1940), aff'd 115 F.2d 375 (certiorari and rehearing denied), it was held that a suit against an American citizen in a
ministers and consuls. The Constitution recognized that the prestige of the sovereign nations which they represent requires the submission of such cases to the original jurisdiction of the highest tribunal of the United States. In respect to actions against ambassadors, public ministers, their domestics and domestic servants, the Judicial Code made this jurisdiction exclusive.

In the courts of the United States the term "public minister" has been understood as covering all persons entitled to diplomatic privileges and immunities. Therefore, the meaning of the term may be found by examining the group of persons to whom the immunities are accorded.

The special position of foreign diplomats, their privileges and immunities, is one of the basic principles of the law of nations recognized for centuries. The Judicial Code expressly limited the Supreme Court's jurisdiction to cases consistent with international law.

Immediately after the Constitution came into effect and the first Judiciary Act was passed, Congress resolved to protect the diplomatic privileges of foreign representatives

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27. A rationalization of the constitutional provision has been given by Hamilton: "Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judiciary of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observations are in a great measure applicable to them." THE FEDERALIST, No. 81 at 416 (edited by Max Beloff 1948).


29. The term "public minister" will be used interchangeably with "diplomat" and "foreign representative."

30. The old principle of immunity of diplomatic representatives from the jurisdiction of the country in which they reside was expounded by Hugo Grotius in DE JURE BELLI AC PACIS: "As to what respects the personal effects [mobilia] of an ambassador, which are considered as belonging to his person, they are not liable to seizure, neither for the payment nor for the security of a debt . . . for an ambassador, in order to enjoy complete security, ought to be exempt from every species of restraint, both as to his person, and to those things which are necessary for his use. If, then, he has contracted debts, and if, which is usually the case, he has no real property [immobilia] in the country, he should be politely requested to pay, and, if he refuses, resort must be had to his sovereign." H. TAYLOR, JURISDICTION AND PROCEDURE OF THE SUPREME COURT (1905), 47.
in respect to their immunity from judicial process by some provisions of the Act for the Punishment of certain Crimes against the United States,\textsuperscript{31} of April 30, 1790.\textsuperscript{32} Sec. 25 of the Act is embodied today in Sec. 252, Title 22 U.S.C.A. (Foreign Relations and Intercourse), practically without any change. Sec. 252 declares void "any writ or process . . . whereby the person of any ambassador or public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, and his goods or chattels are distrained, seized, or attached."

Of course, the above provision is but declaratory of the principle of international law, which is deemed to be "a part of the law of the land." But, by its express incorporation in the domestic legal system, the courts and other authorities of the union are made directly bound by it.\textsuperscript{33}

Only in one case does the positive law of the United States permit the bringing of an action against a person "in the service of an ambassador or a public minister," and lift the prohibition of Sec. 252, Title 22 U.S.C.A. This case was provided for as early as in 1790, by the above mentioned Act,\textsuperscript{34} and now, slightly changed, is found in Sec. 252, Title 22 U.S.C.A. It refers to suits where defendant "is a citizen or inhabitant of the United States . . . and the process is founded upon a debt contracted before he entered upon such service." If such a case arises, it seems that the suit can be brought only in the Supreme Court, by virtue of Sec. 1251, Title 28 U.S.C.A.

The permission to sue is probably intended to prevent the debtors from escaping their liability by entering into the service of a foreign representative. However, it has

\textsuperscript{31} The provisions of the Act referring to foreign relations of the United States were based on the Statute 7 Anne, c.12, the wording of which the Act repeated in several instances.

\textsuperscript{32} 1 STAT. 112, 117, Sec. 25, (1790).

\textsuperscript{33} Sec. 253, Title 22 U.S.C.A., declares a person guilty of violating Sec. 252 "a violator of the laws of nations and a disturber of the public repose," and provides for him a penalty of imprisonment for not more than three years and fine at the discretion of the court. Sec. 253 is a repetition of Sec. 26 of the Act of 1790.

\textsuperscript{34} 1 STAT. 112, 118, Sec. 27, (1790).
never been applied. It was invoked in *Carrera v. Carrera*, not before the Supreme Court, in an action by the wife of defendant for separate maintenance for herself and for the custody of and support for their fifteen year old son. Defendant, although not an American citizen, resided permanently in the United States and entered into the service of the Czechoslovakian Ambassador. The United States District Court for the District of Columbia dismissed the suit, and the Court of Appeals affirmed, holding that it cannot regard defendant's "moral or legal obligation to support his child . . . as a 'debt contracted before he entered upon' the Ambassador's service." The Supreme Court will entertain a suit against a foreign diplomat only if the action is "not inconsistent with the law of nations." Thus, international law must be consulted in each case where a suit is brought.

The only clear case where the suing of a foreign representative is permitted by international law, is when his diplomatic immunities are waived. By waiver defendant becomes submitted to the jurisdiction of the United States courts. The waiver may concern the protection given defendant by the law of nations, but it cannot relate to the jurisdiction of the courts. Their jurisdiction is mandatory and cannot be changed by the parties. Even if the immunity is waived, the diplomat remains a "public minister." Thus, a suit against him is cognizable only by the Supreme Court.

The waiver of the broad immunities of a public minister, or of the much more limited privileges of a consul, cannot be effected by defendant himself, either by his general appearance, or his pleading to the merits, or any other means. The privilege is not his; it is accorded to the sovereign whom he represents. Therefore, only the sending

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36. Ibid., 498.
state may renounce the privilege of its representative by its government or the chief of the mission.39

In practice, cases of waiver happen very rarely. Therefore, the application of Sec. 1251(a)(1) of the Judicial Code is extremely restricted, and the cases which arise in the courts in the United States, involve the question of whether defendant is a foreign diplomat, entitled to full immunities and not subject to the jurisdiction of the courts at all, rather than of whether because of his character defendant could be sued only in the Supreme Court. The decisions reached, however, also have a direct bearing on the question of who may be sued in the Supreme Court in the exercise of its original and exclusive jurisdiction, if the circumstances of the case permit such an action. The possibility of invoking this jurisdiction in a suit against a foreign representative is always imminent.

What class of persons should be considered as “ambassadors or other public ministers of foreign states or their domestics or domestic servants,” entitled to a special treatment?

The term “ambassador” is clear; but an interpretation of the expression “public minister” must be made. Of course, the ministers plenipotentiary of foreign states, accredited to the government of the United States, are covered by this term; but it must be understood in a much broader sense, and cover other persons possessing the character of diplomatic representatives and their staffs.40 Thus, it has been held that it includes the chargés d’affaires,41 even if they are consuls, appointed to per-

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37 Pet. (32 U.S.) 276, 284 (1833), the Court said: “If the privilege or exemption [of a foreign consul] was merely personal, it can hardly be supposed that it would have been thought a matter sufficiently important to require a special provision in the Constitution and laws of the United States.”

39. See the Harvard Research in International Law, Diplomatic Privileges and Immunities, Draft Convention (1932), Article 26.


form the duties of a chargé d'affaires only until a minister plenipotentiary should arrive in the United States; the secretaries of a legation; the attachés to a legation, or the press counselors. The Instructions to Diplomatic Officers of the United States, issued in 1927, declares that "[t]he personal immunity of a diplomatic representative extends to his household, and especially to his diplomatic staff. Generally, his servants share therein . . . ."

A proper interpretation of the term public minister has been given by the United States District Court for the Southern District of New York in United States v. Coplon, in which it was said that it "generally denotes an emissary of one sovereign to another sovereign sent to perform diplomatic duties. It encompasses persons of all ranks . . . . The American cases have tended to classify as public ministers all persons entitled under international law to diplomatic immunity, regardless of rank."

In recent years, another group of persons residing within the United States must be recognized as "public ministers": the representatives of various nations in the United Nations and some members of their staffs. Thus, it has been held in City of New Rochelle on complaint of Burkhardt v.

46. Ch.VII, Sec. 8; see 4 MOORE'S INTERNATIONAL LAW DIGEST, 433 ss, 648 ss.
48. In accordance with the HARVARD RESEARCH IN INTERNATIONAL LAW, the privileges and immunities should be understood as relating, in general terms, "to a member of a mission, to a member of his family, and to a member of the administrative personnel." DIPLOMATIC PRIVILEGES AND IMMUNITIES, DRAFT CONVENTION (1932), Article 16.
49. By virtue of the Headquarters Agreement between the United Nations and the United States, 61 Stat. 756 (1946), full diplomatic status is accorded to principal resident representatives to the United Nations of Member-States, and such resident members of their staffs as may be agreed upon between the U.N., the United States, and the Member-State concerned. Art. 105 of the U.N. Charter makes no distinction between the representatives of the Member-States and the officials of the Organization, and requires for them only "such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."
Page-Sharp\(^{50}\) that the secretary of the Australian mission to the United Nations was entitled to diplomatic privileges and immunities. Similarly, in Friedberg v. Santa Cruz\(^{51}\) the New York court held that it had no jurisdiction in an action to "recover damages for personal injuries . . . alleged to have been due to the negligent operation of a motor vehicle owned by defendant . . . and operated by his wife," because defendant was a Permanent Representative to the United Nations from the Republic of Chile, and recognized by the Department of State as entitled to diplomatic privileges and immunities. The court invoked Sec. 15 of Public Law 357 of the 80th Congress, Chapter 482.\(^{52}\) By virtue of this permanent representatives to the United Nations were to be treated in the same manner as diplomatic envoys accredited to the United States. The court recognized Santa Cruz’ defense based on the original and exclusive jurisdiction of the Supreme Court clause of the Judicial Code as "clearly sufficient in law" to dismiss the case.

The representatives of different states in the United Nations should be distinguished from the employees of the Organization. In United States v. Coplon\(^{53}\) an employee of the United Nations was held not to be included in the constitutional provisions relating to "public ministers," in spite of the fact that prior to his arrival in the United States, he was a Third Secretary, employed by the Russian Ministry of Foreign Affairs, and that upon his arrival in the United States he carried a Soviet diplomatic passport bearing a United States diplomatic visa. Thus, the Supreme Court did not have original and exclusive jurisdiction in criminal proceedings against him, and the United States District Court could try the defendant for the offenses charged.\(^{54}\)

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50. 196 Misc.8, 91 N.Y.S.2d 290 (1949).
51. 86 N.Y.S.2d 369 (1949).
52. In other words, the Headquarters Agreement; see note 49.
In some other cases defendants were not recognized as "public ministers" even though they asserted that they were diplomatic representatives of foreign countries accredited to the United States. In Hollander v. Baiz\(^5\) it was held that a United States citizen who was consul general of Guatemala, Salvador and Honduras and was in charge of the legation of these countries during the absence of the minister was not a "public minister" as understood by the laws of the United States. He did not prove that he was a chargé d'affaires \textit{ad interim}, that he was invested with "the principal diplomatic functions," or that the Department of State recognized him as a diplomatic representative.

In Trott v. Tompkins,\(^6\) the Assistant Commissioner for Shipping and Immigration of the Royal Yugoslav Government was not recognized as public minister. It was not proved that the Department of State considered defendant as included in the group of persons to whom the diplomatic immunity extended. Defendant was provided an office in the embassy building, and his work was supervised by the ambassador. But, in this respect, said the court, "the latter's action [was] but an instance, not unusual, of the exercise of a non-diplomatic function by a diplomatic representative," since defendant's duties consisted of transacting business with private persons or organizations not connected with the United States government. The work in which defendant was engaged was "a matter extrinsic to the diplomatic functions" and did not entitle him to diplomatic immunity owed to "members of the official or domestic household of the ambassador," such as "secretaries, military attachés, clerks, or domestic servants."

Sec. 288, applicable to the United Nations. But that Act . . . does not confer general diplomatic status . . . It does confer immunity on U.N. officers and employees for the category of acts performed by them in their official capacity and falling within their functions . . ." \textit{Ibid} 474. Thus, their position is similar to that of consuls. The Court stressed the fact, that in accordance with the U.N. Charter and the Resolution of the U.N. Assembly of 1946, immunities of subordinate officials of the Organization are only very limited.

55. 41 Fed.732 (D.C.N.Y. 1890).
A condition of treating a diplomat or a member of his staff as "public minister," in the meaning of the laws of the United States, is that the United States recognize his government and him as its representative. In *United States v. Skinner* the privileges of a foreign minister were claimed by defendant who "was a minister from the government of Buenos Ayres to that of the United States," but denied by the court on the ground that he was not accredited by the president, and the independence of Buenos Ayres was not acknowledged by the government of the United States. Similarly, the attorney general pointed out that no diplomatic privileges could be granted to Mr. French, who came to the United States to present himself as minister of Nicaragua, where no diplomatic intercourse with the revolutionary government of Nicaragua was established. Mr. French was informed by the Department of State that the United States would not treat him as a minister.

As a general proposition, it may be said that the courts will follow the certificates of the Department of State, relating to the recognition or non-recognition of a state, a government, or the official character of the defendant. The question has not only legal but also political aspects. The certificates of the Department of State may be in various forms. In one case an affidavit of defendant was read "setting forth that he [was] Military Attaché of the French Legation at Washington; also a telegram addressed to John K. Valentine, United States District Attorney.

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57. 27 Fed. Cas. 1123, No. 16,509 (C.C.D.N.Y. 1818).
59. "The constitution of the United States having vested in the president the power to receive ambassadors and other public ministers, has ... bestowed upon that branch of the government, not only the right, but the exclusive right, to judge of the credentials of the ministers so received; and so long as they continue to be recognized and treated by the president as ministers, the other branches of the government are bound to consider them as such. If courts ... could sit in judgment upon the decisions of the executive in reference to the public character of a foreign minister ... and deprive him of the privileges of a minister, what an extraordinary anomaly would such an interference present to the world?" United States v. Ortega, 27 Fed. Cas. 359, 361, No. 15,971, 4 Wash.C.C.531 (C.C.E.D.Pa 1825).
60. *In re Anfrye*, 3 Wkly. Notes Cas. 188 (Pa. 1876).
dated Washington, December 8th, 1876, signed by Hamilton Fish, Secretary of State, recognizing and affirming the said official position of Captain Anfrye." In *United States v. Benner* 61 the court in charging the jury declared that a certificate from the Secretary of State, under the seal of the Department, to show that Mr. Bardis arrived in the United States as attaché to the legation of Denmark, was full evidence of his character as public minister. In *In re Baiz* 62 the Supreme Court declined "to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister." As soon as the Department of State recognizes defendant’s claim of immunity "its determination of that question is conclusive" upon the court. 63 But additional parol evidence as to the period during which a person was recognized as a minister by the Government of the United States may be admitted. 64

On the other hand, the court will not recognize that defendant is a public minister if the Department of State denies him such a character. In *United States v. Coplon* 65 defendant Gubitchev claimed diplomatic immunity; but the Department of State declared that he did not enjoy diplomatic status, and the court held that "[i]t [was] a political decision which the courts do not review." 66 In spite of this holding, the court itself examined the decision reached by the Department of State and concurred in it.

In *Trost v. Tompkins* 67 the court did not recognize as equivalent to a certificate of the Department of State the fact that defendant’s name was printed on the "white list" 68 of the Department, and held that the list was not a con-

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62. 135 U.S. 403 (1889).
68. List of Employees in the Embassies and Legations in Washington Not Printed in the Diplomatic List.
clusive proof of the character of defendant, since it could not be said that the executive's recognition of his character was expressed by it. If, however, beyond the listing of defendant's name in the "white book," there is presented a letter of the Department of State, stating expressly that the listing was made pursuant to the registration of defendant in the Department of State as an employee of a foreign ambassador, the court will not inquire into the propriety of the listing, and will accept the evidence as conclusive. 69

The term public minister may be interpreted broadly, in order to harmonize the United States laws with the requirements of the law of nations. But, however extensive, no construction of the term can cover the domestics and domestic servants of ambassadors and public ministers.

Congress cannot extend the original jurisdiction of the Supreme Court to cases not provided for expressly by the Constitution; thus, how could the Judiciary Acts confer original and exclusive jurisdiction of the Supreme Court on "actions and proceedings against . . . domestics or domestic servants"?

The only possible answer is to find the authorization for the congressional enactments in the term affecting ambassadors and other public ministers, for as a matter of fact, diplomats may be affected not only by suits to which they are parties. Suing of their "domestics or domestic servants" may also be a matter of concern for them and a hindrance in the performance of their official duties. This interpretation of the constitutional provisions was probably the basis for the first Judiciary Act.

The term domestic is defined in Webster's International Dictionary as "of or pertaining to the household or family." In the sense used in the Judiciary Acts it should be understood as covering members of the family of public ministers. The Harvard Research in International Law speaks generally about the "members of family," whereas the Havana Convention on Diplomatic Officers (1928) restricts the im-

munities to "members of the respective families living under the same roof." The latter interpretation of the term *domestic* was adopted in *Friedberg v. Santa Cruz,* which followed the Havana Convention. The New York Court emphasized the fact that "in present day usage the word 'domestics' is ordinarily understood as meaning household servants," but that it must be viewed in the light of historical considerations and of the fact that in using the words *domestics* and *domestic servants* Congress intended to ascribe a different meaning to each term. Thus, the wife of a public minister was recognized as a domestic of her husband and as suable only in the Supreme Court in the exercise of its original and exclusive jurisdiction.

The domestic servants of foreign representatives will be deemed as covered by the Judicial Code provisions irrespective of the function they perform: the cook of the chargé d'affaires of Sweden and Norway, or the butler and chauffeur of the Czechoslovakian Ambassador. The United States legal system places them practically on the same footing with the diplomats, contrarily to the practice of some other nations. The trend to curtail their immunities is reflected in Art. 23, *Draft Convention, Diplomatic Privileges and Immunities.*

There was a conflict of opinion as to what extent diplomatic privileges and immunities granted to ambassadors and public ministers resident in the United States are to be accorded to diplomats who sojourn in the United States only temporarily or in transit. In *Carbone v. Carbone* the Supreme Court of New York County invoked the principles of international law and held that defendant who

70. 86 N.Y.S.2d 369 (1949).
71. "In our opinion, the term 'domestic' . . . includes a member of the ambassador's or minister's family, dwelling in his household." *Ibid.*, 371.
74. Art. 23: "Subject to the provisions of this convention, a receiving state may exercise jurisdiction over any member of the administrative or service personnel of a mission, only to an extent and in such manner as to avoid undue interference with the conduct of the business of the mission."
75. 206 N.Y.S. 40, 123 Misc. 656 (1924).
was a diplomatic attaché of the Republic of Panama, attached to its legation in Italy, was entitled only to "certain" immunities. Accordingly, it vacated the order to arrest defendant, but refused to vacate the service of summons in plaintiff's action for divorce. The court did not think that the suit could have been brought only in the United States Supreme Court. 76

In other cases, however, an absolute immunity of diplomats in transit was recognized by the courts. Thus, in *Wilson v. Blanco* 77 the New York Superior Court vacated a judgment against a minister plenipotentiary from Venezuela to France, who was served process while waiting in the City of New York, to take "early means of conveyance . . . to France." In the light of the wording of the constitutional provisions, which do not qualify the ambassadors and other public ministers to which they refer, if not in the light of the principles of international law, this decision seems to be well taken. By virtue of these provisions, supplemented by those of the Judicial Code, diplomats in transit should be sued only before the Supreme Court in the exercise of its original and exclusive jurisdiction in the rare cases permitted by international law.

The immunity of public ministers in transit from service of civil process in the United States through which they may pass on the way to their posts was upheld by the United States District Court for the Southern District of New York in the recent case of *Bergman v. De Sieyes* 78 in which no service of process was allowed to the minister of France to Bolivia. The court did not attempt to find the solution of the problem in the construction of the Constitution or statutes, but, admitting that there was a conflict in the courts' decisions, founded its opinion primarily on the law of nations which it examined extensively. 79

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76. Federal courts refuse to take jurisdiction of cases involving divorce.
77. 56 N.Y. Super. Ct. (24 Jones & S.) 582, 4 N.Y.S. 714 (1889).
79. The *HARVARD RESEARCH IN INTERNATIONAL LAW* limits the immunities of the members of a mission in transit to persons who represent a state recognized by the state of transit, which should be notified of the official character of such a person (Art. 15 of the Draft Convention).
It seems that this court's opinion indicates a trend which will be followed.

Consuls are not included in the group of foreign representatives who may be sued only in the Supreme Court. This distinction is based upon the difference between the character of a public minister and that of a consul, a distinction well settled in the law of nations.\(^8\) International law requires freedom of public ministers from being sued in the country where they are accredited; but this requirement does not refer to consuls.\(^8\) It is true that consuls are often accorded a treatment different from that of any other individual. But, apart from the acts strictly connected with the performance of their official duties, this attitude is the result of either comity or of special conventions between the states, not of a positive command of international law. The rule that all cases to which consuls are parties have to be brought in the federal courts has its rationale in the fact that they are appointed to and received by the union, not by the states, which abandoned all their international law personality to the United States. The distinction between public ministers and consuls persists in the United States legal system\(^8\) as well as in others.\(^8\)

And, indeed, it seems that in no country is there a law by virtue of which a suit against a foreign consul may be

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80. "[I]t is now fully settled that a consul is not a public minister. He is not considered as such by the writers of the law of nations, because he is not in any degree invested with the representative character; and it has, more than once, been judicially determined that he is not entitled to the privileges attached to the person of every public minister." 1 Op. Atty. Gen. 42 (1794).

81. A consul "is not privileged from legal process . . . by the general law of nations." 1 Op. Atty. Gen. 77-78 (1797).


83. "[I]t is universally recognized as a principle of international law that, in the absence of express agreement therefor, immunity does not extend to consuls, who are merely commercial representatives of foreign states." Carrera v. Carrera, 174 Fed.2d 496, 498 (C.A.D.C. 1948). In an early case, it was said: "Nor is there anything in the official character and functions of a consul which should lead us to suppose that the framers of the constitution meant to confine cases affecting . . . [consuls] exclusively to the Supreme Court. A consul is not entitled, by the law of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides; and may be punished in its courts for any offence he may commit against its laws. He, usually, is a person engaged in commerce." Gittings v. Crawford, 10 Fed.Cas. 447, 450-451, No. 5,465 (C.C.N.Y. 1838).
brought only in the Supreme Court. The commercial, and not diplomatic character of the consul, is reflected in the practice often followed by the states, of appointing as their consuls businessmen or other persons, nationals and residents of the state in which they are to perform their functions. This practice was so frequent that it was held in *Borr v. Preston* that where it does not appear from the record that the consul is a foreign national he will be considered as a United States citizen. On the contrary, as a general rule, a United States citizen will not be recognized as a public minister of a foreign country.

In view of the purpose of the constitutional provisions granting to ambassadors, other public ministers and consuls a special position before the United States courts, it is clear that they did not refer to American diplomats and consuls to foreign countries. A contrary construction based upon the mere wording of the Constitution was rejected by the courts.

The foreign “public minister” should be treated as such as soon as he enters the territory of the United States, even before he is received by the president if consent of the United States to his appointment has been given in advance. His character should be recognized still after the termination of his duties until he leaves the United

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84. Gittings *v.* Crawford, *supra* note 83 at 451: “In this country, as well as others, it often happens that the consular office is conferred by a foreign government on one of our own citizens.”

85. 111 U.S. 252 (1894).

86. Answering the request to recognize the appointment of Mr. Baiz, a United States citizen, as chargé d’affaires of Honduras, the Secretary of State wrote: “A difficulty arises in the fact... that you are a citizen of the United States. It has been the almost uniform practice of this government to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The... immunities and... privileges attaching to the office of a foreign minister make it not only inconsistent, but at times even inconvenient, that a citizen of this country should enjoy so anomalous a position.” *In Re Baiz*, 135 U.S. 403, 411 (1890).


88. “If, if the person is already within the territory of the receiving state, as from the time of his becoming... a member of a foreign mission,” adds the Harvard Research in International Law, Draft Convention, Article 16.

89. H. TAYLOR, JURISDICTION AND PROCEDURE OF THE SUPREME COURT (1905) 47.
States without unreasonable delay. The courts will have to treat him as foreign public minister or consul so long as the United States government does not withdraw its recognition of his official position. Thus, *United States v. Trumbull* held that a vice-consul of Chile, who possessed an unrevoked *exequatur* granted him by the United States, did not lose his official character in spite of the fact that the government which appointed him was overthrown in a revolution and a new government was established. Similarly, the former chargé d'affaires of Portugal, Barrazo Pereira, was held entitled to his immunities even after Mr. Torlade d'Azambuja was appointed and received by the United States as his successor. A suit by the latter against the former was dismissed. If, however, a public minister resigns his position, returns his diplomatic identification card and remains in the United States, he will enjoy the immunity from suit only in respect to causes of action which arose when he still performed his official duties. Of course, after a public minister's duties are terminated and he returns to his country he is no longer entitled to diplomatic immunity.

In the light of the foregoing observations, it is clear that in spite of the fact that Estonia, Latvia and Lithuania were annexed by the Union of Soviet Socialist Republics during World War II and do not exist any longer as independent countries their diplomats, appointed before the annexation, have to be recognized as immune from being sued on any cause of action in any court except the Supreme Court. The annexation of the Baltic countries was not recognized by the United States, and their representatives are still considered as "public ministers."

90. HARVARD RESEARCH IN INTERNATIONAL LAW, DRAFT CONVENTION, Article 29: "until such persons have had reasonable opportunity to leave the territory of the recognizing state."
91. 48 Fed.94 (D.C.S.D.Cal. 1891).
95. Cf. The Maret, 145 F.2d 451 (C.C.A.3d 1944), where the Acting Estonian Consul General in New York was recognized as such by the Court four years after the annexation of Estonia by the U.S.S.R.
3. Controversies between the States of the Union

After the establishment of a federal union had been decided, it was necessary to provide for some peaceful means of settling disputes between the members of the federation.

Article IX of the Confederation provided for an arbitral settlement of controversies between the states by a tribunal ad hoc, composed of judges appointed by the parties directly or with the help of Congress in case of lack of agreement. A few disputes were settled in accordance with Article IX. A similar procedure was suggested at the Constitutional Convention of 1787, but rejected on the motion of Rutledge who considered it necessary under the Confederation, but superfluous in view of the fact that a national judiciary would be established.

Thus, controversies between the states have been subjected by the Constitution to the federal judiciary, and the Judiciary Acts conferred upon the Supreme Court exclusive jurisdiction of such cases. The defendant states cannot set up the defense that they acted as sovereigns. Indeed, one of the bases upon which the union rests is the assumption that the controversies between its members will be settled by peaceful means. It would ill serve the interstate relations if a state were permitted to declare that it does not consent to be sued by another state and thus leave the plaintiff without possibility of judicial redress. The anarchy still existing in international law had to be eliminated from the internal structure of the union. As

96. For details, see H. TAYLOR, JURISDICTION AND PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES (1905) 8-9; CHARLES WARREN, THE SUPREME COURT AND SOVEREIGN STATES (1924) 44s.; JAMES BROWN SCOTT, JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION (1919) 2.

97. A. T. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION (1941) 729-730.

98. Commenting upon the original jurisdiction clause of the Constitution Hamilton wrote: "In cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." THE FEDERALIST, No. 81, 416 (edited by Max Beloff 1948).

99. "State is subject to the jurisdiction of the federal courts, in cases provided for by the federal law, irrespective of whether it acts in its 'sovereign' or in its 'private' capacity." United States v. California, 297 U.S. 175, 183. (1936).
a matter of fact, "all the rights of the States as independent nations were surrendered to the United States . . . . Their political status at home and abroad is that of States in the United States." \(^{100}\) They do not exist as subjects of international law. They cannot enter into any relations with foreign states or engage in war without the consent of Congress. Thus, in the light of international law they are not sovereign states any more; however, they like the idea that they retained their sovereignty. \(^{101}\)

Even if it is admitted that the states are still "sovereign," \(^{102}\) by entering the union they consented once and for all to have their disputes settled by the Supreme Court and not to take recourse to war in order to protect their claims. \(^{103}\)

Adjudicating controversies between states which were once independent and still consider themselves "sovereign" or "quasi-sovereign," the Supreme Court may assume the role of a quasi-international tribunal. \(^{104}\) But the scope of the law it can apply is broad: it should base its decisions on international as well as on municipal law. \(^{105}\) Therefore, its rule of decision should not be, in all cases, that "which controls foreign and independent states in

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100. Chief Justice Waite in New Hampshire v. Louisiana, 108 U.S. 74 (1883)

101. Actually, "sovereignty" means "supreme power," not subjected to any limitations. But the creation of the Union imposed limitations on the power of the States. Their "sovereignty," resting upon the powers not delegated to the United States, may be compared to that of a county enjoying an autonomy as to matters within its "domestic jurisdiction."

102. How difficult it is to make the theory of the sovereignty of the States of the Union understandable is well illustrated by the following words of Chief Justice Waite in New Hampshire v. Louisiana, supra note 100: "The States are not nations, either as between themselves as towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality."

The concept of a sovereignty within some sphere does not exist in international law, and the setting up of "nationality" as a fuller "sovereignty" is puzzling.

103. In international law such a consent might have been given still before the first World War by the device of "compulsory arbitration" treaties and was extended by the system of the League of Nations and the United Nations (particularly, by the "optional clause," Art. 36 of the Statute of the International Court of Justice).

104. Cf. supra, pp. 111-112.

105. "Sitting, as it were, as an international, as well as a domestic tribunal, we apply federal law, state law, and international law, as the exigencies of the particular case may demand . . . ." Kansas v. Colorado, 185 U.S. 125, 146-147 (1902). See also Connecticut v. Massachusetts, 282 U.S. 600, 670 (1931).
their relations to each other," as was contended by the State of Colorado in *Kansas v. Colorado*.\(^{106}\)

The jurisdiction over controversies between states, conferred upon the Supreme Court is undoubtedly the most important power of the federal judiciary. The Court has been asked to resort to this jurisdiction in many instances, and it has been pointed out that it settled some disputes which if they had arisen between independent nations might have resulted in wars.\(^{107}\)

The Supreme Court has dealt with various aspects of interstate litigation, and the scope of decisional law in that field is broad. The exercise of the Supreme Court's original and exclusive jurisdiction in respect to controversies between the states of the union seems to be a much more interesting and practical problem than that in respect to the other class of suits suable only in the Supreme Court: those against public ministers. It has been dealt with in some treatises and articles.\(^{108}\) The present short observations will only try to delimitate the scope of the Court's jurisdiction and its most outstanding features.

It should be pointed out as a preliminary observation that if a person responsible for the state sues or is sued on behalf of the state, the state itself is considered as plaintiff or defendant, and the original jurisdiction of the Supreme Court attaches. Thus, in *Kentucky v. Dennison, Governor and Executive Authority of the State of Ohio*,\(^{109}\) it was said that it had been settled that:

where the State is a party . . . the Governor represents the State, and the suit may be, in form, a suit by him as Governor

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106. 185 U.S. 125, 143 (1902).
107. In cases of "a situation which, if it arose between independent sovereignties, might lead to war," the Court's "jurisdiction and authority . . . is not open to doubt." Justice Holmes in *Missouri v. Illinois*, 200 U.S. 496, 518 (1906). It must be realized, however, that in the disputes involving boundary questions between independent countries, the determination of an international frontier bears to the inhabitants of the disputed territories consequences much more important than in the boundary litigation between the states of the union.
108. Among the general works dealing with that subject the most important is that of JAMES BROWN SCOTT, *JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION* (1919).
in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant.\textsuperscript{110}

In view of the fact that the Constitution did not impose any restraint on the jurisdiction of the Supreme Court in respect to cases between states, it might seem that any dispute, irrespective of its merits, could be brought in the Supreme Court provided it was not political,\textsuperscript{111} appropriate for settlement by another branch of the government, and that a real controversy existed.\textsuperscript{112} However, this power of the Court was contested in the early days of the union. As in many other instances the powers of a federal organ were interpreted narrowly by the states, and it took some time before it was settled that such a construction of the Constitution was inadmissible.

During the debates in the Constitutional Convention, the Committee of Detail adopted on August 6th, 1787, Art. XI, Sec. 3, which conferred upon the Supreme Court jurisdiction over controversies between two or more states except such “as shall regard territory or jurisdiction.”\textsuperscript{113} The final dropping of this restriction impliedly conferred upon the Supreme Court the jurisdiction upon the questions relating to boundaries between the states. But some states were not prone to recognize this power of the Court.

The leading authority for the Court’s jurisdiction over such controversies is the case of \textit{Rhode Island v. Massachusetts}.\textsuperscript{114}

\textsuperscript{110} \textit{Cf.} Chief Justice Marshall in \textit{The Governor of Georgia v. Madrazo}, 1 Pet. (26 U.S.) 110, 123-124 (1828): “In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made.”

\textsuperscript{111} Controversies between states are “in their nature political, when the sovereign or state reserves to itself the right of deciding on it.” \textit{Rhode Island v. Massachusetts}, 12 Pet. (37 U.S.) 657, 737 (1838).

\textsuperscript{112} Otherwise, the Court will dismiss the action. “The proposed bill of complaint does not present a justiciable controversy between two States. To constitute such a controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State, which is susceptible of judicial enforcement . . . .” \textit{Massachusetts v. Missouri}, 308 U.S. 1, 15 (1939).

\textsuperscript{113} A. T. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION (1941) 673.
In 1832, the State of Rhode Island filed a bill against the State of Massachusetts for the settlement of the boundary between the two states. The exact border-line had never been fixed and constituted a permanent cause of disputes between the states for many years when they were still colonies. While Rhode Island asserted its rights to the territory in dispute, the jurisdiction over it was exercised by Massachusetts.

The case reached its final phase in 1838, when it came for the third time before the Supreme Court. Webster, acting as counsel for Massachusetts, moved to dismiss the bill on the ground that the Court had no jurisdiction of the cause: first, because of the character of the respondent, independent of the nature of the suit; second, because of the nature of the suit, independent of the character of the respondent.

The Court did not have much difficulty in refuting the first argument of the defendant state. It referred to the Constitution by which “it was ordained” that the Court’s power should be exercised “in cases where a state was a party... as one of original jurisdiction. The states waived their exemption from judicial power.”

As to the second objection of Massachusetts, the Court held that “though the Constitution [did] not, in terms, extend the judicial power to all controversies between two or more states, yet in terms exclude[d] none, whatever may be their nature or subject.” Moreover, the con-

114. 12 Pet. (37 U.S.) 657 (1838); a previous boundary dispute between New Jersey and New York, 5 Pet. (30 U.S.) 284 (1831) and 6 Pet. (31 U.S.) 323 (1832), did not result in any leading opinion of the Court.

In New York v. Connecticut, 4 Dall. (4 U.S.) 1 (1799), Connecticut undertook to make grants of tracts of land belonging to New York, and a suit in equity, asking for an injunction, was brought before the Supreme Court. The Court said that it could, unquestionably, settle a boundary dispute between two States; but the real parties in controversy, individuals claiming title to the land, brought suits in the Circuit Court of Connecticut, and the litigation in the Supreme Court arose out of these suits; however, the defendants in the court below were not parties to the case in the Supreme Court. The Court held that “as the State of New York was not a party to the suits below, nor interested in the decision of those suits, an injunction ought not to issue.”


116. Ibid., 721.
stitutional provisions were implemented by the Judiciary Act of 1789.

"[W]here no exception is made in terms," said the Court, "none will be made by mere implication or construction;"\(^\text{117}\) and it expressed the opinion that "it would be a most forced construction" to hold that the controversies which relate to boundary "were excluded from judicial cognizance, and that it was to be confined to controversies to arise prospectively on other subjects." The Court corroborated its reasoning by examining other provisions of the Constitution, which limited the powers of the states in respect to entering into treaties, agreements, and engaging in war.

The opinion of the Court was delivered by Justice Baldwin. In a dissent Chief Justice Taney said that a controversy involving "sovereignty and jurisdiction" of the state over a territory was political and should not be decided by the Court.

Massachusetts, still unwilling to submit to the compulsory jurisdiction of the Court in a boundary dispute, interpreted the Court's decree as upholding its jurisdiction because of the appearance of the defendant state. This interpretation was expressly rejected by the Court in the next case of Rhode Island v. Massachusetts.\(^\text{118}\) The Court held that if the defendant state refused to appear the plaintiff would be allowed to proceed ex parte.\(^\text{119}\)

Since the case of Rhode Island v. Massachusetts, the Supreme Court has decided a large number of boundary disputes between the states. This kind of litigation between states appeared to be most frequent.

It is true that still after Rhode Island v. Massachusetts attempts were made to challenge the Court's jurisdiction. Thus, in Virginia v. West Virginia\(^\text{120}\) it was argued that the Court had no power to settle the boundary between the two states, because the dispute involved the considera-

\(^{118}\) 12 Pet. (37 U.S.) 755 (1838).
\(^{119}\) Justice Baldwin dissented without giving reasons for his dissent.
\(^{120}\) 11 Wall. (78 U.S.) 39 (1871).
tion of questions purely political. But, in spite of the fact that the background of the case was political indeed—the Civil War, the birth of a new state, and popular vote in two counties—the Court applied its "established doctrine" and assumed jurisdiction.

A peculiarity of controversies involving boundary lines between the states is the rule established by the Court in *Florida v. Georgia* that the United States will be permitted to produce evidence, unconnected with the arguments of the litigating states, without becoming a party to the suit in the technical sense of the term. Both states resisted such intervention of the United States. But the Court recognized that the union had a "deep interest in the decision of this controversy" and had no means of review if it were decided adversely to its rights. The United States represented "twenty-nine other States, who [were] also interested in the adjustment of this boundary." Therefore, justice required "that they should be heard before their rights [were] concluded by the judgment of the Court," and the Attorney General of the United States was permitted to intervene and file the testimony referred to in his information.

That the jurisdiction of the Supreme Court extended to any other possible justiciable dispute between the states was much easier to settle than in respect to the most delicate question of boundaries. That it can construe compacts between the states has been held in many instances, e.g. in the mentioned cases of *Rhode Island v. Massachusetts* and *Virginia v. West Virginia*. It has the power, too, to pass upon cases brought by a state as parens

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121. In *Florida v. Georgia*, 17 How. (58 U.S.) 478 (1854), the Court expressed the opinion that "a question of boundary between States is necessarily a political question . . . . But under our form of government a boundary between two States may become a judicial question to be decided by this court."

122. 17 How. (58 U.S.) 478 (1854).


124. Four justices dissented.


126. 11 Wall. (78 U.S.) 39, 55 (1871). The Court held it had the competence to determine how the public debt of the two states should be apportioned.
patriae protecting the interests of its inhabitants.\textsuperscript{127} And it may be said that the general rule has been clearly established

that whenever and in all cases where one state may choose to make complaint against another, no matter whether the subject of complaint arises from the legislation of the defendant state, or from acts of its officers and agents, and no matter whether the nature of the injury complained of is to affect the property rights or the sovereign powers of the complaining state, or to affect the rights of its citizens, the jurisdiction of this court would attach.\textsuperscript{128}

In spite of this rule, in a case involving a "novel character" of the problems presented, the Court may examine the question of whether it is within its jurisdiction although this jurisdiction is not contested by the parties. Thus, in \textit{Texas v. Florida}\textsuperscript{129} the Court inquired, on its own motion, whether it had jurisdiction of a suit in the nature of interpleader brought in order to determine the true domicile of a decedent and the right to levy taxes. The Court assumed equity jurisdiction of the case.

The Supreme Court developed some special rules in respect to the exercise of its jurisdiction in disputes between states.

Thus, the Court will not assume jurisdiction of a case involving matters of slight importance. The Constitution did not fix any jurisdictional amount in cases within the original jurisdiction of the Supreme Court. Nevertheless, the Court itself imposed a limitation, applicable particularly to cases in equity. In \textit{New York v. New Jersey}\textsuperscript{130} the Court said:

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.

\textsuperscript{127} See the fourth part of this article, pages 145-152, \textit{infra}.
\textsuperscript{128} Missouri v. Illinois, 180 U.S. 208, 239 (1901).
\textsuperscript{129} 306 U.S. 398, 405 (1939).
\textsuperscript{130} 256 U.S. 296, 309 (1906).
This requirement has been reaffirmed in other cases and is now well settled. Not only the wrong suffered by the complainant state must be serious, but the evidence presented by it in support of its claim must be clear and cannot present any serious doubts. In *North Dakota v. Minnesota* the Court said:

In such action by one State against another, the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties.

The Court established still some other features of interstate litigation; thus, in cases of such a magnitude, the Court will decline to apply the general rule that "the truth of material and relevant matters, set forth with requisite precision, are admitted by demurrer." The joinder of parties will not be permitted if not strictly necessary, and the Court will consider the cases "in the untechnical spirit proper for dealing with a quasi-international controversy." The question of the execution of the Supreme Court’s decrees is separate from the problem of its jurisdiction. Suffice it to say here, that the defiance of some states to


132. 263 U.S. 365, 374 (1923).

133. See also Colorado v. Kansas, 320 U.S. 383, 393 (1945); rehearing denied, 321 U.S. 803 (1944), where the Court said: "In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State."


135. "Considerations of convenience that in suits between private parties reasonably may justify exercise of discretion in support of such joinders have no bearing in a case such as this." *Alabama v. Arizona*, 291 U.S. 286, 291 (1934).

136. Virginia v. West Virginia, 220 U.S. 1, 27 (1911); cf. New Jersey v. New York, 285 U.S. 356, 342-343 (1931), (bill in equity to enjoin defendant from diverting water from the Delaware River): "We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given in a controversy between neighbor members of a single State.... [T]he effort always is to secure an equitable apportionment without squibbling over formulas."
comply with its decisions in the early days of the union could not seem to be possible today. Anyhow, if the Court had jurisdiction of a controversy, it assumed its duties and proceeded to deliver a judgment irrespective of the position which the states could have taken in respect to the execution of the decree.

The case of Kentucky v. Dennison was a noteworthy exception. A dispute between Kentucky and Ohio, acting by its governor, involved the extradition of Lago, "a free man of color," who enticed a slave "to leave her owner and possessor, and did aid and assist said slave in an attempt to make her escape... against the peace and dignity of the Commonwealth of Kentucky." According to Kentucky law Lago committed a crime. The Governor of Ohio refused the request that he extradite Lago as a fugitive from justice. Kentucky asked the Supreme Court to issue a mandamus. The Court assumed jurisdiction of the case, recognized its justiciable character, and held that defendant had the duty to comply with the request of Kentucky. However, since he refused to discharge this duty, and since there was "no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him," the motion for mandamus was overruled.

The specific circumstances of the case may make us applaud the Court's refusal to issue the mandamus; but it is difficult to agree with the reasoning of the Court. From the time of the Civil War no other case identical to Kentucky v. Dennison can arise; but it is conceivable that a state will decline to extradite a criminal guilty of some other crime. In such a case, it seems that the Court should not make its decision dependent on speculations whether the defendant state will comply with it or not. If an interstate dispute is political, the Court cannot intervene; but once

137. The case of Chisholm v. Georgia, 2 Dall. (2 U.S.) 419 (1793), was a striking example; see infra note 148.
139. Ibid., 67.
it has decided that the controversy is justiciable, its duty is to declare how the wrong committed should be redressed.

The legislative branch of the government should be concerned with the question of how to assure the execution of the Court's decisions. But, in absence of any legislation, the Court itself may provide for some means of execution in some cases.

The famous litigation between Virginia and West Virginia, which reached the Supreme Court nine times, presented in the case of 1918 the question of execution. Virginia applied to the Court for a mandamus to compel the levy of a tax to satisfy the judgment. This time the Court did not think such an action transgressed its powers. It expressly upheld its power to provide for the execution of its decrees; but, showing an extraordinary patience, it still postponed the exercise of this power and gave the defendant state another possibility to take the necessary steps to comply with the judgment. At last, in 1919, West Virginia's legislature provided for the payment of the debt due to Virginia.

Although not expressly overruled, Kentucky v. Dennison is no more a guide for the Supreme Court's decisions.

4. Suits by or on behalf of Individuals against the States

Besides Art. III there is still another provision of the United States Constitution dealing with the federal judiciary. It is the XIth Amendment, limiting the Supreme Court's jurisdiction. The Amendment, adopted in 1798 declares that:

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.

140. However, after the non-compliance of Georgia with one of the Supreme Court's judgments, President Andrew Jackson "is reported to have stamped his foot, saying 'John Marshall has made his decision; now let him enforce it.'" JAMES BROWN SCOTT, JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION (1919) 529.

141. For details of this dispute, see JAMES BROWN SCOTT, op. cit., 519-534.

Today, with the XIth Amendment and Sec. 1251 of Title 28, U.S.C.A., there cannot be any doubt that suits between states and citizens of other states are not within the original and exclusive jurisdiction of the Supreme Court. Suits where states are plaintiffs are within its original and concurrent jurisdiction, and those where states are defendants are not subject to federal jurisdiction at all. These principles, however, could not be deduced from the very text of Art. III of the Constitution which was the only provision to be applied in the earliest days of the United States. And, as a matter of fact, the XIth Amendment repeals in part Art. III, Sec. 2, of the Constitution. While, according to paragraph (2), Sec. 2, the Supreme Court was to have the original jurisdiction in all cases “in which a State shall be a party,” paragraph (1) extended the federal judicial power to controversies “between a State and citizens of another State.”

The provisions of Art. III are clear and it seems that they must be understood as covering cases where states are either plaintiffs or defendants in suits in which individuals are the other party to the litigation. This construction of the constitutional provisions was embodied in Sec. 13 of the Judiciary Act of 1789, which took them just as they were written and did not bar citizens of one state from suing other states before the federal courts. However, it did not submit such suits to the exclusive jurisdiction of the Supreme Court.

144. See supra, page 114.
145. However, Hamilton understood them as subjected to the general principle of the sovereignty of states and wrote: “It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. . . . The contracts between a nation and individuals, are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against states for the debts they owe? How would recoveries be enforced? It is evident that it could not be done, without waging war against the contracting state; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.” THE FEDERALIST, No. 81, p. 417 (edited by Max Beloff 1948).
The provision of the Constitution construed as granting to the citizen of one state the right to sue another state in the federal courts was considered by some founders as "wise," "honest," and "useful;" but "many of the leading members of the convention [argued], with great force, against it."

After the Supreme Court proceeded to render judgments in suits brought by individuals against states, a wide feeling of disapproval on the part of the several states brought about the enactment of the XIth Amendment.

Thus, the problem of suing the states by citizens of other states before the federal courts has been settled early by a constitutional enactment. However, the XIth Amendment did not mention anything about the suing of states by their own citizens before the United States tribunals.

It seems that the judicial power of the union was not intended to extend to such cases, since it was understood that the several states retained their "quasi-sovereignty," and with it—the power over their citizens. But after a hundred years of the union elapsed and no express constitutional provision prohibited such a suit, a case was brought in the United States Circuit Court for the Eastern District of Louisiana by one Hans against his own state. The Circuit Court dismissed the case, and the Supreme Court in affirming based its opinion on the rationale of the XIth Amendment, the pronouncements of some founders like Hamilton, Madison and Marshall, and the spirit of the Constitution. The Court said that plaintiff attempted "to strain the Constitution and the law to a construction never imagined or dreamed of," and held

146. Chief Justice Jay in Chisholm v. Georgia, 2 Dall. (2 U.S.) 419, 479 (1793). Plaintiff was a citizen of South Carolina.
148. The judgment of the Supreme Court in the first case of that sort, Chisholm v. Georgia (supra note 146), was not complied with by Georgia, which "passed a statute making it a felony for any person to execute the process of the Court under a penalty of 'death, without benefit of clergy, by being hanged.'"
ROBERT H. JACKSON, op. cit., 14.
149. Hans v. Louisiana, 134 U.S. 1 (1890).
150. Ibid., at 15.
that the consent of the state to be sued by its own citizens was necessary.\textsuperscript{151}

If a state cannot be sued by an individual, can it become a defendant in a case where another state sues on behalf of its citizen?

The original and exclusive jurisdiction of the Supreme Court is based on the quality of the parties, not on the subject-matter of the controversy.\textsuperscript{152} The Constitution and the judiciary acts laid down the principle that suits in which both parties are states may be brought only in the Supreme Court. However, some limitations on this general principle have been established by the judicial decisions of the Court. Thus, as a broad proposition, the Court held in \textit{Louisiana v. Texas},\textsuperscript{153} that the controversy to be determined by it must be one "arising directly" between the two states, "and not a controversy in the vindication of grievances of particular individuals." There must be "a direct issue" between the states;\textsuperscript{154} and in order that such a controversy can be recognized as existing, "something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another."\textsuperscript{155} In an earlier case\textsuperscript{156} it was held that a state had no interest and could not become a party to litigation where an ejectment suit was brought by an individual against another, in spite of the fact that the case involved the question of the boundary between the two states.

The first famous case which settled the principle that, in order to have the standing to sue, the plaintiff state

\textsuperscript{151} "[I]t has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own State without its consent," and this rule covers also the original jurisdiction of the Supreme Court, since the second clause of Art. III, Sec. 2, of the Constitution merely distributes the federal jurisdiction conferred by the preceding one into original and appellate jurisdiction and does not itself confer any. \textit{Duhne v. New Jersey}, 251 U.S. 311, 313-314 (1920).

\textsuperscript{152} "The original jurisdiction depends solely on the character of the parties." \textit{Louisiana v. Texas}, 176 U.S. 1, 16 (1900).

\textsuperscript{153} \textit{Ibid.}, 16.
\textsuperscript{154} \textit{Ibid.}, 18.
\textsuperscript{155} \textit{Ibid.}, 22.
\textsuperscript{156} \textit{New York v. Connecticut}, 4 Dall. (4 U.S.) 1 (1799); see note 114.
must be a real party in interest was New Hampshire v. Louisiana, decided together with New York v. Louisiana in 1883.\textsuperscript{117} The controversy involved enforcement of the defendant state's contractural obligation which had been assigned by an individual to the plaintiff state only for the purpose of bringing the suit. The rights of the assignor to recovery were reserved.\textsuperscript{118}

The Court examined the history of the XIth Amendment and held that its purpose was to deny any remedy to the individuals before the federal courts in actions against the states. The plaintiff states could not maintain the suit, since it was "beyond all doubt . . . commenced and . . . prosecuted, solely by the owners of the bonds and coupons." Suits brought directly by the individuals were permitted by the Constitution, and there was no reason to believe that "it was the intention of the framers of the Constitution"\textsuperscript{119} to grant a parallel right to the state to sue on behalf of its citizens. Thus, when the XIth Amendment took away the remedy granted by the Constitution, no other was left, and "one State cannot create a controversy with another State . . . by assuming the prosecution of debts owing by the other State to its citizens."\textsuperscript{120}

The decision in New Hampshire v. Louisiana saved to the Court a great number of potential cases involving similar causes of action.

The rationalization of the Court did not cover cases where the plaintiff state becomes an absolute owner of the

\begin{footnotes}
\item[117] 108 U.S. 74 (1883).
\item[118] On July 18, 1879, an act was passed in New Hampshire by virtue of which the citizens of the state, owners "of any claim against any of the United States . . . arising upon a written obligation to pay money issued by such State . . . may assign the same to the State of New Hampshire." Upon the assignment the attorney general was to prosecute an action for the recovery of the money due, to "keep all moneys collected upon such claim . . . separate and apart from any other moneys of this State . . . and pay to the assignor of such claim all such sums of money as may be recovered by him . . . ." Substantially, the same act was passed by the legislature of New York on May 15, 1880.
\item[119] Note 157 supra, 91.
\item[120] It is interesting to recall that before 1948, in the federal practice, the execution of an assignment had no effect upon the jurisdiction of the courts for the citizenship of the first assignor remained controlling. However, this principle had no bearing upon New Hampshire v. Louisiana.
\end{footnotes}
bonds of another state and is maintaining a suit on its own behalf; but in *South Dakota v. North Carolina*\(^{161}\) it was held (four Justices dissenting) that the Court had jurisdiction of a case brought by the plaintiff state against the defendant. Here the plaintiff owned shares of stock and coupons issued by the defendant state which were unpaid for thirty years. The motives of the individual in making a gift of the bonds to the plaintiff were held to be irrelevant.

The construction of the Constitution made by the Court in respect to contractual claims was upheld also in respect to money damages in tort actions. In *North Dakota v. Minnesota*\(^{162}\) one of the counts of action was for money compensation to North Dakota farmers for damages amounting to more than a million dollars. The damage caused by overflows of the Bois de Sioux River was attributed by plaintiff to the construction and operation of ditches by defendant. The Court invoked the XIth Amendment, cited *New Hampshire v. Louisiana*, and denied its jurisdiction to pass upon the claim. In *Massachusetts v. Missouri*\(^{163}\) the Court made a general statement that the plaintiff state "may not invoke our jurisdiction for the benefit of individuals."

The above mentioned holdings of the Supreme Court do not preclude the states from bringing suits against other states in the exercise of their duty to protect their citizens from an imminent danger. A significant case, upholding the right of the state to sue as *parens patriae* "to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action" of another state, is *North Dakota v. Minnesota*\(^{164}\). The case involved the changing of the "method of draining water from lands within its border" by Minnesota.\(^{165}\) The decision was based upon some previous holdings of the Court sustaining its jurisdiction in interstate litigation.

\(^{161}\) 192 U.S. 286 (1904).
\(^{162}\) 263 U.S. 365 (1923).
\(^{163}\) 308 U.S. 1, 17 (1939).
\(^{164}\) 263 U.S. 365 (1904).
\(^{165}\) Ibid., 374.
in actions: to enjoin the deposit by another state, in an interstate stream, of drainage containing noxious typhoid germs because dangerous to the health of the inhabitants of the plaintiff state;\(^{166}\) to restrain one state from a diversion of water from an interstate stream by which the lands of a state lower down on the stream may be deprived of the use of its water for irrigation in alleged violation of the right of the lower state;\(^{167}\) to prevent a state from diverting water from an interstate stream to the injury of rights acquired through prior appropriations of the water by land owners of another state under the doctrine of appropriation recognized and administered in both states;\(^{168}\) or to enjoin a state from enforcing its statute by which the flow of natural gas in interstate commerce from this state was forbidden, to the threatened loss and suffering of the people of the suing state who had become dependent for comfort and health upon its use.\(^{169}\) States have the same right to bring suits as *pars pro tajo* acting on behalf of themselves in order to protect their citizens in instances in which the defendant party is not a state.\(^{170}\)

In the light of these holdings, a general principle may be laid down that the states, as *pars pro tajo*, have the right "to protect [their] citizens in relation to quasi-sovereign interests," but have no standing "to represent their individual rights for the purpose of enforcing their contract, tort, or statutory claims."\(^{171}\)

This principle developed by the Supreme Court is contrary to the practice in international law, although in many respects interstate controversies are comparable to international ones. In the traditional law of nations, individuals are not subjects of international law and may not sue foreign states as long as their government does

\(^{166}\) Missouri v. Illinois, 180 U.S. 208, 241 (1901), and 200 U.S. 396, 518 (1905).

\(^{167}\) Kansas v. Colorado, 185 U.S. 125, 141, 143 (1902).


\(^{169}\) Pennsylvania v. West Virginia, 262 U.S. 555, 592 (1923).


\(^{171}\) J.W. MOORE, COMMENTARY ON THE UNITED STATES JUDICIAL CODE, (1949) 624-625.
not uphold their claim. But each cause of an individual may be supported by his government and thus acquire the character of an international dispute, cognizable by international courts. A number of cases have been decided in accordance with this principle.\textsuperscript{172}

The power of the independent states to espouse the claims of their citizens, incident to national sovereignty, "involves also the national powers of levying war;" whereas, the states of the United States "can neither make war nor peace without the consent of the national government."\textsuperscript{173}

5. Controversies between foreign States and States of the Union

The Supreme Court has original and exclusive jurisdiction of all controversies between two or more states; but how is the word \textit{state} to be understood? Does it cover foreign states, or does it relate only to the states of the union?

All the powers not delegated to the union are reserved for the states; the federal government is not competent to interfere in matters which are within the jurisdiction of the states. On the other hand, the states surrendered to the union the whole area of their foreign relations. They do not possess any personality in the law of nations. As they are not subjects of international law, they do not entertain any diplomatic relations with foreign states; and, in case of an action of a state impairing the interests of a foreign state, the latter may not seek redress by a direct dealing with the state of the union. It is not able to settle the litigation by the usual means applied in international disputes, such as diplomatic negotiations or arbitration. All it can do is to apply to the federal government.

In any case where an international treaty was concluded, the federal jurisdiction increases and the state jurisdiction

\textsuperscript{172} E.g., the Mavrommatis cases, decided by the Permanent Court of International Justice, where the Greek Government maintained suits against the British Government on behalf of its citizen.

\textsuperscript{173} New Hampshire v. Louisiana, 104 U.S. 74, 90 (1883).
must give way by virtue of the supremacy clause of the Constitution. Thus, in the affair of the schools in San Francisco, where the State of California excluded Japanese children from the public schools of that city, contrary to a treaty of 1894 between the United States and Japan, the Japanese government had a legal basis, by virtue of the American legal system itself, to ask the federal government for intervention. Similarly, in the cases of the lynching of Italians the Italian government did not institute any direct actions against the states which might have been held responsible for the mob violence, but intervened before the federal government and invoked the provisions of a treaty granting Italian citizens "the most constant protection and security for their persons and property."

But it is more difficult for a foreign state to seek redress from an unwilling state of the union if no treaty between the foreign state and the United States was concluded and the matter is not within the federal jurisdiction.

It might have seemed that the Constitution did not bar foreign states from suing a state of the union in the Supreme Court. In the early days of the nation, in more than one dictum, the justices of the United States highest tribunal expressed the opinion that such a suit was possible without the consent of the defendant state.

For many years the Supreme Court was not asked to voice an opinion on the problem. It seemed that it would have to decide the question in 1916, when the Republic of Cuba asked leave of the Court to file a declaration against the State of North Carolina. However, the motion was withdrawn before any further proceedings were taken.

175. 3 HACKWORTH'S DIGEST OF INTERNATIONAL LAW (1942) 755-757.
176. 6 MOORE'S INTERNATIONAL LAW DIGEST (1906) 837-849.
177. Ibid., 838.
178. J. J. Lenoir, Suit by a Foreign State against a State of the Union, 7 MISS. L.JOUR. 134, note 3 (1934).
The first and only case which caused the Court to examine the question was *Monaco v. Mississippi* in 1934.\(^\text{180}\)

In 1933 the Principality of Monaco received as an absolute gift some unpaid bonds and coupons issued by the state of Mississippi in the first half of the nineteenth century. The gift was to be used by the Principality “to the causes of any of its charities, to the furtherance of its internal development or to the benefit of its citizens in such manner as it may select.”

Monaco applied to the Supreme Court for leave to bring an action against Mississippi to recover the principal and interest of the bonds, and asserted that plaintiff was a foreign state within the meaning of Art. II, Sec. 2, of the Constitution and that all the requisites for bringing a suit in the Supreme Court were met.

Mississippi, in its return to the rule to show cause why leave should not be granted, raised six objections; but the Supreme Court, speaking through Chief Justice Hughes, found it necessary to deal with only one of them: that which stressed the lack of consent of the State of Mississippi to be sued.

The absence of an express constitutional requirement of consent of a state to be sued was held by the Court to be inconclusive; nothing was said in the Constitution about the necessity of procuring consent of the United States before any action might be brought against it; however, its consent was required in accordance with the principle of the immunity of the sovereign from suit. The X\text{I}th Amendment did not exhaust the restrictions upon suits against states; they retained their sovereignty, and their consent to be sued was necessary, save where there had been “a surrender of [their] immunity in the plan of the convention.”

In respect to controversies between each other, the states waived their exemption from judicial power in Art. III, Sec. 2, of the Constitution, since such waiver was

\(^{180}\) 292 U.S. 313 (1934).
“essential to the peace of the Union.” In the Constitutional Convention there were no discussions relating to suits between the states of the union and foreign states; but in pronouncements posterior to the Convention, Madison, Marshall and Hamilton clearly expressed the opinion that the waiver did not cover suits brought by foreign states, and that in cases other than those between one state of the union and another, or between a state and the union, the full principle of immunity was unimpaired and the consent was necessary. The enactment of the XIth Amendment reinforced this principle. Thus, the waiver of consent did not run in favor of a foreign state; and “the foreign State enjoys a similar sovereign immunity and without her consent may not be sued by a State of the Union.”

Thus, the possibility of a suit against a state of the union by a foreign state was denied by the Court. A new constitutional principle was settled.