Number 83, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

versus

STATE OF LOUISIANA,

Defendant

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF SPECIAL MASTER, DATED SEPTEMBER 15, 1980, AND BRIEF IN SUPPORT THEREOF

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EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

The State of Louisiana, the defendant herein, excepts to the Special Master's Report dated September 15, 1980, in the following respects:

Exception No. 1

The State of Louisiana excepts to the Special Master's recommendation that the State of Louisiana's Motion to Dismiss the Complaint be denied.

Exception No. 2

The State of Louisiana excepts to the Special Master's failure to recommend that the Complaint be dismissed on the ground that the pending tax refund suit filed by the pipeline company taxpayers in the Louisiana state courts provides "an appropriate forum in which the *issues* tendered here may be litigated," *Arizona v. New Mexico,* 425 U.S. 794, 797 (1976), thus making it unnecessary for the Court to exercise any original jurisdiction it may have in this case.

Exception No. 3

The State of Louisiana excepts to the Special Master's failure to recommend that the Complaint be dismissed on the ground that the plaintiff States have no standing, either as proprietary users of natural gas or as *parens patriae* of their gas-consuming citizens, to protest the constitutionality of the Louisiana First Use Tax, LA. Rev. St. 47:1301-1307, as applied to private pipeline taxpayers that in turn pass on to consumers the cost of the tax.

Exception No. 4

The State of Louisiana excepts to the Special Master's failure to recommend that the Complaint be dismissed on the ground that the Complaint does not allege any cause of action or controversy "between two or more States" within the contemplation of Article III of the Constitution or 28 U.S.C. §1251 (a) (1), thus depriving this Court of original jurisdiction over the cause.

Exception No. 5

The State of Louisiana excepts to the Special Master's failure to recommend that the Complaint be dismissed on the ground that this Court's original jurisdiction should not be invoked so as to interfere with the administration of the Louisiana First Use Tax statute, particularly before the Louisiana state courts have had an opportunity to give the statute an authoritative construction, interpretation and application.

Exception No. 6

The State of Louisiana excepts to the Special Master's failure to recommend that the Complaint be dismissed on the ground that the plaintiff States seek to invoke the original jurisdiction of this Court merely to litigate, as volunteers, the tax and constitutional claims of the real parties in interest, the private pipeline taxpayers upon whom the legal incidence of the Louisiana First Use Tax directly falls.

Exception No. 7

The State of Louisiana excepts to all the Special Master's findings of fact and conclusions of law with respect to the foregoing six exceptions, except his finding of fact that:

> Louisiana is, of course, correct in its assertion that no tax is directly imposed by it on the plaintiff States. At no time are

they called on to remit funds to Louisiana; they and their citizens pay the pipelines which are liable for the first use tax.

Exception No. 8

With respect to the Special Master's recommendation that the plaintiffs' Motion for Judgment on the Pleadings be denied "without prejudice to a reconsideration of the issues raised on the basis of further proceedings," the State of Louisiana hereby reserves the right to file exceptions, if any, to the findings of fact and conclusions of law underlying said recommendation until such time as the State of Louisiana files its replies to any exceptions of the plaintiffs to that recommendation.

Respectfully submitted,

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*BRIEF IN SUPPORT OF THE
EXCEPTIONS OF THE STATE OF LOUISIANA
TO THE REPORT OF THE SPECIAL MASTER
DATED SEPTEMBER 15, 1980*

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BRIEF IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

STATEMENT OF THE CASE

On March 29, 1979, the eight plaintiff States moved for leave to file a complaint against the State of Louisiana. The proposed complaint sought (1) a declaration that the Louisiana First Use Tax "is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce;" (2) preliminary and permanent injunctions prohibiting Louisiana from collecting that tax; and (3) an order "that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon."

Paragraph I of the proposed complaint asserted that

> The exclusive original jurisdiction of this Court is invoked under the Constitution of the United States, article III, section 2, clauses 1 and 2 ("Controversies between two or more States"), and 28 U.S.C. §1251 (a) (1) (1976). Plaintiffs have no other plain, speedy or adequate remedy at law and have no remedy whatsoever in any other federal court.

In Paragraph III of the complaint it was further alleged that

> Plaintiffs bring this action in their proprietary capacities as substantial purchasers of natural gas upon which the [Louisiana] First Use Tax will be imposed, and in those capacities will sustain substantial monetary damages as a result of the First Use Tax. Plaintiffs also bring this action in their *parens patriae*, or quasi-sovereign capacities, as guardians of the health, welfare and prosperity of the citizens of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin.

Louisiana responded to the motion for leave to file by a brief in opposition that challenged not only the substantiality of the federal constitutional issues respecting the First Use Tax but also the standing of the plaintiff States to raise those issues. Standing was questioned from the standpoint of the plaintiffs' alleged proprietary capacities as gas consumers and their alleged *parens patriae* representation of their citizens. Louisiana further urged that maintenance of this action was precluded by the prudential abstention doctrine reflected in *Arizona v. New Mexico*, 425 U.S. 794 (1976).

Thereafter the United States and the Federal Energy Regulatory Commission, as *amici curiae*, filed a brief asserting that the plaintiff States did have standing and that the case was otherwise appropriate for the exercise of original jurisdiction. The Arizona case was distinguished *inter alia* because in the instant situation there was — at the time the *amici* brief was filed — no pending suit in any other court that was thought to be "an appropriate vehicle" for the decision of the constitutional issues raised by the plaintiff States.[1]

On June 18, 1979, this Court entered an order that simply granted the motion for leave to file the bill of complaint and gave the State of Louisiana sixty days to answer. No mention was made of the objections raised by Louisiana. Nor was there any finding or determination that the plaintiff States had standing to raise their constitutional objections to the First Use Tax or that this Court's original jurisdiction had been properly invoked.

On August 17, 1979, Louisiana filed an answer to the complaint, accompanied by a motion for the appointment of a Special Master. The answer addressed each paragraph of the complaint, specifically denying the allegations of jurisdiction in Paragraph I of the complaint and the allegations of standing in Paragraph III "either in their proprietary capacity or as *parens patriae* on behalf of their respective citizens." Paragraph LXVII of the answer recited the additional allegation that "plaintiff states are without standing to institute and prosecute this action, and this Court has no original jurisdiction of this cause, all for the reasons set forth in Louisiana's brief in opposition to plaintiffs' motion for leave to file complaint herein."

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[1]In the *Arizona* case, 425 U.S. at 796, it appeared that a declaratory judgment action had been filed by three Arizona utilities in a New Mexico state court prior to Arizona's filing of its motion in this Court to file a bill of complaint. That state court action raised the same constitutional issues that Arizona sought to raise in this Court.

This paragraph of the answer also asserted that the plaintiff States "have other judicial remedies available to them by way of intervention in pending legal proceedings in the courts of Louisiana through which the issues sought to be raised here may be fully litigated and, if necessary, ultimately brought to this Court by direct appeal."

The "pending legal proceedings in the courts of Louisiana" referred to in Paragraph LXVII of the answer related to the filing in a Louisiana state court on June 22, 1979—just four days after this Court granted leave to file the plaintiff States' complaint — of a tax refund suit by the seventeen private pipeline companies. That suit alleged that the Louisiana First Use Tax was unconstitutional for precisely the same reasons that are asserted before this Court by the plaintiff States. *Southern Natural Gas Co., et al. v. McNamara, Louisiana Department of Revenue and Taxation and the State of Louisiana*, Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, Number 225,533.[2] The Federal Energy Regulatory Commission had required that the natural gas pipeline companies — the taxpayers — institute an appropriate refund proceeding in the Louisiana courts as a prerequisite to the Federal Energy Regulatory Commission permitting the First Use Tax to be passed on to their consumers.[3]

On August 28, 1979, the seventeen pipeline companies upon whom Louisiana's First Used Tax is levied filed a motion for

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[2]The petition in that tax refund suit has been reproduced in full (pp. A-1 to A-11) in the Appendix to Louisiana's Brief in Response to Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae, filed in this Court on December 5, 1979.

[3]State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10, "Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed. Reg. 45,553 (October 3, 1978); Order No. 10-A, "Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comment," issued December 20, 1978, 43 Fed. Reg. 60,438 (December 28, 1978), Appeal Docketed, Tennessee Gas Pipeline Company v. Fed. Energy Regulatory Commission, No. 78-38-13, et al. (4th Cir., December 26, 1978); and Order No. 10-B, "Order on Rehearing. Modifying Prior Order and Amending Regulations." Issued March 2, 1979, 44 Fed. Reg. 13,460 (March 12, 1979).

leave to intervene as plaintiffs in this Court and to file a complaint. The proposed complaint, attached to the motion, asserted in its first paragraph that leave was being sought "to file this Complaint in Intervention pursuant to article III, §2, clauses 1 and 2 of the Constitution of the United States ('Controversies ... between a State and Citizens of another State'); Rule 9 of this Court; and Rule 24 of the Federal Rules of Civil Procedure." Paragraph 10 of the proposed complaint stated that each intervenor had timely instituted suit in the Louisiana state court (the aforementioned case No. 225,533) to recover from the State of Louisiana all First Use Taxes that had been paid each month under protest. The proposed complaint then proceeded to allege the identical constitutional defects in the First Use Tax statute that had been asserted by the plaintiff States in their complaint on file in this Court and by the same seventeen pipeline companies in their tax refund petition on file in the Louisiana state court.

On September 18, 1979, the eight plaintiff States filed a motion for judgment on the pleadings. That motion was later supported by the United States and the Federal Energy Regulatory Commission as *amici curiae*. The seventeen pipeline companies, whose motion to intervene and to file a complaint lay unacted upon by the Court, filed a separate motion for leave to file their own motion for judgment on the pleadings, with accompanying brief in support thereof.

In the meantime, on October 22, 1979, the State of Louisiana filed a motion to dismiss the complaint of the plaintiff States, combined with a supporting brief and a brief in opposition to the pending motion of the plaintiff States for judgment on the pleadings. This motion to dismiss renewed and expanded the jurisdictional and prudential objections that Louisiana had expressed in its earlier opposition to the motion for leave to file the complaint, objections which had been restated in Louisiana's answer to the complaint. Special emphasis was given to the newly-demonstrated availability of an alternative forum in the Louisiana state courts wherein the identical constitutional issues were being raised and pursued. This was said to put this case on all fours with the abstention situation before this Court in the *Arizona v. New Mexico* litigation. Emphasis was also given to the total absence of any real sovereign interest in the plaintiff States, other than that of being gas consumers; it was becoming increasingly clear, said Louisiana, that the plaintiff States were simply volunteering to pursue the tax refund claims of the private taxpayers, the seventeen pipeline companies.

In response to Louisiana's motion to dismiss, the plaintiffs' brief in opposition asserted (p. 6) that this Court's June 18 order, which had merely allowed the complaint to be filed, constituted an acknowledgment of the standing of the plaintiff States to bring this original action, inasmuch as the Court had "acted in the face of Louisiana's brief in opposition" to the filing, "which urged that the plaintiff states lacked standing." This Court, said the plaintiff States, "should not reverse its decision acknowledging the standing of the plaintiff states to bring this suit" (p. 6).

As to Louisiana's prudential objections in its answer and motion to dismiss, relative to the recently filed tax refund suit in the Louisiana state courts, the plaintiff States' opposition brief (pp. 6-7) asserted that the Court's June 18 order reflected a considered rejection of Louisiana's claim in this respect. That order, reiterated the brief (p. 7), constituted "this Court's decision to exercise its original jurisdiction."

On October 22, 1979, the State of New Jersey filed a motion for leave to intervene as a party plaintiff, alleging in its proposed complaint facts and issues comparable to those in the complaint of the eight plaintiff States. Louisiana duly filed an opposition to this motion.

Out of this welter of complaints, answers, motions, oppositions, and briefs, not all of which have been described herein, came this Court's order of March 3, 1980. That order granted Louisiana's motion to appoint a Special Master and appointed the Honorable John F. Davis as the Special Master. The Court thereby referred all pending matters to the Special Master.

The Special Master invited briefs and statements from all concerned respecting the efforts of the private pipeline companies and the State of New Jersey to intervene as parties plaintiff and to file separate complaints. After being urged to do so by the Special Master,[4] the United States and the Federal Energy Regulatory Commission abandoned their *amici* stance and filed their own motion for leave to intervene as plaintiffs and to file an attached Complaint in Intervention. This complaint sought to invoke the jurisdiction of this Court "under Section 1251 (b)(2) of Title 28 of the United States Code." Like the complaint of the plaintiff States, this complaint in intervention requested a declaration of the constitutional invalidity of Louisiana's First Use Tax statute, as well as an order that all revenues collected pursuant to that statute "be refunded to the taxpayers together with interest thereon." The complaint, apparently unable to assert what relief the interests of the United States necessitated, merely requested that the Court "grant such relief as the Court may deem appropriate and necessary to protect the interests of the United States and the Federal Energy Regulatory Commission."

At a hearing held on March 21, 1980, the Special Master requested a Proffer of Proof by the State of Louisiana as to the facts that Louisiana considers to be in dispute and thus necessary to be proved should an evidentiary hearing be scheduled to determine the constitutional issues arising under the Commerce Clause, the Supremacy Clause, the Import-Export Clause, the Contract Clause and the Equal Protection Clause. On April 15, 1980, Louisiana filed its Proffer of Proof.

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[4]At the hearing held on March 21, 1980, the Special Master stated to Government counsel (Tr. 85) that if the time comes "when you feel you want to participate in this case, you are not going to be able to just tell me you want to participate in the case. We will have the delay of getting a report to get it to the Court and getting the Court to act on it. I can't grant you intervention in the case. All I can do is recommend to the Court ... You may be in trouble and we can't get you in just overnight."

To that statement, Government counsel responded: "I understand, and I think the United States will take steps to protect itself" (Tr. 85).

On May 14, 1980, the Special Master filed his interim report respecting motions for leave to intervene and to appear as *amici curiae.* The Special Master therein recommended that the State of New Jersey, the United States and the Federal Energy Regulatory Commission, and the seventeen pipeline taxpayers all be allowed to intervene as parties plaintiff. To each of these motions there was attached a complaint raising the same constitutional issues contained in the complaint of the plaintiff States, as well as in the complaint of the seventeen pipeline companies in their tax refund suit in Louisiana. On July 9, 1980, Louisiana filed Exceptions to the Special Master's interim report with a brief in support of the Exceptions.

Arguments were held on June 19, 1980, before the Special Master relative to Louisiana's motion to dismiss the complaint filed by the plaintiff States, as well as the plaintiff States' motion for judgment on the pleadings. On September 15, 1980, the Special Master filed his Report on these two motions.[5]

To be precise, the State of Louisiana is involved in twelve judicial proceedings. In each of these proceedings the same five constitutional objections as to the validity of the First Use Tax statute are at issue.

FEDERAL PROCEEDINGS

(1-4) Before this Court in the instant case, one complaint has been filed by the eight Plaintiff States. The Special Master has recommended that three sets of parties be allowed to intervene (New Jersey, the United States and Federal Energy Regulatory Commission, and seventeen pipeline companies). Proposed complaints are attached to the three intervention motions.

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[5]This Report of the Special Master has been reproduced in full [pp. A-1 to A-33] in the Appendix.

(5) A complaint was filed by the Federal Energy Regulatory Commission against Shirley McNamara, et al., in the Middle District of Louisiana, Civil Action 78-384. A motion to stay was granted. See opinion reproduced in the Appendix to the Motion to Dismiss and Brief in Support of Motion to Dismiss and in Opposition to Motion for Judgment on the Pleadings, filed by the defendant in this Court on October 22, 1979. The matter was appealed to the Fifth Circuit and there docketed as No. 79-1403. On the day of argument, the matter was stayed.

STATE PROCEEDINGS

(6) On September 22, 1978, Edwin W. Edwards, et al., filed a petition for declaratory relief, naming as defendants, among others, all of the pipelines doing business in Louisiana. All of these pipelines, except Mississippi River Transmission Corporation, filed a reconventional demand (cross-claim), asserting these constitutional grounds. The pipeline companies removed the case to the federal court where a motion to remand was granted. (464 F. Supp. 654, USDC MD LA. 1979).

(7) A petition was filed on May 29, 1979, by Arkansas Louisiana Gas Company against Shirley McNamara, et al., under Docket Number 224,695, Division J, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(8) The seventeen pipeline companies filed a petition, for refund of taxes paid under protest, against Shirley McNamara, et al., on the 22nd day of June, 1979, under Docket Number 225,533, Division D, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana. Pertinent parts of this petition may be found in the Appendix to the Brief of the State of Louisiana in Response to Brief of the United States and the Federal Energy Regulatory Commission as *Amici Curiae*, filed herein on December 5, 1979.

(9) A petition was filed by Pennzoil Oil & Gas, Inc. against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,649, Division D, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(10) A petition was filed by Pogo Producing Company against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,650, Division H, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(11) A petition was filed by Pennzoil Louisiana and Texas Offshore, Inc., against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,651, Division F, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(12) A petition was filed by Nicor Supply Inc., against Shirley McNamara, et al., on the 10th day of July, 1980, Docket Number 237,522, Division J, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

As noted, these seven state court proceedings have all been filed in the same court, the Nineteenth Judicial District Court, East Baton Rouge Parish, Louisiana. These cases are all in the discovery stage. A motion for consolidation has been filed because the same issues respecting the constitutionality of the Louisiana First Use Tax on Natural Gas, LA. Rev. St. 47:1301-1307, have been raised in each case. And, in each of these cases the alleged grounds of unconstitutionality are identical to those asserted here. The state trial judge who would handle the consolidated cases has stated, and the local rules of court provide, that upon certification by counsel as to the completion of discovery, a pretrial conference and order would be entertained for the purpose of setting the case for trial.

The plaintiff States have made no effort to intervene or otherwise participate in any of these state court proceedings. No Louisiana statute or rule of practice prevents a sovereign State from intervening or otherwise participating in the Louisiana proceedings, provided only that the States allege an interest. LA. C.C.P. art. 1091.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, clauses 1 and 2, of the Constitution provide in relevant part:

> The judicial Power shall extend ... to Controversies between two or more States ... .
>
> In all Cases ... in which a State shall be Party, the supreme Court shall have original Jurisdiction.

The Eleventh Amendment of the Constitution provides:

> 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.

28 U.S.C. §1251 (a) (1) provides:

> (a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more States;

ARGUMENT

I.

THE COMPLAINT SHOULD BE DISMISSED BECAUSE THERE IS AN APPROPRIATE STATE COURT FORUM IN WHICH THE CONSTITUTIONAL ISSUES HERE TENDERED MAY BE LITIGATED

There is presently pending in the Nineteenth Judicial District Court of Louisiana, Parish of East Baton Rouge, a tax refund suit brought against the Louisiana First Use Tax authorities by the same seventeen pipeline companies that are seeking to intervene as parties plaintiff in the original proceeding before this Court. That tax refund suit is entitled *Southern Natural Gas Co., et al. v. McNamara, Louisiana Department of Revenue* *and Taxation and the State of Louisiana*, No. 225,533. The pipeline companies premise their refund demands on the identical five constitutional issues raised by the eight plaintiff States in this original proceeding, thus guaranteeing that the constitutional issues will be fully developed and litigated in the Louisiana state courts. A chart exhibiting the complete identity of issues in the two proceedings appears at page 18 of the Brief in Support of Motion to Dismiss, filed by the State of Louisiana in this Court on October 22, 1979.[6]

The pendency of the tax refund suit in the Louisiana courts is a decisive and controlling consideration at this juncture of the original action instituted in this Court. Such pendency makes it "inappropriate for this Court to attempt to adjudicate the issues [Maryland, et al.] seeks to present." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 501 (1971). It is inappropriate because there is in fact a "pending state-court action [that] provides an appropriate forum in which the *issues* tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) [emphasis in original].

A. The Special Master's Report

The Special Master's Report, to be sure, acknowledges (p. 15 [A—14]) that this Court "can, and will, refuse to accept jurisdiction of a cause when there are other and better ways of resolving the dispute." But that Report, after reviewing the "other ways" of resolving this dispute and attempting to distinguish the precedential value of *Arizona v. New Mexico*, concludes (pp. 19-20 [A—17]) that the nature of this case "seems to be appropriate for this Court's attention." The Special Master finds the appropriateness in five considerations: (1) "the huge sums involved"; (2) "the number of States affected, thirty in all"; (3)

---

[6]The tax refund suit was instituted by the seventeen pipeline companies on June 22, 1979, four days subsequent to this Court's order of June 18, 1979, allowing the eight plaintiff States to file their complaint in this original proceeding.

"[t]he issues are important on their own account and because of their effect on the price of gas"; (4) "[a]n expeditious settlement of the controversy is desirable"; and (5) "this Court [if it continues to entertain this original proceeding] can at least control the case and, if it desires, move it forward more speedily than would be possible in a [lower court] trial and appeal procedure."

The State of Louisiana submits that the Special Master has misconceived both the philosophy and the values involved in the invocation and exercise of this Court's original jurisdiction. He has turned the focus of original jurisdiction concepts upside down, concentrating on the supposed appropriateness rather than the inappropriateness of using this Court as a tribunal of original or first impression.

It thus becomes appropriate to restate the nature of this Court's vested jurisdiction over interstate disputes, as well as the factors relevant to any determination to exercise or not exercise that jurisdiction. Central to any such restatement is obedience to the Court's recognition in *Ohio v. Wyandotte Chemicals Corp.*, *supra*, 499, of "the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court."

B. The rationale of original jurisdiction

Any examination of the modern use made of the original jurisdiction vested in this Court must start on a historical note. One must be aware of the prolonged movement away from John Marshall's dictum in *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821), that the Court "must decide" every case properly before it, and that the Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." This broad proposition is no longer universally true, if indeed it ever was. If for no other reason, the modern need to control and limit the decisional input of cases compels resistance to the efforts of the legal community to exploit to the hilt every facet of jurisdiction vested in this Court.

The original jurisdiction vested in the Court by Article III of the Constitution is clearly governed by the proposition that the exercise of a vested jurisdiction is obligatory only in appropriate cases, despite certain language in the Constitution and Title 28 of the United States Code. Admittedly, the first clause of Section 2 of Article III does extend the judicial power of the United States "to Controversies between two or more States." The second clause defines the original jurisdiction of this Court in terms of the various categories of judicial power, described in the first clause, that *inter alia* involve cases "in which a State shall be Party."[7] And Section 1251 (a) (1) of Title 28 in turn purports to render both original and exclusive this Court's jurisdiction of "[a]ll controversies between two or more States." But, as this Court said in *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972), "We construe 28 U.S.C. §1251 (a) (1), as we do Art. III, §2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases."

Thus, however original or exclusive may be this Court's jurisdiction over controversies between two or more States, there is no constitutional or statutory mandate that such jurisdiction be exercised whenever a State invokes it. Original jurisdiction, in other words, is not to be equated with obligatory jurisdiction. This Court has repeatedly made statements that original jurisdiction is to be "invoked sparingly," *Utah v. United States*, 394 U.S. 89, 95 (1969), and that this type of jurisdiction is marked by "a sparing use" that limits its exercise to "appropriate cases." *Illinois v. City of Milwaukee*, *supra*, 94.

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[7]But it is well established that "Clause 2 of §2 of Article III merely distributes the jurisdiction conferred by clause one." *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939), and cases cited. As Chief Justice Marshall said in *Cohens v. Virginia*, 6 Wheat. 264, 398-99 (1821), the reference in the second clause of Section 2 to the original jurisdiction of this Court encompassing cases where a State is a party "refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal Courts; not to those cases in which an original suit might not be instituted in a Federal Court."

That suits brought in this Court between two or more States are to be adjudicated only in "appropriate cases" is illustrated by *Massachusetts v. Missouri*, 308 U.S. 1 (1939), and *Arizona v. New Mexico*, 425 U.S. 794 (1976). In both instances, the Court declined to exercise its vested original jurisdiction over the cases, because it was found not appropriate to do so. The exercise of jurisdiction was inappropriate in the *Massachusetts* case because the plaintiff, Massachusetts, appeared to have a proper and adequate remedy in the state and federal courts in Missouri. 308 U.S. at 19-20. And the inappropriateness in the *Arizona* case was grounded in the availability of an appropriate state court forum in New Mexico for litigating the identical constitutional issues raised by Arizona in this Court. 425 U.S. at 797.

The *Massachusetts* and *Arizona* rulings are something more than illustrations of what is or is not appropriate. Their reliance on the availability of some other appropriate forum in which the issues at stake can be litigated demonstrates that such availability forms the crux of this Court's growing reluctance to entertain original suits between States other than in the most compelling circumstances. True, there are other ingredients in the appropriateness concept. These include "the seriousness and dignity of the [plaintiff State's] claim," *Illinois v. City of Milwaukee, supra*, 93; "the nature of the interest of the complaining State — the essential quality of the right asserted," *Massachusetts v. Missouri, supra*, 18; and "the nature of the relief requested ... [and] [t]he nature of the remedy which may be necessary, if a case for relief is made out," *Washington v. General Motors Corp.*, 406 U.S. 109, 114 (1972). But always the core inquiry is whether there is a factual showing of necessity for exercising original jurisdiction and for thus assuming a burden "which might seriously interfere with the discharge by this Court of its duty in deciding the [appellate] cases and controversies appropriately brought before it." *Massachusetts v. Missouri, supra*, 19.

In sum, as was said in *Washington v. General Motors Corp., supra*, 113, "The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 499, teaches that protection of the administration of the appellate docket sometimes requires a discretionary declination of the exercise of original jurisdiction where "(1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities." The second of these declination rationales necessarily gains importance as time marches on and the appellate docket increases.

These articulated rationales for use of the great original powers of this Court are not reflected in the Special Master's Report. Nowhere does the Report assess whether declination of original jurisdiction in this instance would disserve any of the principal policies underlying the Article III grant. Nowhere does the Report assess the impact of entertaining this original proceeding on the Court's effective and expeditious administration of its appellate docket. The Report does not appreciate or address the Court's expressed concern that its appellate docket duties not be impaired by assuming jurisdiction over an original controversy that could just as well be heard in another forum.

In the *Wyandotte* case, 401 U.S. at 497, this Court gave voice to the fear that an easy assumption and exercise of original jurisdiction could quickly make this Court the principal forum for settling controversies involving state laws — including "laws concerning taxes." In the Court's words:

> As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedent's estates, business torts, government contracts, and so forth. It would, indeed,

be anomalous were this Court to be held out as a potential principal forum for settling such controversies.

The concerns that are addressed in the Report must yield to the constitutional and practical rationales for utilization of this Court's original jurisdiction. If this Court were to entertain every complaint one State might register against another, without regard to the availability of some other forum, this Court's ability to administer its increasingly heavy appellate docket would be substantially impaired. This Court would then become a tribunal devoted primarily to the trial and resolution of interstate disputes, with little or no time left to perform its other constitutional functions as the nation's supreme appellate body.

Thus the problem posed by this case is quite different from that discussed in the Special Master's Report. The problem is not whether this case "seems to be appropriate for this Court's attention." Rather, it is whether declination of original jurisdiction would be consistent with Article III policies or would advance the Court's ability to perform its heavy appellate responsibilities. If so, it becomes inappropriate to use this Court as a forum of first impression for the adjudication of any given constitutional dispute between States. In resolving that basic jurisdictional concept of inappropriateness, the availability of another forum, where all the constitutional issues can be raised and determined, plays an increasingly decisive role.

C. Reasons for declining jurisdiction

The practical problems that often beset the exercise of original jurisdiction and that thereby divert the Court's energies away from its awesome appellate tasks have been fully explicated in the *Wyandotte* opinion, authored by Mr. Justice Harlan. They need not be repeated here except to reemphasize the Court's concern, 401 U.S. at 498, that it is "structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." Yet, as Mr. Justice Harlan recognized (at 499), discretionary declination is not simply to shield the Court from "noisome, vexatious, or unfamiliar tasks," such as factfinding, but also

> ... as a technique for promoting and furthering the assumptions and value choices that underlie the current role of this Court in the federal system. Protecting this Court per se is at best a secondary consideration. What gives rise to the necessity for recognizing such discretion is preeminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court. A broader view of the scope and purposes of our discretion would inadequately take account of the general duty of courts to exercise that jurisdiction they possess.

It is difficult to perceive how declination of the original jurisdiction invoked in the instant case would offend any of the policies underlying the Article III grant of original jurisdiction as to interstate disputes. Long ago this Court recognized that its jurisdiction over controversies between two or more 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). Such necessity would appear absolute only where the interstate dispute, were it not for the availability of this Court's original jurisdiction, would necessitate diplomatic negotiations or a resort to war, assuming the States were true sovereign entities. See *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 450 (1945); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

But where, as here, the interstate dispute involves issues that have been raised and can be judicially settled in some other state or federal forum, there can be no "absolute necessity" for exercising the Court's original jurisdiction. In that event, the issues will ultimately become reviewable by this Court in the exercise of its appellate jurisdiction. Thus the Court is free, in its discretion and in terms of Article III policy, to accept or reject adjudication of the issues in the context of an original proceeding. Neither Article III nor Section 1251 (a) (1) compels this Court to be the potential or actual principal forum for settling controversies between States of a kind that lend themselves to adjudication in alternative and available forums. The Court is not required to view its original jurisdiction as "an alternative to the redress of grievances which could have been sought in the normal appellate process, if the remedy had been timely sought." See *Illinois v. Michigan*, 409 U.S. 36, 37 (1972).

Moreover, there are many "reasons of practical wisdom" (*Wyandotte*, at 499) that demonstrate the inappropriateness of this Court as the initial forum for testing the constitutionality of the Louisiana tax statute in question. To list the more obvious of these reasons:

(1) The tax refund suit filed by the private pipeline taxpayers is pending in a Louisiana state trial court, the Nineteenth Judicial District Court. It is primarily a trial court, with all the traditional facilities and procedures appropriate to the role of a factfinder. And it can actually preside over the introduction of the multiplicity of facts that underlie the constitutional issues here tendered.[8] The Nineteenth Judicial District Court, in short, has precisely the factfinding characteristics that this Court so woefully lacks. See *Wyandotte*, 401 U.S. at 498. To allow the Louisiana court to find and develop the essential constitutional facts is to free this Court from the awkward burden of factfinding and to permit the Court to devote more of its energies to its heavy — and vital — appellate functions.

(2) Allowing the tax refund suit to proceed to final judgment in the Louisiana state courts would allow those courts to give a definitive construction and interpretation of the Louisiana First Use Tax statute, a new law which has yet to receive any judicial

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[8]Some idea of the vast quantity of the constitutional facts to be established in this case can be gleaned from the Proffer of Proof submitted to the Special Master by the State of Louisiana on April 15, 1980. The Proffer specified 154 complex factual matters that Louisiana deems essential to support the constitutionality of the Louisiana First Use Tax statute. The plaintiff States would doubtless want to offer proof as to many additional facts.

analysis in Louisiana. Declination of this Court's original jurisdiction would thus relieve this Court of the difficult if not impossible task of guessing what interpretation the Louisiana courts will place on this statute and then attempting to resolve the constitutional implications of that interpretation. Withholding the exercise of the Court's original jurisdiction in these circumstances is fully justified by the established abstention doctrine that new state enactments "should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality." *Harrison v. NAACP*, 360 U.S. 167, 178 (1959).

(3) Declination is further justified in terms of lifting from this Court and the parties the burdens of pursuing an original proceeding that at best is needlessly duplicative, unsatisfactory, incomplete and time-taking. Given the on-going tax refund proceeding in the Louisiana state courts, why should this Court, using awkward fact-finding tools, expend time and energy to create a highly questionable superstructure for constitutional litigation? Armed with the unique power to render authoritative interpretations of the Louisiana First Use Tax statute, the Louisiana state courts are far better equipped to construct a relevant factual and statutory base for resolving the constitutional issues. Any reading this Court might give the statute would not be binding on the Louisiana courts and could be discredited at any time. Thus any decision by this Court on the constitutional implications of its statutory reading could well constitute "a tentative answer which may be displaced tomorrow by a state adjudication." *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 500 (1941).

(4) By declining to exercise original jurisdiction in this instance, this Court would also avoid having to address and resolve the many thorny threshold problems, problems rooted deeply in jurisdictional and prudential considerations. These problems, discussed hereinafter, are such as to cast doubts on the "seriousness and dignity," *Illinois v. City of Milwaukee*, *supra*, 93, of the complaint filed by the eight plaintiff States. But the

point here is that this Court's valuable but limited resources need not be devoted to uprooting these threshold obstacles when there is a smooth alternative route to the constitutional issues. The state tax refund procedure poses none of these obstacles, while providing an authoritative construction of the tax statute and a constitutional ruling that would be subject to this Court's appellate review.

(5) Still another reason for declination deserves emphasis. It is highly questionable whether this Court can or should grant any of the relief requested by the eight plaintiff States. To the extent that the complaint seeks a declaration of the unconstitutionality of the Louisiana First Use Tax statute, which has yet to be authoritatively construed by the Louisiana courts, the plaintiff States are seeking the kind of premature or tentative opinion that this Court should not give. To the extent that the complaint seeks preliminary and permanent injunctions prohibiting Louisiana and its agents from collecting the First Use Tax, serious questions arise as to the impact of the Tax Injunction Act of 1937, 28 U.S.C. §1341, on the exercise and implementation of this Court's original jurisdiction. See *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943).

And the request of the plaintiffs that this Court order

> . . . that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers with interest thereon

would impose on this Court a function never contemplated by the framers of Article III — the function of acting as the judicial overseer of the state tax refund claims of private taxpayers. Indeed, this particular request is precisely the relief that the taxpayers are seeking in the Louisiana tax refund procedures and that the Louisiana courts are best equipped to provide. Such a duplicative request in this Court also serves to underscore the total absence of any controversy between the plaintiff States and the State of Louisiana; the only true controversy is that between the private pipeline taxpayers and the State of Louisiana. The plaintiff States are simply acting as volunteers for the private taxpayers in their efforts to secure tax refunds, the States making the refund claims in this Court while the taxpayers pursue the claims in the Louisiana courts.

All these requests for relief suggest reasons why this Court either does not have original jurisdiction in this case or should not exercise it to the extent that it does exist. These requests are classic examples of what this Court meant when it said in *Washington v. General Motors Corp.*, 406 U.S. at 114, that the "nature of the relief requested" and the "nature of the remedy which may be necessary, if a case for relief is made out" can be decisive elements in this Court's discretionary determination whether to exercise its original jurisdiction in a given case.

D. The controlling *Arizona* precedent

All the foregoing reasons for declination in this case serve to bring into focus the precedential nature of this Court's 1976 ruling in *Arizona v. New Mexico*, 425 U.S. 794. While the *Arizona* ruling was by way of denying leave to file a complaint in this Court rather than granting a subsequent motion to dismiss, the case is so factually and conceptually similar to the instant proceeding as to make it a controlling precedent.

In *Arizona*, this Court denied the State of Arizona leave to file a complaint against the State of New Mexico challenging the constitutionality of New Mexico's electrical energy tax. The tax, which was non-discriminatory on its face, was laid upon all generation of electricity in New Mexico, a fact that led to this Court's comment that "the legal incidence of the electrical energy tax is upon the utilities [that generate electricity]." 425 U.S. at 798. As in the instant situation, the utility taxpayers in *Arizona* succeeded in passing on the cost of the tax to their electrical consumers. Such passing on of the tax led the State of Arizona to assert, as do the plaintiff States in this case, that "the economic incidence and burden of the electrical energy tax falls upon it [to the extent the State was a consumer] and its citizens [who were also consumers]." 425 U.S. at 796.

The complaint that the State of Arizona sought to file alleged that the New Mexico tax should be declared unconstitutional since it "constitutes an unconstitutional discrimination against and burden upon interstate commerce, denies Arizona citizens due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution, and abridges the privileges and immunities guaranteed them by Art. IV, §2 of the Constitution." 425 U.S. at 795.[9] And the State of Arizona sought to invoke the original jurisdiction of the Court in three capacities:

(1) As a proprietary consumer of electricity in its state facilities, being forced to bear the burden of the New Mexico tax that had been passed on to all consumers;[10]

(2) As a proprietary generator of electricity in New Mexico, in the form of an Arizona political subdivision known as the Salt River Project,[11] and thus directly subject to the New Mexico electrical energy tax; and

(3) As *parens patriae* for all citizens of Arizona who consumed and paid for electricity generated in New Mexico and thus were forced to bear the passed-on burden of the New Mexico tax.

Such was the nature of Arizona's attempt to use the original jurisdiction of this Court to secure a declaration of the invalidity

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[9]There, as here, the complaint also sought to enjoin New Mexico from assessing, levying or collecting the tax. 425 U.S. at 795.

[10]Nothing in the New Mexico electrical energy tax statute compelled electricity consumers to bear the economic burden of the tax. It was identical to the Louisiana First Use Tax statute in that respect. All that the pleadings in the *Arizona* case show is an assertion in the attached state court complaint (paragraph 20) that such a tax is "uniformly . . . passed on to consumers of electricity" in Arizona.

[11]The full name of this state agency was the Salt River Project Agricultural Improvement and Power District. It operated a federal reclamation project pursuant to contracts with the Secretary of the Interior. In conjunction with two investor-owned public service corporations based in Arizona, the Salt River Project owned electrical generating facilities in New Mexico and transmitted such energy to consumers in Arizona. See Paragraph VI of Arizona's proposed complaint in this Court, No. 70, Original, referred to at 425 U.S. at 794.

of a tax statute of a sister State. This Court, in recognition of its philosophy of allowing its original jurisdiction to be invoked but sparingly, denied leave to file the complaint on the discretionary ground that a

> . . . pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated.
> 425 U.S. at 797 [Emphasis in original].

Italicizing the word "*issues*" is significant. The Court thereby emphasized that, for purposes of declining to exercise its original jurisdiction, it is enough that there be an alternative forum that provides an opportunity to raise and resolve all the "*issues* tendered here." The appropriateness of the alternative forum, in other words, depends not on whether the identical parties can appear in that forum but whether the identical issues can be or are being raised in that forum.[12]

It is instructive to note that the alternative forum found to be appropriate in the *Arizona* case was a New Mexico state court wherein the taxpayers had filed a declaratory judgment action. Those taxpayers, upon whom "the legal incidence of the electrical energy tax" fell (425 U.S. at 988), sought a declaration that the New Mexico tax was unconstitutional for all the reasons suggested and tendered by the State of Arizona in the complaint it sought to file in this Court. It was also a fact, although the Court did not emphasize it, that one of the five plaintiff taxpayers in the New Mexico action was the Salt River Project, a political subdivision of Arizona engaged in the generation of electricity in New Mexico.[13]

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[12]In a sense this stress on the identity of the issues rather than the identity of the parties represents a subtle shift in emphasis from the statement in *Illinois v. City of Milwaukee*, 406 U.S. at 93, that the alternative forum is appropriate for declination purposes if the forum is one "where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had."

[13]Two other plaintiffs were Arizona investor-owned public service corporations, which owned generating facilities in New Mexico jointly with the Salt River Project and distributed electricity within Arizona. The remaining two plaintiffs were Texas and California electric utility corporations, selling and distributing New Mexico energy in their respective states.

Mr. Justice Stevens stated that he concurred in the Court's denial of Arizona's motion for leave to file because "the Salt River Project is able to litigate in another forum." 425 U.S. at 798. In his view, it was unnecessary to open the door of this Court's original jurisdiction to the extent that Arizona was attempting "to litigate [here] on behalf of an entity which has access to another forum." 425 U.S. at 798-99. What is not clear is whether Mr. Justice Stevens meant to imply that, absent a state entity with access to another forum, a State is free to invoke original jurisdiction to litigate the same issues at stake in that other forum at the instance of other unrelated but aggrieved parties.

But the studied reliance by Mr. Justice Stevens on Arizona's privity with the Salt River Project, a matter which was mentioned but not employed to justify the Court's *per curiam* declination, underscores anew that the Court meant what it said. Declination is justified wherever there is an alternative and appropriate forum "in which the *issues* tendered here may be litigated." That means that appropriateness of the forum depends on the identity of the issues, not upon the presence or absence in that forum of a political subdivision of a State that tendered the same issues in this Court. For aught that appears in the *Arizona per curiam*, the Court would have denied leave to file even had the Salt River Project not been a taxpayer party plaintiff in the pending state court action.

The significant core of the *Arizona per curiam* is its use of "issues" as the ultimate test of the appropriateness and suitability of the alternative forum. If the issues tendered in this Court can be raised and resolved in the other forum, from which appellate review by this Court would be available, then what purpose is served by invoking this Court's original jurisdiction? When there is such an appropriate alternative, why force this Court to expend its energies and its awkward factfinding facilities to initiate and oversee the development of constitutional adjudication? The Court has indicated in *Arizona* that there are no good answers to those queries.

The applicability to this case of the *Arizona v. New Mexico* precedent should now be obvious. The same five constitutional issues tendered here by the plaintiff States have been raised and are in the process of litigation in the courts of Louisiana. The ultimate and forthcoming determination by the Louisiana Supreme Court with respect to the meaning and constitutional implications of the First Use Tax statute will be subject to this Court's appellate review powers.[14] And it can safely be assumed that declination in this instance would no more disserve the principal policies underlying Article III or negate the inappropriateness of this Court as a principal trial forum than it did in *Arizona v. New Mexico*. If anything, the "reasons of practical wisdom" justifying declination are stronger and more numerous here than in the *Arizona* litigation.

The Special Master's Report contains no effective denial of the controlling nature of the *Arizona* ruling. The Report states (p. 19 [A—17]), without elaboration, that the "really significant difference" is that "by reason of its relationship to one of the litigants [the Salt River Project], Arizona could be heard in its own behalf in the State court," whereas the plaintiff States in this proceeding "cannot represent themselves in the State court proceedings." For the reasons heretofore expressed, this purported difference is without merit. The *Arizona* declination rested on the fact that the identical "*issues* tendered here" could be and had been raised in the New Mexico proceedings, not on the fact that Arizona was in privity with one of the protesting taxpayers. Indeed, the lack of any privity between any of the plaintiff States in this proceeding and any of the protesting taxpayers in the tax refund proceeding cannot do service as a reason for invoking original jurisdiction. If anything, the lack of privity underscores the States' lack of any real interest in whether Louisiana can constitutionally impose a tax on those who engage in

[14]In the *Arizona* litigation, the declaratory judgment action in the New Mexico courts resulted in a judgment of the New Mexico Supreme Court that was reviewed and reversed on appeal to this Court. *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

one of the specified uses of natural gas in Louisiana. If those States have no standing or grievance to warrant protesting the tax in the Louisiana proceedings, as the Special Master indicates, what greater standing or grievance do they have before this Court?

To the extent that eligibility to participate in the alternative state court proceedings may be a *sine qua non* of declination, even that eligibility is apparent. Nothing in Louisiana law or procedure precludes another sovereign State from intervening or otherwise participating in a Louisiana tax refund proceeding, assuming that State can assert or allege an interest. See LA. C.C.P. art. 1091. Combined with the fact that the plaintiff States are seeking to present precisely the same constitutional issues as the taxpayer plaintiffs in the Louisiana proceedings, the plaintiffs cannot complain for want of an opportunity to be heard in the Louisiana courts.

The Special Master's Report (p. 19 [A—17]) also suggests a possible difference in the fact that the *Arizona* declination came on a motion for leave to file, whereas the Court has already granted the motion in this proceeding. The Report opines that to dismiss the instant complaint at this juncture on the *Arizona* rationale "would be a far more serious reversal, penalizing the plaintiffs both in time and money."[15] The short answer to that suggestion is that this Court's order of June 18, 1979, granting leave to file the complaint without comment, in no way con-

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[15]But see the Special Master's own comment in footnote 9 of the Report (p. 10):

> The grounds urged by the defendant for dismissal are substantially the same as the grounds on which the defendant opposed the plaintiffs' motion for leave to file their complaint. The plaintiffs therefore urge that the granting of their motion over the objection of the defendant amount to a rejection of the defendant's jurisdictional and prudential arguments. However, the Court's order did not explicate the reasons for the order and the defendant urges that it should be taken as postponing consideration of its objections, rather than rejecting them. It does not seem profitable to speculate on the reasons underlying a *per curiam* order. Since the issues are constitutional, the defendant is probably not foreclosed from renewing its argument in the form of a motion to dismiss whatever the basis for the order.

stituted a ruling on any of the jurisdictional and prudential considerations that plague this case. See *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974), and cases cited. Nor can that formal order be viewed as a ruling that the prudential considerations that justify entertaining an original suit have all been met. Certainly the "seriousness" of a declination, or the "time and money" incurred by the plaintiffs, cannot be allowed to control this Court's determination of whether the necessity is so absolute as to justify the exercise of this "delicate and grave" jurisdiction. See *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

Certain other efforts to distinguish *Arizona v. New Mexico* deserve summary consideration. The plaintiff States, as well as the United States, have previously and consistently urged that the national significance and impact of the Louisiana tax are so much greater than ascribable to the New Mexico tax as to render the *Arizona v. New Mexico* ruling inapplicable. Suffice it to say that the sparing exercise of this Court's original jurisdiction does not depend upon a comparative analysis of the importance of the issues that plaintiff States seek to tender. Only if there is no other available forum in which to raise the tendered issues, whatever their societal impact, does the practical and absolute necessity exist for exercise of the Court's original powers. If that necessity does not exist, the tendered issues must proceed through the established judicial system, culminating in the exercise of the Court's appellate review powers.

The United States has also claimed that *Arizona* is distinguishable on the ground that collection of the New Mexico tax had been enjoined pending the state court proceeding, whereas collection of the Louisiana tax continues (though put in escrow) while the taxpayers pursue their tax refund procedure in Louisiana. In a sense, this contention is but a variation on the theme that the economic impact on gas consumers is so great and immediate that the Court should throw its original jurisdiction cautions to the winds and ignore its Article III commitments to the appellate docket. To the extent that this argument is meant to cast doubt on the efficacy and speed of the Louisiana tax refund procedure, this Court has already rejected the contention.

As hereinafter explicated, the Court has found this particular Louisiana tax refund procedure to be "an adequate remedy to the taxpayer," one in which "he may assert his federal rights and secure a review of them by this Court." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 301 (1943).

The conclusion follows that the Louisiana tax refund procedure is an adequate and appropriate alternative to the exercise of this Court's original jurisdiction. That is the meaning of the *Arizona v. New Mexico* precedent. It is the meaning of all the precedents in this Court that have warned that original jurisdiction is to be exercised in a most sparing manner, and only in cases of absolute necessity where no adequate alternative forum is available.

II.

PLAINTIFF STATES SHOW NO COMPELLING REASON TO INVOKE ORIGINAL JURISDICTION TO ENJOIN OR SECURE REFUNDS OF LOUISIANA TAXES LEVIED ON CITIZENS OF OTHER STATES

There is a second compelling reason for declining to exercise original jurisdiction in the circumstances of this case. It is a reason expressed in the observation of Mr. Chief Justice Hughes, writing for the Court in *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939):

> To open this Court to actions for States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it.

To render that precept totally applicable to the instant case, one may fairly change the opening phrase of the Chief Justice to read: "To open this Court to actions by States to enjoin the collection, or to secure the refund, of taxes payable to another State by citizens of still other States ...." Whether a State seeks the original offices of this Court to recover its own taxes or to enjoin and secure refunds of some other State's taxes, the same consequential question is posed. Absent a showing of absolute necessity, why should this Court intervene as a *nisi prius* tribunal into the tax affairs of a sovereign State and thereby divert its energies away from the burden of "deciding the cases and controversies appropriately brought before it"?

As developed in Part I of this brief, *Arizona v. New Mexico*, 425 U.S. 794 (1976), demonstrates one reason why the requisite showing of necessity is here absent—the pendency of an adequate alternative forum in Louisiana where all the issues tendered in this Court have been raised. But there are other equally cogent reasons why the plaintiff States have failed to meet the burden of showing a necessity for invoking the original jurisdiction of this Court. Some but not all those failures have been addressed or discussed in Sections A and B of the Special Master's Report dealing with the Motion to Dismiss.

Preliminarily, it should be noted that the plaintiffs' burden of demonstrating reasons why original jurisdiction should be exercised is an extremely high one. This being an action between States, "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." *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923). Or, as stated in *New York v. New Jersey*, 256 U.S. 296, 309 (1921), "[b]efore 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." See also *Colorado v. Kansas*, 320 U.S. 383, 394 (1944).

These expressions of the high burden of proof imposed upon complainant States in an interstate controversy are particularly relevant where, as here, the proof of necessity for invoking the extraordinary original powers of this Court must come in large part from the pleadings and mouths of the plaintiff States. For example, to the extent that the plaintiff States are seeking to invoke the jurisdiction of this Court to enjoin the collection of the Louisiana First Use Tax, they bear the burden of proving some reason why this Court must enjoin despite the admonition in *Matthews v. Rodgers*, 284 U.S. 521, 526-27 (1932), that, where a suit is brought in any federal court to enjoin the collection of a state tax,

> [t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved, ...

It is with such admonitions in mind that one must assess the various jurisdictional and prudential factors that underlie any demonstration of necessity for invoking the original jurisdiction of this Court. That is indeed a tall order where such jurisdiction is invoked to secure (1) an injunction against the collection of a sovereign State's tax, (2) a refund of that tax to the private taxpayers, and (3) a declaration of the unconstitutionality of that tax—all at the instance of eight other sovereign States that at best have a remote consumer-type interest in the state tax in question. Superimposed upon the plaintiff's burden, of course, is the Court's increasing reluctance to accept any kind of an original case where there is an adequate alternative forum. *Ohio v. Wyandotte Chemicals Corp., supra; Arizona v. New Mexico, supra.*

A. Absence of a sovereign controversy

It is axiomatic that to engage this Court's original jurisdiction over controversies "between two or more States," a plaintiff State must first demonstrate that (1) the injury for which it seeks redress is an injury to its sovereign or quasi-sovereign interests, and (2) the injury to such interests was directly caused by the actions of another state. *Pennsylvania v. New Jersey*, 426 U.S. 660, 663, 665 (1976). Or, to quote again from *Massachusetts v. Missouri*, 308 U.S. at 15, "To constitute such a [justiciable] controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress ..."

In the case at bar, the eight complaining States have failed to allege, let alone prove by clear and convincing evidence, that Louisiana's imposition of its First Use Tax on private taxpayers in Louisiana has in any way implicated the plaintiffs' sovereign or quasi-sovereign interests. The only alleged interest, the only interest the Special Master could find (Report, pp. 12, 14 [A—11, A—12-13]), concerns the burden on the complaining States' treasuries in having to incur added costs as consumers of natural gas. But the interest of a State as a consumer or purchaser of needed supplies or products does not reflect any sovereign interest. Indeed, while such a consumer interest might indicate some proprietary activity by a State, the very fact that the plaintiff States seek simultaneously to represent *parens patriae* all their gas-consuming citizens demonstrates that the States' interests are not at all sovereign in nature. Their interests are purely those of consumers of gas, indistinguishable from those of the private citizen consumers.

Having failed to prove that any sovereign interests of the plaintiff States are at stake, the plaintiffs could not even begin to prove that the State of Louisiana directly caused any injury to the plaintiffs' sovereign interests. No allegation to that effect is even attempted in the complaint. While the Special Master's Report (p. 14 [A—13]) suggests that "the States do have a quasi-sovereign interest in their [the citizens'] economic welfare," there is no allegation or proof that Louisiana directly caused any cognizable injury to the "economic welfare" of eight northern States.

In sum, the plaintiffs have failed to allege or prove that any kind of sovereign or quasi-sovereign interest was so directly implicated by the imposition of the Louisiana First Use Tax that only the intervention of this Court, in the extraordinary exercise of original jurisdiction, can save the day.

B. Absence of standing

The plaintiff States have failed to demonstrate that they have such a high degree of standing and interest, either in their proprietary or *parens patriae* capacity, that they should be allowed to continue this original proceeding designed to enjoin and recoup taxes paid to Louisiana by citizens of other States.

At the threshold of the standing problem in this case are two unquestioned considerations:

(1) As the Special Master acknowledged (Report, p. 11 [A—10]), no tax is directly imposed by Louisiana on the plaintiff States. In the Special Master's words, "At no time are they [the plaintiff States] called on to remit funds to Louisiana; they and their citizens pay the pipelines which are liable for the first use tax."[16]

(2) With respect to the direct impact of the Louisiana First Use Tax, and any constitutional implications thereof, the only real parties in interest are the pipeline taxpayers. See *Arizona v. New Mexico*, 425 U.S. at 797-98, where the Court stated, in vir-

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[16]The Special Master erred, however, in suggesting that the plaintiff States and their citizens "pay the pipelines which are liable for the first use tax." There is no such direct privity with the pipeline taxpayers. The activities of the pipeline companies cease when the gas is delivered to local gas distribution companies or local gas service companies, from which customers purchase gas.

tually identical circumstances dealing with a New Mexico tax on electrical energy, that "we are not unmindful that the legal incidence of the electrical energy tax is upon the utilities [the taxpayers]." See also *Gurley v. Rhoden*, 421 U.S. 200 (1975); *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968).

(1) Proprietary standing

Those two factors undermine the force and effect of the plaintiffs' asserted standing to pursue this original action. As to standing in a proprietary capacity, the States can assert only that they "are major consumers of natural gas subject to the First Use Tax, including gas used for space and water heating in public buildings."[17] And the Special Master sought to find the requisite standing in the circumstance that "although the tax is collected from the pipelines, it is really a burden on consumers," Report at 12 [A—11], adding that the indirectness of the cost of the tax "does not foreclose plaintiffs from asserting the injury to them and their citizens," Report at 14 [A—12].

Such attenuated standing is insufficient to invoke original jurisdiction, particularly where the purpose of the invocation is to enjoin, recoup and invalidate a tax laid by another State on private taxpayers. In such circumstances, the plaintiff States must be able to demonstrate that in substance they are the real parties in interest. They must comply with the principle announced in *Arkansas v. Texas*, 346 U.S. 368, 371 (1953):

> In determining whether the interest being litigated is an appropriate one for the exercise of our original jurisdiction we of course look behind and beyond the legal form in which the claim of the States is pressed. We determine whether in substance the claim is that of the State, whether the State is indeed the real party in interest.

Yet by common consent the plaintiff States are not the real parties in interest in this tax controversy. Not being the tax-

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[17]Plaintiffs' Brief in Support of Motion for Leave to File Complaint at 12.

payers, their interest can rise no higher than that associated with some kind of indirect interest or impact not ascribable to any direct action by the taxing authorities. Such indirectness of interest will not do for the requisite standing to invoke original jurisdiction, as this Court's decision in *Oklahoma v. Atchison, T. & S.F. R.R. Co.*, 220 U.S. 277 (1911), demonstrates. The Court there held that Oklahoma had no standing or interest in its corporate capacity to invoke the Court's original jurisdiction to seek an injunction against a railroad that allegedly charged unreasonable freight rates to shippers doing business in Oklahoma. The Court said (at 286) that, in that capacity, Oklahoma would

> ... have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma.

The Court added that Oklahoma had "no direct interest in the particular property or rights immediately affected or to be affected by the alleged violation of such laws." *Id.*

And so in the instant case, the plaintiff States have no direct interest in the particular property or activity subject to the Louisiana First Use Tax. For purposes of standing to invoke the original jurisdiction of this Court to settle a state tax controversy, the indirectness of the plaintiffs' alleged injury requires dismissal of the case. The extraordinary original jurisdiction of this Court to settle disputes between sovereign interests of the States, assuming that it can ever be used to resolve interstate tax controversies, cannot and should not be invoked on anything less than a direct tax assault on some sovereign interest of the complaining State. Without that kind of a direct tax injury, the putative State plaintiff should be considered without standing to invoke original jurisdiction.

In this extraordinary tax setting, it will not do to seek original jurisdiction standing in the traditional concept that standing can be premised on allegations of "injur[ies] that fairly can be traced to the challenged action of the defendant ...." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72, 74 (1978). [18]

This Court simply does not don its original robes to assess and remove the indirect economic burdens, suffered by consumer States or their citizens, that are no more than traceable to some other State's tax. To do so would be inconsistent with the narrow Article III philosophy underlying original jurisdiction. It would also open the doors of this Court and perhaps of the entire judicial system to hitherto unknown forms of indirect consumer-type causes of action. Cf. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Finally, even if this Court should determine that the plaintiff States have standing to sue in their proprietary capacity, Louisiana argues that this Court should recognize that prudential considerations here, as in other kinds of suits by one State against another, justify declination of jurisdiction. As Professors Wright, Miller and Cooper concluded after surveying original jurisdiction actions between States,

> Although most of the ["[s]uits by one state to enjoin enforcement of the laws of another state"] have not seemed susceptible of ready settlement between the states themselves, it is not surprising that the Court has generally rejected efforts to obtain settlement in its orginal [*sic*] jurisdiction .... [J]ustification may be found for the frequent denials of justiciability that seem to leave the same issues open for decision in other tribunals. Other litigation would often avoid unnecessarily direct conflict between the

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[18]Even under the traditional causation principles of standing, the chain of events triggered by Louisiana's First Use Tax exhausted itself upon the payment of the tax by the taxpayers. What triggered the economic burden on the consumers was the decision of the taxpayers not to absorb the tax but to pass it on to the ultimate consumers with the approval and sanction of the Federal Energy Regulatory Commission. Louisiana played no role in the taxpayers' decision not to absorb the burden of the tax.

> states involved. Other courts are better equipped to handle any kind of trial, including challenges to state statutes. And there may even be some value in delaying decision, so the states have ample opportunity to exhaust whatever possibilities of satisfactory adjustment there may be, and so that final decision is illuminated by lower court opinions. Special doctrines of justiciability in this setting may indeed be seen as an alternative to more directly discretionary refusals to exercise jurisdiction for similar reasons.
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> C. Wright, A. Miller & E. Cooper, 17 Federal Practice and Procedure, § 4045 at 135, 136-37 (1978).

(2) *Parens patriae* standing

The plaintiff States have alleged and proved no greater standing to bring this action as *parens patriae* than they have in their proprietary capacity. They have asserted no more of a *parens patriae* interest than that of representing the interests of such of those "citizens of each plaintiff state" who purchase or receive "natural gas supplies ... delivered by interstate natural gas pipeline companies who will be subject to the tax and who will collect such tax from Plaintiff States and their citizens." Paragraph XV of Complaint.

It is immediately obvious that the plaintiffs' *parens patriae* standing suffers the same deficiencies that mark their proprietary standing, to wit:

(1) The gas consuming citizens of these States have no greater or more recognizable legal interest in protesting any tax cost passed on to them in the price of the goods and services that they purchase than do the States in making their purchases.

(2) The alleged economic burden resulting from the passed-on cost of the Louisiana tax is a burden suffered not by all citizens but only by those who purchase and use natural gas. Such a limited burden has never been deemed the kind of general, direct injury to a State's entire economy, or to the health and welfare of all citizens, that will support *parens patriae* standing. Cf.

Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) (standing to protest antitrust injuries to the entire economy of the State); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (standing to protest effect on entire state economy of cutting off all interstate gas shipments); *New York v. New Jersey*, 256 U.S. 296 (1921) (standing in suit alleging noxious sewage discharge endangered "the health, comfort and prosperity of the State"). Contra: *Oklahoma v. Atchison, T. & S.F. R.R. Co.*, 220 U.S. 277, 289 (1911) (no standing to seek injunction against unreasonable freight rates affecting only shippers).

(3) Standing on a *parens patriae* basis may depend on "the presence or absence of a more appropriate party or parties capable of bringing the suit." *Commonwealth of Pennsylvania v. Kleppe*, 533 F.2d 668, 675 (D.C. Cir. 1976). In the context of an interstate tax controversy, the most appropriate party is of course the taxpayer. The taxpayer is the one who suffers the most direct injury and who is best qualified to protest the tax.

(4) Standing to invoke the original jurisdiction of this Court, whether on a proprietary or *parens patriae* basis, should not rest on an indirect economic burden traceable in some way to the imposition of a tax by some other State.

(5) Where the plaintiff State has no sovereign interest to assert or protect, its effort to represent those citizens who have a tax complaint against another State may reduce the *parens patriae* suit to "nothing more than a collectivity of private [tax] suits" against that State. *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976). Thus in *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938), this Court declined to accept an original suit to enforce the statutory liability of shareholders of a liquidating state bank, Oklahoma contending it had *parens patriae* standing to sue on behalf of the depositors and creditors. The Court held (at 394) that the *parens patriae* theory

> ... does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts economic interest in the claims and declares their enforcement to be a matter of state policy.

The Court's decision in *North Dakota v. Minnesota*, 263 U.S. 365, 375-76 (1923), also echoes this original jurisdiction policy.

In addition to violating the *parens patriae* principles established in these prior cases, the plaintiffs here are asking the Court to make a dramatic and unprecedented expansion in the *parens patriae* concept—an expansion which would lead to vast numbers of additional cases being brought under the Court's original jurisdiction. They contend that a *parens patriae* suit premised on original jurisdiction is proper whenever a State takes an action or imposes a tax that increases the price paid by persons in other States on goods transported from that State. Standing, they thus argue, should be granted here because Louisiana's First Use Tax will increase the price paid for natural gas. Such a contention would allow any State to bring suit in this Court against another State whenever a State increases its severance tax on any sort of natural resources.

Indeed, the principle plaintiffs espouse would allow an original action in this Court if a State makes a pollution control regulation that increases the costs of a company within that State and thus increases the prices of any goods shipped by that company in interstate commerce. Their logic would also allow suit whenever a State increases the state minimum wage, enforces strict health standards, or takes any other action which could increase the costs to a company engaged in interstate commerce, and thus forces the company to pass on that increase to customers residing in other States. Such a startling extension of original jurisdiction is unwarranted, given the clear language in this Court's precedents and the obvious practical effects.

C. Eleventh Amendment considerations

The Special Master properly recognized (Report at 13 [A—12]) that the original jurisdiction of this Court "may not be invoked when the plaintiff State is really asserting a claim in behalf of individuals who are the real parties in interest," citing *Oklahoma v. Atchison, T. & S.F. R.R. Co.*, 220 U.S. 277 (1911); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). See also *Louisiana* *v. Texas*, 176 U.S. 1 (1900); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883).

But the Special Master does not properly apply this jurisdictional principle to the facts of this case. The problem is one of identifying the individual real parties in interest, if any, on behalf of whom this original action has been brought. The Special Master appears to identify two possible groups of such individuals — the pipeline taxpayers and the gas-consuming citizens — and then purports to excuse both groups from application of the jurisdictional principle by reference to standing concepts. Report at 14 [A—12-13].

The Special Master's confusion is quite understandable. Never before has there been this kind of a volunteer effort by States to represent and prosecute in this Court the claims not of their own citizens but of citizens of States not parties to the litigation. The individuals on behalf of whom this suit has been filed are indeed the real parties in interest — the seventeen private pipeline taxpayers. Not one of those taxpayers is a citizen of any of the plaintiff States, or of Louisiana.[19]

The plaintiff States, in other words, have apparently volunteered to file this original action to prosecute the constitutional claims of foreign pipeline taxpayers relative to the Louisiana First Use Tax. The plaintiff States seek no relief for themselves or their gas-consuming citizens. Instead, they seek precisely what the aggrieved taxpayers seek in their own tax refund proceeding:

(1) A declaration that the Louisiana First Use Tax is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce;

(2) A permanent injunction prohibiting Louisiana from collecting the tax on such natural gas;

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[19]Sixteen of the pipeline taxpayers are incorporated in Delaware; the seventeenth is a West Virginia corporation. See Paragraph 11 of Complaint of Intervenors, filed in this Court as an attachment to the pipeline taxpayers' Motion for Leave to Intervene as Plaintiffs and to File Complaint at 32-34.

(3) A preliminary injunction, pending final determination, prohibiting Louisiana from collecting the tax; and

(4) An order that any and all revenues collected pursuant to the First Use Tax with respect to such natural gas "be refunded to the taxpayers together with interest thereon."[20]

It is difficult to imagine a more candid concession that this is a spurious original suit, one brought in the names of the eight plaintiff States and their gas-consuming citizens and for the primary benefit and relief of seventeen private citizens of other States. The original jurisdiction of this Court simply cannot be invoked for such private purposes. As was said long ago in *Louisiana v. Texas*, 176 U.S. at 22, "in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another."

The resulting absence of original jurisdiction over such a spurious claim of a clash between sovereign interests is only exacerbated by the fact that the plaintiff States here seek relief for individuals who are not even their own citizens. But the consequences of this effort to pursue private claims under the umbrella of this Court's original jurisdiction do not end with the absence of jurisdiction. It is equally true that an action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals — in this instance, the seventeen private pipeline taxpayers. See, e.g., *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *North Dakota v. Minnesota*, 263 U.S. 365, 376 (1923); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972).

As this Court said in the *New Hampshire* case, 108 U.S. at 91, "one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of

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the Constitution, by assuming the prosecution of debts owing by the other States to its citizens." To assume jurisdiction over this type of private action against a State is to violate both the letter and the spirit of the Eleventh Amendment.[21]

D. Interference with state tax administration

What is unique and disturbing about this case is the fact that there is no precedent for using the original jurisdiction of this Court as the vehicle for an attempt by one State to interfere with the administration of a tax statute of a sister State. Nor is there any precedent in the annals of original jurisdiction for using this Court as the first and final interpreter of state tax legislation as a prelude to assessing the constitutionality of the state statute.

Among the prayers for relief in the plaintiff State's Complaint are requests for preliminary and permanent injunctions prohibiting Louisiana and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce. Such requests immediately raise substantial questions as to the impact of the Tax Injunction Act of 1937, 28 U.S.C. §1341, on the exercise of this Court's original jurisdiction. That Act provides that federal district courts "shall not enjoin ... the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

By its terms, this Act only forbids injunctions by the district courts. This statute, however, reflects a much broader prudential concern that the federal judiciary not use its injunctive or equity powers to interfere with a state's internal economy and its administration of state tax statutes in particular. Five years before passage of the Tax Injunction Act, *Matthews v. Rodgers*, 284 U.S. 521 (1932), affirmed that federal courts could not en-

[21]In his second interim Report, dated September 15, 1980, the Special Master did not address or mention the Eleventh Amendment implications of this case. But in his first Report, dated May 14, 1980, the Special Master in dealing with the intervention motion of the pipeline taxpayers reserved "final determination of the applicability of the Eleventh Amendment until the final decision of the case."

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But the Special Master does not properly apply this jurisdictional principle to the facts of this case. The problem is one of identifying the individual real parties in interest, if any, on behalf of whom this original action has been brought. The Special Master appears to identify two possible groups of such individuals — the pipeline taxpayers and the gas-consuming citizens — and then purports to excuse both groups from application of the jurisdictional principle by reference to standing concepts. Report at 14 [A—12-13].

The Special Master's confusion is quite understandable. Never before has there been this kind of a volunteer effort by States to represent and prosecute in this Court the claims not of their own citizens but of citizens of States not parties to the litigation. The individuals on behalf of whom this suit has been filed are indeed the real parties in interest — the seventeen private pipeline taxpayers. Not one of those taxpayers is a citizen of any of the plaintiff States, or of Louisiana.[19]

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The resulting absence of original jurisdiction over such a spurious claim of a clash between sovereign interests is only exacerbated by the fact that the plaintiff States here seek relief for individuals who are not even their own citizens. But the consequences of this effort to pursue private claims under the umbrella of this Court's original jurisdiction do not end with the absence of jurisdiction. It is equally true that an action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals — in this instance, the seventeen private pipeline taxpayers. See, e.g., *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *North Dakota v. Minnesota*, 263 U.S. 365, 376 (1923); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972).

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What is unique and disturbing about this case is the fact that there is no precedent for using the original jurisdiction of this Court as the vehicle for an attempt by one State to interfere with the administration of a tax statute of a sister State. Nor is there any precedent in the annals of original jurisdiction for using this Court as the first and final interpreter of state tax legislation as a prelude to assessing the constitutionality of the state statute.

Among the prayers for relief in the plaintiff State's Complaint are requests for preliminary and permanent injunctions prohibiting Louisiana and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce. Such requests immediately raise substantial questions as to the impact of the Tax Injunction Act of 1937, 28 U.S.C. §1341, on the exercise of this Court's original jurisdiction. That Act provides that federal district courts "shall not enjoin ... the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

By its terms, this Act only forbids injunctions by the district courts. This statute, however, reflects a much broader prudential concern that the federal judiciary not use its injunctive or equity powers to interfere with a state's internal economy and its administration of state tax statutes in particular. Five years before passage of the Tax Injunction Act, *Matthews v. Rodgers*, 284 U.S. 521 (1932), affirmed that federal courts could not en-

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[21]In his second interim Report, dated September 15, 1980, the Special Master did not address or mention the Eleventh Amendment implications of this case. But in his first Report, dated May 14, 1980, the Special Master in dealing with the intervention motion of the pipeline taxpayers reserved "final determination of the applicability of the Eleventh Amendment until the final decision of the case."

join collection of a state tax if the taxpayers had a "plain, adequate, and complete" remedy at law in the state courts. Although the Court cited for authority Section 16 of the Judiciary Act of 1789, it stated that the provision "was but declaratory of the rule in equity, established long before [the Judicial Act's] adoption." *Id.* at 525. *Matthews* upheld as a "plain, adequate, and complete remedy" Mississippi's procedure for payment under protest and suit for recovery on the ground that the tax was enacted in violation of the United States Constitution. Similarly, in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Court stated that

> This Court has recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer ....
>
> It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states ....
>
> Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer — especially where the state, acting within its constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax. *Id.* at 297-98.

That case involved the same Louisiana refund procedure under attack here. The Court concluded that a federal injunction was improper:

> The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of the Act of August 21, 1937, are persuasive that relief by way of declaratory

> judgment may likewise be withheld in the sound discretion of the court. With due regard for these considerations, it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes.
>
> *Id.* at 300-01.

An example of the procedure preferred by the Court can be found in *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963). In *Halliburton* the plaintiff paid the assessed Louisiana tax under protest and instituted a tax refund suit challenging the validity of the state tax on federal constitutional grounds. The initial construction, interpretation, application and constitutionality of the state tax took place in the state courts. This Court resolved the matter on appeal from the Louisiana Supreme Court. Here, as in *Halliburton*, the taxpayers have paid the tax under protest and instituted their tax refund suits raising the identical constitutional issues presented by the plaintiff States.

The Special Master recognized the principles discussed in *Matthews v. Rodgers* and *Great Lakes Dredge and Dock Co. v. Huffman* in his ruling denying the plaintiff States' motion for judgment on the pleadings. There he stated that "[t]o invalidate a State tax law is a serious limitation on the State's prerogative to manage its own fiscal affairs." Report of the Special Master, September 15, 1980, at 21 [A—18-19].

The constitutional issues raised by the plaintiff States' complaint necessarily depend upon a reading of the Louisiana First Use Tax statute, which the Louisiana courts have yet to interpret. It also depends on a reading of the Louisiana Constitution of 1974, which the pipeline plaintiffs in the Louisiana refund suit argue prohibits this tax. The Louisiana Constitution is new and to a large measure uninterpreted. The state court is the appropriate forum for resolution of state constitutional and statutory issues. Their resolution could obviate the necessity for examination of the federal constitutional questions. Existence of state constitutional and statutory questions brings into focus the abstention concepts generated by *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). That case counsels abstention whenever a federal court is otherwise forced to interpret state law without the benefit of state court consideration and therefore under circumstances when a constitutional determination is predicated on a reading of the statute that is not binding on the state courts and may be discredited at any time. In the circumstances here, as in *Pullman*, this Court's decision on the constitutional issues raised in the plaintiff States' complaint may well be conjecture, and the underlying litigation rendered meaningless. Preventing such a waste of a district court's time (as in *Pullman*) is important, but preventing such a waste of the Supreme Court's time is vital.

The plaintiff States' broad facial attack on Louisiana's First Use Tax statute poses still another threat to the federal system of government in the form of "needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 471 (1945). The Court's recent observation in this regard in *Moore v. Sims*, 442 U.S. 415 (1979), clearly applies to the plaintiff States' efforts to use this Court's original jurisdiction to attack a new and complex statute of a sister State:

> State courts are the principal expositors of state law. Almost every constitutional challenge—and particularly one as far ranging as that involved in this case—offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. *Trainor v. Hernandez*, 431 U.S. at 445, 52 L Ed 2d 486, 97 S Ct 1911. The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims—a postulate we have repeatedly and emphatically rejected. *Id.* at 429-30.

The Court concluded that, with respect to all facets of abstention, "the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims." *Id.* at 430. That "adequate opportunity" is demonstrably present in the form of the Louisiana tax refund procedure. This leads us back to *Arizona v. New Mexico*, 425 U.S. at 797, where the Court declined to grant leave to file Arizona's bill of complaint, functionally indistinguishable from the plaintiff States' complaint here, inasmuch as New Mexico, like Louisiana, provided an appropriate state court forum "in which the *issues* tendered here may be litigated."

The plaintiff States ask this Court for a declaratory judgment that the Louisiana First Use Tax statute is unconstitutional and unenforceable on its face. They seek this declaration without awaiting any interpretation or construction of the statute by the Louisiana courts in the pending tax refund suits. Such an effort is totally misplaced. This Court has long frowned on attempts to initiate interpretation of state statutes in federal courts unless an emergency exists. "[A]s questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944). Yet the plaintiffs in this case would have this Court guess as to which aspects or interpretations of the First Use Tax statute might create problems under the Commerce Clause, the Supremacy Clause, the Import-Export Clause, the Contract Clause, and the Equal Protection Clause. And the Court is expected to perform this gargantuan task under the rubric of reading the face of the statute.[22]

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[22]The Court's discussion in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229, 230 (1957), while directed to an entirely different Louisiana statute, is also relevant to the Louisiana First Use Tax statute:

> The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality. The District Court recognized

[footnote continued]

CONCLUSION

Out of the multitude of complaints, motions, briefs, reports and exceptions on file in this proceeding emerges one overall conclusion: As presently structured, this case is not an appropriate subject for the exercise of this Court's original jurisdiction.

Seldom has a single case produced so many jurisdictional and prudential defects. Seldom has it proved so difficult to justify maintaining a case on the original docket. Any prolongation of the pendency of this proceeding before the Court will likely cause even more difficulties to arise, particularly of the prudential variety. Prudential defects tend to beget further problems.

Fortunately, there is one dominant reason for dismissing the complaint, growing out of the fact that there is an available and adequate alternative forum in which all the important constitutional issues here tendered have been raised and are in the process of being resolved. In that circumstance, this Court's decision in *Arizona v. New Mexico* teaches that this complaint should be dismissed forthwith, without prejudice to the right of the interested parties to assert their interests and to participate fully in the on-going tax refund proceedings in the Louisiana state courts.

Dismissal of the complaint on that basis has the added advantage of rendering it unnecessary for the Court to consider and

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the importance of the statute in deciding the case; it also recognized that a problem of interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana law? What are the problems that it was designed to meet? The answers to these questions are, or may be, relevant. Before attempting to answer them and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court. The Louisiana declaratory judgment procedure appears available to secure such an interpretation, ... It need hardly be added that the state courts in such a proceeding can decide definitively only questions of state law that are not subject to overriding federal law.

resolve the more difficult problems involved in some of the other motions now before the Court.

For all of these reasons, the Court should grant the motion of the State of Louisiana to dismiss the complaint. The contrary recommendation of the Special Master should not be followed.

All of the above and foregoing is thus respectfully submitted.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, counsel of record for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 14th day of November, 1980, I served copies of the *Exceptions of the State of Louisiana to the Report of the Special Master dated September 15, 1980 and Brief in Support Thereof*, by depositing three copies thereof in a United States mailbox, with postage prepaid, addressed to counsel of record at his or her post office address. Their names and addresses are as follows:

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All parties required to be served have been served.

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APPENDIX

No. 83, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF MARYLAND, *et al.*,
Plaintiffs,

v.

STATE OF LOUISIANA,
Defendant.

ON MOTIONS OF THE PLAINTIFFS FOR JUDGMENT ON THE PLEADINGS AND OF THE DEFENDANT FOR DISMISSAL OF THE COMPLAINT

REPORT OF THE SPECIAL MASTER

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Special Master

September 15, 1980

IN THE
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OCTOBER TERM, 1980

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ON MOTIONS OF THE PLAINTIFFS FOR JUDGMENT ON THE PLEADINGS AND OF THE DEFENDANT FOR DISMISSAL OF THE COMPLAINT

REPORT OF THE SPECIAL MASTER

This is the second preliminary report to be filed by the Special Master. The first, filed on May 14, 1980, contained the Special Master's recommendations with respect to various motions to intervene and to appear as *amicus curiae*. Those motions are still pending before the Court awaiting action on exceptions to the report. This report will contain the Special Master's recommendations with respect to a motion by the plaintiffs for judgment on the pleadings filed on September 18, 1979,[1] and a motion by the defendant for dismissal of the complaint, filed on October 22, 1979.[2]

It seems to the Special Master more orderly to deal with the motion to dismiss first, since it is largely concerned with jurisdictional and prudential issues not directly involving the central theme of the complaint and can therefore be considered a preliminary to the issues on the merits raised by the motion for judgment on the pleadings.

FACTS

This case involves the constitutionality of Louisiana's "first use" tax on natural gas. La. Rev. St. 47:1301-1307. Effective April 1, 1979, that law imposes a tax of seven cents per thousand cubic feet of natural gas on the first use within Louisiana of natural gas which is not subject to State severance taxes imposed by Louisiana or by any other State, or to import duties imposed by the United States. In practical effect, all parties agree that the tax is in fact imposed on the first use within Louisiana of natural gas produced from the submerged lands of the outer continental shelf[3] outside Louisiana and from federal enclaves within Loui-

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[1]Those pipelines which filed motions to intervene have also moved for leave to file a motion for judgment on the pleadings. Since the motion to intervene has not been acted on by the Court, this report will not address the pipelines' motion, but will be limited to the motion of the plaintiffs. However, it may be noted that the positions of the plaintiffs and of the pipelines are entirely consistent. Also it should be noted that the United States and the Federal Energy Regulatory Commission (F.E.R.C.—both hereafter referred to as the United States) have filed a brief *amici curiae* supporting the motion of the plaintiffs for judgment on the pleadings.

[2]Although this motion has not been specifically referred to the Special Master for a recommendation, the Special Master believes that the direction to him to "submit such reports as he may deem appropriate" is sufficient authority to justify a report on the motion. Order of March 3, 1980.

[3]The outer continental shelf consists of submerged lands seaward of the three-mile coastal belt ceded to Louisiana in 1953 by the Submerged Lands Act (43 U.S.C. 1301-15) as interpreted and applied to Louisiana by the opinion of this Court in *United States v. Louisiana*, 363 U.S. 1 (1960). By the Outer Continental Shelf Lands Act (43 U.S.C. 1331-43) Congress retained for the United States all rights of exploration, development and production from the outer continental shelf. The coastal States are specifically excluded from imposing their tax laws on the outer continental shelf.

siana.[4]

The Louisiana statute states that its purpose is to compensate its citizens "for costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana" and to recover for "damages to the state's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof."[5] La. Rev. St. 47:1301C.

Under the Louisiana law, the tax is imposed on the owner of natural gas at the time it is first subjected to a "use" within the State. La. Rev. St. 47:1303. The term "use" is defined as

> "the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery

[4]Nothing developed in the case to date indicates how much gas is produced on federal enclaves. A brief filed by the United States on November 20, 1979, indicates that some gas is produced from the Barksdale Air Force Base, but no figures on amount are provided. There may be a legal distinction between the application of the Louisiana law to gas from enclaves as against gas from the outer continental shelf since the latter production is outside the boundaries of Louisiana and therefore crosses that boundary when it is brought into the State without regard to its ultimate destination. For purposes of the application of the Natural Gas Policy Act of 1978, gas produced on the outer continental shelf is deemed "committed or dedicated to interstate commerce." 15 U.S.C. 3301(18)(A)(i). None of the parties have attributed any significance to this variance in the source of the gas.

[5]In its opposition to the plaintiff's motion to file the complaint, Louisiana cites authorities who estimate that Louisiana is expending $40,000,000 a year for governmental services required for outer continental shelf development and is suffering erosion of its shoreline and barrier reefs of about sixteen square miles annually, 40% of which can be attributed to activities for the development and production of natural gas. The value of the lost land is estimated to amount to $300,000,000 yearly. (Louisiana Brief in Opposition to the motion for leave to file the complaint, p. 24.) In a proffer of proof filed with the Special Master on April 15, 1980, Louisiana recites in great detail the costs to it of services rendered and damages suffered by reason of the operations on the outer continental shelf, but gives no estimate of the dollar amount involved. Louisiana Proffer of Proof, pp. 61-90.

point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state." La. Rev. St. 47:1302(8).

In practical effect, this case involves for the most part the application of Louisiana's tax to natural gas produced from the outer continental shelf.[6] In a proffer of proof submitted by Louisiana on April 15, 1980, pursuant to the request of the Special Master, there is a description of the procedures involving this gas. It rises to the surface at a platform in the Gulf of Mexico. There it passes through a separator or dehydrator to remove salt water and some impurities. In most cases ownership of the gas passes at the wellhead to the pipeline company. With respect to about 15% of the gas, the producer retains title to the gas until it is brought to shore and the processing is complete. In either case the gas passes through a gathering system of underwater pipelines which lead to the shore and thereafter to processing plants[7] where liquid and liquefiable hydrocarbons and pollutants are removed by a process of compression and decompression, heating and cooling and being subjected to contact with chemicals and oils. Some 5% in volume of the gas is thus removed at the processing plant. At the completion of the processing the dry gas is delivered to pipelines and more than 98% of this gas moves on out of the state. The products removed in the processing, including butanes, propanes, and ethanes, are transported to chemical plants for use as feedstock and fuel. Ordinarily the ownership of these products remains with, or reverts to, the producer.

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[6]In hearings before the Louisiana Senate Revenue and Fiscal Affairs Committee with respect to the bill which became the first use tax, one of the sponsors of the bill, Wilbert J. Tauzin, II, stated at page 3, "We are talking about natural gas brought into this state from outside our boundaries that is not taxed by some other jurisdiction. At the present time that practically means OCS federal gas. That gas is produced outside our three mile limit in federal waters. It is piped in to processing companies in Louisiana and then the dry gas is shipped out of the state."

[7]Louisiana states that there are 124 processing plants in Louisiana which process 95% of the outer continental shelf gas. A processing plant typically occupies about seventy-five acres of land and represents a present cost value of $40,000,000. La. Proffer of Proof, p. 11.

Throughout the process described above, the natural gas is under pressure, either from the well pressure or from compressors, and is in continuous movement throughout its journey. In *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 163 (1954), the Court noted that "the entire movement of the gas, from producing wells through the Phillips gasoline plant and into the Michigan-Wisconsin pipeline to consumers outside Texas, is a steady and continuous flow." And the Fifth Circuit in *Deep South Oil Co. v. Federal Power Commission*, 247 F.2d 882 (1957), *cert. den.*, 355 U.S. 930 (1958), stated at pp. 887-88:

> ". . . petitioner's own brief testified eloquently to the continuous movement of the gas which it sells at the wellhead. Petitioner admits, as, of course it must, 'that there is a continuous flow of gas from the Deep South wells into the gathering system of Texas gas; that the mass of gas of which the Deep South gas becomes a part moves continuously through the gathering system into a processing plant; that the movement through the processing plant is continuous; that there is a continuous movement of natural gas from the outlet of the processing plant to both interstate and intrastate destinations. . . .' "

However, gas which would be subject to the tax is exempted if it is used in Louisiana for "the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state . . ." or is 'consumed in the manufacture of fertilizer and anhydrous ammonia within the state." La. Rev. St. 47:1303A. A separate law provides that an owner subject to the first use tax, who is also subject to a severance tax on other production of gas or oil within the state, may credit his payment of the first use tax against his severance tax liability. La. Rev. St. 47:647. Further tax credits may be claimed against any other Louisiana tax to the extent that electric or gas utility companies or direct purchasers from the pipelines have been subjected to increases in their costs attributable to the first use tax. La. Rev. St. 47:11.

The first use statute declares "as against public policy," and makes unenforceable, any contractual provision which would entitle an owner of gas subject to the tax to recover the amount of the tax from any person other than a purchaser. La. Rev. St. 47:1303C. Thus, the burden of the tax, when it is imposed on a pipeline as the owner, may not be passed back to the producer, but must be borne by the pipeline or passed down the line to those who take the gas from the pipeline. Under the statute the tax is considered a cost of preparation or marketing of the gas. La. Rev. St. 47:1303C. So important did the Louisiana legislature consider these provisions that it added another section providing that if it is finally adjudicated that a contract for such pass-back is enforceable then either all first use taxes previously paid and subject to the contract shall be refunded, or the entire statute shall be null and void. La. Rev. St. 47:1307 Sec. 4.[8]

Estimates of the amount of tax to be collected under the act vary from $225,000,000 (Md. Complaint, ¶XIV) to $275,000,000 (Pipeline Br., p. 15) annually. The amount actually collected during the first year of operation has not been established. Other indications of the importance of this case to the natural gas industry are provided in Louisiana's proffer of proof. It is stated that there are 13,500 wells on the outer continental shelf producing 4.1 trillion mcf per year. The pipelines used to bring the gas ashore comprise 9,650 miles. The natural gas produced constitutes 10% of the natural gas consumed in the United States. La. Proffer, pp. 6-8.

The plaintiffs in this action are Maryland, New York, Massachusetts, Rhode Island, Illinois, Indiana, Michigan and

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[8]The Federal Energy Regulatory Commission has authorized the pipelines to pass on to their customers the first use tax collected from them, subject to refund when and if the tax is adjudged to be illegal. *State of Louisiana First Use Tax in Pipeline Rate Cases*, Docket No. RM78-23, Order No. 10, 43 Fed. Reg. 45553 (1978); Order No. 10-A, 43 Fed. Reg. 60438 (1978); and Order No. 10-B, 44 Fed. Reg. 13460 (1979), petitions for review pending *sub nom. Tennessee Gas Pipeline Co., et al. v. Federal Energy Regulatory Commission*, No. 78-3816 (5th Cir.). On April 24, 1980, the Commission issued an additional order modifying in some respects the terms of the prior orders with respect to insuring refunds to consumers. Order No. 10-C. On the same date, the Commission issued a show cause order in the same docket case to resolve the question of whether persons other than natural gas consumers should bear the burden of the first use tax while the constitutionality of the law is litigated. Show Case Order in Docket No. RM78-23 (Phase II) issued April 24, 1980.

Wisconsin. The sole defendant is Louisiana. The plaintiffs filed their motion for leave to file the complaint on March 29, 1979. The complaint alleged unconstitutionality under the commerce clause, the supremacy clause, the duty on imports clause, impairment of the obligation of contracts and the equal protection clause of the Fourteenth Amendment. Only the interstate commerce and the supremacy arguments are involved in the present motions. The plaintiff States allege injury by reason of the additional cost of gas used by them and by reason of such additional costs incurred by their citizens. The amounts alleged are very large: Maryland, $4,000,000; New York, $29,000,000; Massachusetts, $8,000,000; Rhode Island, $370,000; Illinois, $33,000,000; Indiana, $9,000,000; Michigan, $30,000,000; Wisconsin, $10,000,000.

On May 29, 1979, the defendant, Louisiana, filed a brief in opposition to the motion for leave to file. The United States, seventeen pipelines, the American Gas Association, the State of Alabama, and Associated Gas Distributors all filed briefs supporting the plaintiffs. On June 18, 1979, the Court granted the motion for leave to file the complaint and gave the defendant sixty days to answer. On August 17, 1979, Louisiana filed its answer generally denying the assertions of the complaint and asserting the validity of the tax. Thereafter, on September 18, 1979, the plaintiffs filed a motion for judgment on the pleadings. On October 22, 1979, Louisiana filed a motion to dismiss the complaint. The pipelines and the United States filed briefs *amici curiae* supporting the plaintiffs.

On March 3, 1980, the Court appointed the undersigned Special Master and referred the motion for judgment on the pleadings to him. The Special Master has held two open hearings on March 21, 1980, and June 19, 1980, at which the parties and the applicants for intervention participated, to consider the course of proceedings and to hear argument on the various motions. Also, the Special Master requested Louisiana, which had moved for an evidentiary hearing, to submit a proffer of proof covering the factual matters as to which it asserted evidence was necessary. Louisiana has filed an extensive proffer of proof to which the other participants have responded by memoranda asserting that no evidentiary hearing is necessary.

And so the matter stands.

I.

MOTION TO DISMISS THE COMPLAINT

The defendant presents three arguments for dismissal of the complaint: First, the States have no standing to attack the constitutionality of the tax since the tax is imposed on the owners at the time of the first use of the gas and the fact that those owners have passed the tax on in the form of higher prices does not give the States standing to sue either for their own increased costs or for the increased costs to their citizens; second, the case is not a proper one to invoke the original jurisdiction of the Court since it is really not a dispute between the plaintiffs and Louisiana but between the pipelines or gas consumers and Louisiana; and, third, the dispute can better be tried in some other court, preferably a Louisiana court where State questions of construction can be decided and where constitutional issues, if they survive, can be tried on a full record and then appealed, if necessary, to the Supreme Court. The motion to dismiss does not argue that the constitutionality of the Louisiana law can be upheld on the face of the pleadings.[9]

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[9]The grounds urged by the defendant for dismissal are substantially the same as the grounds on which the defendant opposed the plaintiffs' motion for leave to file their complaint. The plaintiffs therefore argue that the granting of their motion over the objections of the defendant amount to a rejection of the defendant's jurisdictional and prudential arguments. However, the Court's order did not explicate the reasons for the order and the defendant argues that it should be taken as postponing consideration of its objections, rather than rejecting them. It does not seem profitable to speculate on the reasons underlying a *per curiam* order. Since the issues are constitutional, the defendant is probably not foreclosed from renewing its argument in the form of a motion to dismiss whatever the basis for the order.

A. Standing of Plaintiffs To Challenge Tax

Louisiana is, of course, correct in its assertion that no tax is directly imposed by it on the plaintiff States. At no time are they called on to remit funds to Louisiana; they and their citizens pay the pipelines which are liable for the first use tax. At least theoretically the seven cents per thousand cubic feet of gas could be absorbed by the producers of the gas or the pipelines. However, by the terms of the Louisiana statute, the owners liable for the tax are not allowed to pass it back to the producers. La. Rev. St. 87:1303C [*sic*]. The pipelines are public utilities whose rates, and the prices paid by purchasers from them, are controlled by FERC. Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d. Thus they are entitled to recover from their customers all of the legitimate costs of obtaining the gas, processing it, and transporting it.[10] The Louisiana statute specifically provides that "this tax shall be deemed a cost associated with uses made by the owner in preparation of [or] marketing of the natural gas. La. Rev. St. 87:1303C [*sic*]. Although the FERC had previously accepted contracts which required producers to assume the costs of transporting liquid hydrocarbons associated with natural gas and of processing the natural gas to recover liquid and liquefiable hydrocarbons, FERC has now ordered that the amount of the Louisiana first use tax be handed on to customers, thus accepting for the time being Louisiana's treatment of the item as a cost of processing the gas for transportation.[11] Thus, both by reason of the Loui-

[10]*See FPC v. United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967): "One of [the Commission's] statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. Normally included as a cost of service is a proper allowance for taxes, including federal income taxes. The determination of this allowance, as a general proposition, is obviously within the jurisdiction of the Commission."

[11]*State of Louisiana First Use Tax in Pipeline Rate Cases*, Docket No. RM78-23. In issuing its order in this case the FERC challenged the constitutionality of the tax and required the pipelines to institute refund proceedings in the Louisiana courts and to make appropriate undertakings to insure refunds to their customers if the tax is thrown out.

siana law and the orders of FERC, the ultimate cost of the tax is now borne by the plaintiffs and by consumers in the plaintiff States. Under these circumstances it is clear that, although the tax is collected from the pipelines, it is really a burden on consumers. The parties required to stand the cost of the tax should be accorded standing to contest its constitutionality.

In analagous [*sic*] situations this Court has held that a state has standing to sue when it and its citizens have been adversely affected by the actions of a sister state. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). In that case where West Virginia was attempting to restrict the flow of natural gas, this Court said at page 592:

> This interference gives rise to a matter of grave concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.

In *Georgia v. Pennsylvania Railroad*, 324 U.S. 439, 447 (1945), an alleged conspiracy with respect to freight charges imposed on shippers was found to implicate the state sufficiently to sustain its standing to sue. In a more recent case this Court held that, although ordinarily only direct purchasers may recover Clayton Act treble damages, cost-plus purchasers may be in a different posture. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). In these cases the Court looks beyond forms to the substance of the claim. *Arkansas v. Texas*, 346 U.S. 368, 371 (1953).

It would be unfortunate if the parties who actually stand the loss were required to rely on an intermediary who had passed on the loss to them to press the claim of unconstitutionality. In this case the pipelines are in agreement with the plaintiffs, but their interest is different and the states would be allowed to speak for themselves. I conclude they have standing to sue.

B. Jurisdiction as an Original Action

The original jurisdiction of this Court, established by Article

III, Sec. 2, Clauses 1 and 2 of the Constitution, and made exclusive by 28 U.S.C. 1251 (a)(1), may not be invoked when the plaintiff State is really asserting a claim in behalf of individuals who are the real parties in interest. *Oklahoma v. A.T. & Santa Fe Ry.*, 220 U.S. 277 (1911); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976).[12]

The defendant argues that in this case the plaintiffs are not the real parties in interest, but are volunteers for the pipelines, or for their own citizens. I have discussed the issue of standing with respect to the pipelines above and concluded that the fact that the cost of the tax is indirect rather than direct does not foreclose plaintiffs from asserting the injury to them and their citizens. With respect to the impact of the tax on consumers, the plaintiffs allege damage both in their proprietary status as users of natural gas in their various governmental functions and as *parens patriae.*

The plaintiff States allege that they have incurred material added costs as consumers of natural gas forced to pay higher prices by reason of the first use tax. The annual cost to each of the plaintiffs as alleged in the complaint is as follows: Maryland, $60,000 (¶XVI); New York $300,000 (¶XXVI); Massachusetts, $25,000 (¶XXII); Rhode Island, $25,000 (¶XXVIII); Illinois, $270,000 (¶XVIII); Indiana, $70,000 (¶XX); Michigan, $650,000 (¶XXIV); Wisconsin, $70,000 (¶XXX). As far as these sums are involved, the States are not suing *parens patriae* or in

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[12]In the latter case the Court said at 665-66:

"It has however, become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.

* * *

"This rule is a salutary one. For if, by the simple expedient of bringing an action in the name of a State, the Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievancies [*sic*], our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, Sec. 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate."

any other representative capacity; they are suing to protect their own treasuries.

With respect to the injury done to the States by reason of the imposition of the additional costs on their citizens, the States do have a quasi-sovereign interest in their economic welfare. The individuals affected are not a selected group but practically the entire population. Perhaps some large consumers and the public utilities have individual claims of sufficient size to justify suits; but by and large it would seem difficult if not impossible for individual consumers to establish sufficient damage to themselves and a class suit would seem to be unmanageable. *Cf. Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972). The case seems to fall within the general class of cases in which the states have been recognized as proper parties. *See Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (restriction on shipment of oil); *Missouri v. Illinois*, 180 U.S. 208 (1901) (sewage in river); *Kansas v. Colorado*, 206 U.S. 46 (1907) (diversion of water); *New York v. New Jersey*, 256 U.S. 296 (1921) (pollution of harbor); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (altering flow of stream).

The Special Master concludes that the case falls within the original jurisdiction of the Court.

C. Court's Discretionary Authority To Restrict Use of Original Actions

Assuming that the plaintiffs have standing to sue and that the case falls within the original jurisdiction of the Court, the question still remains whether the Court should exercise its discretion over the use of original actions by dismissing the action.

It is clear, of course, that controversies between the States fall within the original jurisdiction of the Court under Article III, Section 2, Clauses 1 and 2 of the Constitution, which jurisdiction is exclusive by reason of 28 U.S.C. 1251 (a)(1). The exclusivity of the jurisdiction suggests that in ordinary course the Court should accept such cases since the very grant of power to the Court to the exclusion of other federal courts carries the implication that the Court will exercise its authority. But it is also clear that the Court can, and will, refuse to accept jurisdiction of a cause when there are other and better ways of resolving the dispute. *Arizona v. New Mexico*, 425 U.S. 794 (1976); *Massachusetts v. Missouri*, 308 U.S. 1, 18-19 (1939). In *Louisiana v. Texas*, 176 U.S. 1 (1900), the Court said at 15:

> But it is apparent that the jurisdiction 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 itself properly justiciable.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), the Court stated at pp. 93-94:

> It has long been this Court's philosophy that our original jurisdiction should be invoked sparingly. * * * We construe 28 U.S. 1251 (a)(1) as we do Art. III, Sec. 2, Cl. 2 to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.

The alternatives to the original suit here do not seem attractive as the means of deciding this controversy between the States. The defendant urges that the best forum to hear the case is the judicial system of Louisiana where the courts would have authority to construe the Louisiana statute and perhaps decide it on State grounds which would avoid the necessity of a constitutional adjudication.

There are at present two lines of cases in the State courts. First, the Governor and other officials of the State brought an action on September 22, 1978, against the pipelines and other owners subject to the tax. The case was filed in the Nineteenth Judicial District Court of Louisiana. The title of the case is *Edwards v. Transcontinental Gas Pipe Line Corp.*, Docket No.

216,867. The plaintiffs asked for a declaratory judgment on the constitutionality and construction of the first use statute. The defendants have filed answers raising the same arguments the plaintiffs present in this case. The case is presently in the discovery stage. The plaintiff States in this case are not parties to that proceeding, nor is the United States or FERC.

Second, the pipeline companies which have sought to intervene in this proceeding have filed a tax refund suit on June 22, 1979, in the Nineteenth Judicial District Court. *Southern Natural Gas Co. v. McNamara,* Docket No. 225,533. The defendants are the Secretary of the Department of Revenue and Taxation, the Department itself, and the State of Louisiana. The plaintiffs raise the same issues as are involved in the other State case and here. Again the plaintiff States here are not parties, nor is the United States or FERC. This case also is in the discovery stage.

Finally, the Federal Energy Regulatory Commission filed an action in the United States District Court for the Middle District of Louisiana on September 29, 1978, against the State officials. *Federal Energy Regulatory Commission v. McNamara,* C.A. 78-394. The plaintiffs sought to enjoin enforcement of the first use tax on the same grounds as are asserted in the other cases. On motion of the defendants the action was stayed on January 26, 1979. An Appeal from the stay was filed in the Court of Appeals for the Fifth Circuit, but that appeal is presently stayed.

None of these cases appears to be a suitable substitute for the original action. In the State cases, the plaintiff States have no standing and the court apparently has no authority to grant injunctive relief pending the outcome of the cases. The refunds, if ordered, appear to be limited as to interest to 6% which would result in a substantial advantage to the State and damage to the plaintiffs in view of the quarter of a billion dollars which is being collected annually. But, in any event, the plaintiffs should not be required to depend on private parties to conduct their litigation and protect their interests; they should be permitted to speak for themselves.

As for the United States District Court case, it is clear that the Constitution and Judicial Code give exclusive jurisdiction over the States' case against Louisiana to the Supreme Court so that the States cannot intervene. In view of the amounts involved, moreover, it would seem questionable to leave it to the United States to litigate, to invite the delays incident to a trial, to appeal to the Court of Appeals and then to an application for review here and eventually to consideration on the merits here. Of course cases can be expedited, but if the matter is to be tried in an evidentiary hearing of the type asserted to be necessary by the defendant, it will take time; if the evidentiary hearing is not required, it equally well can be decided here.

The strongest precedent in favor of dismissing the complaint and allowing the issues to be litigated in some other forum is *Arizona v. New Mexico,* 425 U.S. 794 (1976). That case involved an attempt by Arizona to institute an original action in this Court. Arizona was suing in its proprietary capacity as a consumer of electricity and as *parens patriae.* New Mexico had levied a tax on electric generation which fell on three companies that sold electricity in Arizona. Although the taxing statute appeared nondiscriminatory on its face, it was alleged that certain tax credits with respect to electricity sold in New Mexico resulted in the tax actually applying only to electricity sold outside of the State. By the time the motion for leave to file came before the Court, suit had already been brought in the New Mexico courts by the three interstate electric companies attacking the constitutionality of the tax. One of the plaintiffs in that suit was related to Arizona so that the state could in effect represent itself in the New Mexico suit. This Court denied Arizona leave to file, holding in a *per curiam* decision that it was more appropriate to rely on the New Mexico proceeding.[13]

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[13]After the litigation in the State courts, on appeal this Court held the tax invalid. *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979). The Court held the tax invalid under the Supremacy Clause as inconsistent with a federal statute, 15 U.S.C. 391, prohibiting a state from imposing a tax on the generation or transmission of electricity that imposes a greater tax burden on electricity consumed outside of the taxing State than in it.

Both the plaintiffs (Brief in Support of Motion for Leave to File Complaint, pp. 14-18) and the United States (Brief *Amicus* on Motion for Leave to File Complaint, pp. 10-14) have drawn distinctions between that case and this. All the distinctions have merit, but the really significant difference is that, by reason of its relationship to one of the litigants, Arizona could be heard in its own behalf in the State court. The plaintiffs here cannot represent themselves in the State court proceedings described above. Also, in the Arizona case the issue was decided on the motion for leave to file. This Court has granted that motion in this case, permitting the filing, and to dismiss it now on grounds raised on consideration of the motion would be a far more serious reversal, penalizing the plaintiffs both in time and money.

The nature of this case seems to be appropriate for this Court's attention. It is important both because of the huge sums involved and because of the number of States affected, thirty in all. The issues are important on their own account and because of their effect on the price of gas. The defendant asserts the case is not appropriate for original consideration by the Court because, it asserts, an extensive evidentiary hearing is necessary. Even if such a hearing proves to be necessary, the Court has adopted procedures for trying such cases.[14] An expeditious settlement of the controversy is desirable since the refund proceedings cannot make the plaintiffs whole and, while no great speed seems possible in a case of this magnitude and complexity, this Court can at least control the case and, if it desires, move it forward more speedily than would be possible in a trial and appeal procedure.

The Special Master recommends that the motion to dismiss the complaint be denied.

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[14]*See, e.g.*, *Arizona v. California*, 373 U.S. 546 (1963), a case which took two years to try before a special master. Three hundred and forty witnesses were heard and the transcript consisted of 25,000 pages.

II.

MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff States argue that on the basis of the complaint and answer they are entitled to judgment. While there are many facts in dispute, the plaintiffs assert that the Louisiana first use tax should be declared unconstitutional on the basis of facts that are not in dispute, on facts as to which the Court may take judicial notice, and on principles of law established by the Court. The tax act must fall, they say, because under the Supremacy Clause it is overruled by the Natural Gas Act, the Natural Gas Policy Act of 1978 and the Outer Continental Shelf Act. In the second place, plaintiffs claim that, apart from its inconsistency with federal statutes, the act must fall because it encroaches on the exclusive interstate commerce field assigned to federal control. As to both claims it is argued that no evidentiary hearing is necessary or appropriate.

It is the Special Master's conclusion that the facts disclosed in the complaint and answer do not, without more, require that the act be invalidated on the basis of the Supremacy Clause. There are provisions of the federal and State laws which may be irreconcilable in operation; the Louisiana first use tax may in fact interfere with the federal regulatory process; but, on the other hand, the interference may be so indirect, so peripheral, so subject to administrative adjustments, as to permit the State and federal programs to coexist. Evidentiary hearings are necessary to reach a conclusion on these issues.

As far as the Interstate Commerce Clause is concerned, the Special Master believes that a determination on the validity of the Louisiana tax could be made on the pleadings, plus a generous application of judicial notice. But the Special Master also suggests that to reach a conclusion on the papers involves such an application of judgment that it would be desirable to withhold a conclusion until the issues can be tested against facts developed in an evidentiary hearing. To invalidate a State tax law is a serious limitation on the State's prerogative to manage its own fiscal affairs.[15] The Special Master believes that the chance of an erroneous decision can be materially reduced by permitting the parties to present a factual record on the operation of the law rather than judicially noticing abstract scientific theories and engineering practices and then applying legal theories and findings from prior cases to situations not contemplated at the time they were pronounced.

A. Application of the Supremacy Clause

The Natural Gas Act (15 U.S.C. 717-717w) was enacted in 1938 to assure consumers of natural gas of fair prices and to protect them from the monopolistic power of the interstate pipelines in a field where the States were powerless to act. *See Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388-89 (1959). The Federal Power Commission (FPC), whose duties have been inherited by the Federal Energy Regulatory Commission (FERC), was given authority to regulate the interstate gas industry from the wellhead to the delivery of the gas to intrastate distributors or consumers. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). Authority was given the Commission to regulate the prices of sales in interstate commerce for resale, to require certificates of convenience for the connection of pipelines, to approve contracts for the acquisition of gas, and fix the charges for transportation of gas. 15 U.S.C. 717c, 717d, 717f. Every aspect of the interstate natural gas business was entrusted to FPC regulation. Sec. 1(b) of the Act (15 U.S.C. 717(b)) provides:

> (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial,

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[15]*See Great Lakes Dredge and Dock Company v. Huffman*, 334 U.S. 385 (1949); *Matthews v. Rodgers*, 384 U.S. 521 (1932). The Congress has recognized this policy in 28 U.S.C. 1341, limiting the district courts' authority to issue injunctions in such cases.

> or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

The courts have interpreted the Act through the years in line with its purpose to grant the FPC, and now the FERC, full authority to implement the Act by rules, regulations or orders as domestic and international conditions have developed.

The Natural Gas Policy Act of 1978 (15 U.S.C. 3301) amended the Natural Gas Act in an attempt to undo the economic effect of fixing prices for interstate natural gas while leaving intrastate gas unregulated. This had resulted in a severe shortage of gas in the interstate market while producers sought to profit from the higher prices in the intrastate market. The 1978 act was an attempt to put all natural gas on an equal basis and thus to alleviate the shortage. In order to protect consumers of gas from the inclusion in the processing and transportation costs of expenses more properly allocable to the production and transportation of liquid and liquefiable hydrocarbons, FERC was given specific authority to allocate such costs between the products involved. 15 U.S.C. 3320.

The second federal statute involved is the Outer Continental Shelf Lands Act which was enacted in 1953. (43 U.S.C. 1331). This Act provides that the development of the resources of the submerged lands seaward of the boundaries of the coastal states be given to the federal government with authority over the exploration, leasing, and production of natural resources including oil and gas. The act specifically excludes the States from control over that area. 43 U.S.C. 1333.

The history of the dispute with Louisiana over its interest in the submerged lands goes back to 1950 when this Court determined that the U.S. had paramount rights in the submerged lands up to the shoreline. *United States v. Louisiana*, 339 U.S. 707. Congress, heedful of the States' claim that they had lost revenue from areas on which they had previously relied, ceded to the coastal States the submerged lands and their resources within their historic boundaries. *Submerged Lands Act*, 43 U.S.C. 1301 (1953). The validity of this cession was upheld in *Alabama v. Texas*, 347 U.S. 950 (1954), and the Louisiana boundary under the act was fixed at three miles in *United States v. Louisiana*, 361 U.S. 1 (1960).

Having given to the coastal States the submerged lands within their boundaries, the Congress then proceeded to make provision for the development of the remainder of the continental shelf seaward of the belt given to the States. In the committee hearings leading up to this statute, Louisiana and the other gulf States presented strong pleas that they be granted a share of the income from the parts of the shelf abutting their boundaries to compensate them for the expenses they foresaw devolving on them as a result of the offshore operations. Hearings before the Senate Committee on Interior and Insular Affairs on S. 1901, 83d Cong., 1st Sess. pp. 185-6, 187-8, 191-3, 265-6. In the end the Congress decided to give no share of the income from the outer continental shelf to the States and specifically wrote into the law a prohibition against any application of the States' tax laws to the area. S. Rep. No. 411, 83d Cong., 1st Sess., pp. 2-3, 13-14. 43 U.S.C. 1333 (a)(2)(A) provides: ". . . State taxation laws shall not apply to the Outer Continental Shelf." And in 1933 (a)(3): "The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in, or jurisdiction on behalf of, any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom." Section 9 of the Act (43 U.S.C. 1338) provides that all revenues go into the federal treasury.[16]

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[16]In a sense,the first use tax can be considered the most recent step in Louisiana's continuing effort to press its claim to profit from the production of oil and gas off its coast. The claim was first asserted in the initial dispute with the United States over title to all of the submerged lands, a dispute which was re-

[footnote continued]

The final federal statute involved is the Coastal Zone Management Act. 16 U.S.C. 1451. One of the provisions of this statute provides for a fund to make grants to the States to compensate them for the impact of the federal programs for energy development. 16 U.S.C. 1456a. This is one of the purposes declared by the Louisiana legislature in the first use tax as a justification for imposing the tax.

Considering first the possible conflict with the Natural Gas Act, it is clear that Congress did not totally exclude the States from regulating some phases of the industry. This Court in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), recognized that, before the passage of the Natural Gas Act, the States had been held powerless under the Commerce Clause to protect themselves against abuses in the industry. *See, e.g., Missouri v. Kansas Gas Co.*, 265 U.S. 298 (1924). The Court in *Hope* noted at pp. 609-10 that the House report on the bill stated that its purpose was to fill the gap. In accomplishing that purpose the bill was designed to take "no authority from State Commissions" and was "so drawn as to complement and in no manner usurp State regulatory authority." H. Rep. 709, 75th Cong., 1st Sess p. 2. By the terms of the statute the federal government is given authority over interstate transportation, sales for resale in interstate commerce, and over gas companies engaged in such transportation or sale;

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solved in favor of the United States in *United States v. Louisiana*, 339 U.S. 707 (1950). The attempt in Congress to recover by legislation what had been lost in litigation was partially successful in that the Submerged Lands Act gave Louisiana the three mile belt along its coast. As pointed out in the text, Louisiana failed to convince Congress that it should share in the proceeds from the outer continental shelf. Louisiana continued to litigate as to the extent of its historic boundaries, which was finally fixed at three miles in *United States v. Louisiana*, 361 U.S. 1 (1960). Since that decision there has been extensive further litigation to fix the line and determine the disposition of royalties theretofore collected. *See, e.g., United States v. Louisiana*, 420 U.S. 529 (1975). The entire history of this litigation is described in an opinion of the Court issued last term. *United States v. Louisiana*, 100 S. Ct. 1618 (1980). The imposition of the first use tax, which is at precisely the same rate as the severance tax, is looked upon by the plaintiffs as one more step by Louisiana to recover some of the revenues it lost when it lost the submerged lands case.

while the States retain power to regulate local distribution and "the production or gathering of natural gas." 15 U.S.C. 717. Nothing is specified about State taxation, but the Natural Gas Policy Act of 1978 seems to recognize that the States may impose severance taxes on local production. 15 U.S.C. 3320 (a)(1).

The plaintiffs highlight two aspects of federal regulation under the Natural Gas Act and the Natural Gas Policy Act which they assert override the provisions of the first use tax.

First, they assert that the federal authority to fix prices, the very "heart" of the Natural Gas Act (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944)), is undercut by the Louisiana law, since the tax is added to the cost of the gas which is to be sold in interstate commerce. Plaintiffs rely on such authority as *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963); and *Oklahoma Corporation Commission v. Federal Power Commission*, 415 U.S. 961 (1974). They may be right since the impact of the tax appears to be directed at interstate sales by reason of the exemptions and credits granted intrastate users. But a decision is hard to make on the pleadings since it is difficult to calculate how great an effect on the regulatory power of the FERC is imposed. We do know that the FERC has permitted, over its strong disinclination to do so, the first use tax to be treated as a cost of transportation and of processing and therefore included as one of the underlying factors on which the price to consumers is fixed. *State of Louisiana First Use Tax Rate Cases,* Docket No. R.M. 78-23 Orders No. 10, 10-A and 10-B, n.8, *supra.* The issue eventually to be resolved is whether the first use tax is just one of the many factors affecting the price, some of which are beyond FERC control, or whether it is a substantial hindrance to the Commission's powers.

Second, the plaintiffs press a more difficult problem resulting from the provisions of the Louisiana law which allot the tax to the cost of preparation [or] marketing of natural gas and outlaw contractual provisions passing the tax back to producers while permitting it to be added to the purchase price of consumers. La. Rev. St. 47:1303C. Basically this does not appear to be a fiscal matter since the revenue to the State is the same whoever eventually pays the bill. Louisiana in its Answer to the Complaint justifies the provision by stating that "the sole purpose, intent, and application of the [provision] has been to ensure that the First Use Tax will not unreasonably burden any person within the interstate commerce stream but will be passed along to the ultimate users and consumers. Because the tax will be borne by the ultimate users and consumers, neither party to the contracts in question suffers." La. Answer, ¶LX, p. 21. But FERC had previously accepted contracts that provided that the processing involved and the tax on it were properly considered costs of producing liquid and liquefiable hydrocarbons, not properly to be borne by consumers of the natural gas.

For the present, FERC has adopted regulations permitting the tax to be passed along, but making provision for refunds to the consumers if the tax is finally held invalid and mandating the pipelines to seek relief in the Louisiana courts. *State of Louisiana First Use Tax Rate Cases*, Docket No. R.M. 78-23. And FERC is itself seeking to upset the tax in the federal courts. *Federal Energy Regulatory Commission v. McNamara*, C.A. 78-394 M.D. La. Meanwhile the FERC administrative proceedings are continuing with an order to show cause why the producers should not be billed for and pay the First Use Tax with respect to liquid or liquefiable hydrocarbons transported with or extracted from natural gas. FERC Order to Show Cause in R.M. 78-23.

Thus FERC's final decision as to the allotment of the tax is still not made.

There is an ongoing dispute between the parties as to the legal effect of the processing by which the hydrocarbons are extracted and its effect on the natural gas. In part this turns on the physical nature of the process. If the natural gas is essentially the same when it goes into, and comes out of, the processing plant, and if the hydrocarbons are products which were retained by the producers from the start and are separated for their profit, then the position of the FERC is sound that the cost, including the tax, should revert to the producers rather than being passed on to the customers. But if the processing is essentially a step to make the gas dry and of the Btu content standardized for transportation and use, then it is reasonable to pass the tax on to consumers. Plaintiffs claim that the authority to make that judgment is granted to FERC (*Federal Power Commission v. United Gas Pipe Line Co.*, 386 U.S. 237, 243-246 (1967)), and that Louisiana interferes with its function when it seeks to allot the tax. The Special Master believes that the conflict with the Natural Gas Act is the type of issue which cannot suitably be resolved on the papers or by reference to past decisions which were not really focused on the issue. Moreover, it may be that in the end FERC's orders can be adjusted so that the laws will mesh without conflict.

The alleged conflict between Louisiana's law and the Outer Continental Shelf Lands Act does not appear to require an evidentiary hearing. The argument appears to be that Louisiana is in effect imposing a tax on the production of gas produced in the federal domain, in spite of a specific prohibition against that action. 43 U.S.C. 1333 (a)(2)(A). This is a legal question which can be answered by an analysis of the two statutes. It is true that the principle [*sic*] objects of the first use tax are actions with respect to, or transactions in, natural gas produced on the outer continental shelf. But no tax is imposed on any action or person until the gas has been brought into the state. To be sure, all, or almost all, of the gas produced does come into the State, and all, or almost all, of the gas that is brought into the State is subjected to one of the "uses" which results in liability for the tax. But that does not of itself answer the question since what happens in the State may subject it to authority of the State. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

The case which most strongly supports Louisiana's position is *Portland Pipeline Corp. v. Environmental Improvement Commission*, 307 A.2d 1 (Maine), *appeal dismissed*, 414 U.S. 1035 (1973). There, in order to provide funds to clean up oil spills, a tax was levied on the movement of oil over Maine's harbor waters. All, or almost all, of the oil taxed was, or had been, the subject of interstate or foreign commerce. Nevertheless, the court held that the tax was not on the oil itself but on the act of transporting it over Maine's waters. This case dealt not with a tax on gas but on oil, so that there was no question of the supremacy of the Natural Gas Act though a question could have been raised about the supremacy of the Water Quality Improvement Act of 1970. 33 U.S.C. 1321. What the case stands for is the continuing right in the States to protect their interests so long as their regulations do not hamper interstate commerce.

The most substantial possible conflicts appear to be between the Louisiana tax law and the Natural Gas Act, particularly the provisions with respect to passing the burden of the tax back to the producers or forward to the consumers. This may prove to be an irreconcilable conflict but, as this Court said in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 at 157 (1978):

> The Court's prior cases indicate that when a State's exercise of its police power is challenged under the Supremacy Clause, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act. *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218-23 (1947).

The decision whether to decide the issue on the pleadings, or to hold evidentiary hearings, is complicated by the fact that if hearings are held and the case prolonged, Louisiana stands to gain materially by continuing to collect a quarter of a billion dollars a year which, under its provisions for the refund of taxes paid under protest, would be repaid with only 6% interest, whereas the current value of this enormous fund would be far greater than 6%. It is desirable, therefore, to reduce the delay in deciding this case or to eliminate the profit to Louisiana from the delay.[17]

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[17]An interim injunction against the collection of the tax while its validity is being determined would eliminate this element of rewarding Louisiana for extending the litigation, but injunctions against the collection of State taxes are not favored.

It does not appear to the Special Master that the desirability of expediting a decision outweighs the desirability of deciding the issues on the basis of a complete record. The Special Master recommends that the Court not grant the motion for judgment on the pleadings on the basis of the Supremacy Clause.

B. Interference with Interstate Commerce

We are concerned here with gas which is produced from the outer continental shelf, brought ashore by pipelines, processed in plants which remove pollutants and liquid and liquefiable hydrocarbons, delivered to interstate pipelines and transported out of the State. The whole movement is "steady and continuous flow." *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 163 (1954). And in *Deep South Oil Co. v. Federal Power Commission*, 247 F.2d 61 (5th Cir. 1957), it was recognized that "the mass of gas of which the Deep South gas became a part moves continuously through the gathering system into a processing plant; that the movement of natural gas from the outlet of the processing plant to both interstate and the intrastate destinations." The courts have held that the natural gas is in interstate commerce during the entire journey. *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965); *Interstate Natural Gas Co., Inc. v. Federal Power Comm.*, 331 U.S. 682, 684-7 (1947); *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 467 (1950).

The defendant asserts that the interstate transportation of natural gas commences at the tailgate of the processing plant and that the processing is a local activity that transforms "wet" gas into a different product, "dry" gas, so that the processing and the steps which precede it do not directly involve the the interstate transportation. In view of the continuous movement of the gas, this seems a doubtful interpretation, but it hardly helps Louisiana in any event since the movement from the outer continental shelf across the state boundary and up to the processing plant would itself seem to be an interstate journey. *See Continental Oil Co. v. Federal Power Commission*, 370 F.2d 57, 66

(5th Cir. 1966). Moreover, the Natural Gas Policy Act of 1978 defines the term "committed or dedicated to interstate commerce" to include "(i) natural gas which is from the Outer Continental Shelf", 15 U.S.C. 3301(18). Thus, all of the uses preceding the processing would be part of a prior interstate transportation even if Louisiana were correct in asserting that the processing itself broke the chain. Moreover, even if the tax is considered to be imposed on a separable local event, it still will offend the interstate commerce clause if the result of the tax is to impair or hinder the interstate commerce. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977); *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64 (1963).

Although it has been recognized that interstate commerce can be called on to meet its fair share of the State's costs, it has been held that in order to be valid a tax must be (1) "fairly apportioned; (2) "not discriminatory against interstate commerce"; (3) "applied to activity with a substantial nexus with the State"; and (4) "fairly related to service provided by the State." *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978). The plaintiffs claim that Louisiana's tax does not fall equally on both inter- and intrastate transactions, and that it is not fairly apportioned to an identifiable activity within the state.

Louisiana replies that its tax does not discriminate since a tax of seven cents per thousand cublic feet is imposed on all natural gas within the State, either as a severance tax with regard to gas produced within the State or as a use tax when the gas is produced outside the State and thereafter subjected to the specified uses within the State. But this equality is confused by a series of exclusions and credits. First, there is excluded gas used in drilling for or producing oil, natural gas, sulphur or in processing natural gas for liquids extraction, or in the manufacture of fertilizer and anhydrous ammonia, all within the State. La. Rev. St. 47:1303A. No exclusion is provided if these uses are made of the gas outside of the State. Secondly, a severance tax credit is allowed under which a taxpayer liable for the first use tax may, if he is also a producer of other gas within Louisiana, credit his first use tax payment dollar for dollar against his liability for severance taxes.[18] Since there is no apparent relation between the ownership of outer continental shelf gas and the production of gas in Louisiana, it is hard to understand Louisiana's motive in permitting this credit, but it obviously aids an intrastate operation in a way not available to a pipeline engaged only in interstate transportation or producing gas outside of Louisiana. Finally, another credit for any increase in fuel costs by reason of the first use tax is allowed for use within the State by electric generating plants, gas distribution services, and direct purchasers from an interstate pipeline. This credit may be taken against any Louisiana tax or combination of taxes, other than severance taxes, owed to Louisiana, subject to a maximum credit of $2,000,000 and a minimum of $250. La. Rev. St. 47:11. Thus, Louisiana customers of local utilities and local consumers buying directly from the pipelines are protected in whole or in part from the incidence of the tax which is passed on to consumers out of the State.

The plaintiffs assert that these exclusions and credits all work to discriminate against the out-of-state consumer in favor of the Louisiana user.[19] Perhaps so, but it is hard to tell from the pleadings what adjustments can be made in the base prices, and what allowances can be made between buyers and sellers which might reduce or eliminate any disadvantage of one over the other. This Court has said:

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[18]The brief for the United States, n. 47, p. 51, illustrates the effect of this credit: "This difference can be illustrated by the following example. Owner A has 1000 mcf of OCS gas; owner B has 500 mcf of OCS gas and 500 mcf of gas subject to Louisiana's severance tax. A owes $70 of first use tax; B owes $35 of first use tax and $35 in severance tax. B, however, pays only $35 in first use taxes. He owes no severance tax because he can credit the first use payment against the severance tax liability."

[19]In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), this Court held unconstitutional a Louisiana use tax which on its face was merely complementary to a sales tax, but in operation discriminated against out-of-state purchases. *See also Nippert v. City of Richmond*, 327 U.S. 416 (1946).

> "in each case it is our duty to determine whether the statute under attack, whatever its name may be, will in practical operation work discrimination against interstate commerce. [*Best & Co. v. Maxwell,* 311 U.S. 454, 455-456.] This concern with the actuality of operation, a dominant theme running through all state taxation cases, extends to every aspect of the tax operations. . . . Considered in isolation, the Louisiana use tax is discriminatory; it was intended to apply primarily to goods acquired out-of-state and used in Louisiana. If it stood alone, it would be invalid. However, a proper analysis must take 'the whole scheme of taxation into account.' " *Halliburton Oil Well Cementing Co. v. Reily,* 337 U.S. 64, 69 (1963).

So here, instead of being discriminatory, the "actuality of operation" may show that the tax is a "compensating" tax intended to complement the State severance tax as the use tax complemented the sales tax in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

The plaintiffs also assert that the Louisiana tax is invalid because it does not meet the *Washington Stevedoring* case's requirement that the tax must be fairly apportioned. It would seem that that test would be of prime importance when a State is imposing a tax on a business's gross revenues or on its assets as a whole, when, in order to avoid multiple taxation by numerous States, each should tax only the proportion of the entirety which falls within its domain. Here the tax is on the total amount of natural gas within the State and subject to use there. Just as a sales tax, or a severance tax, is imposed on the total amount of the commodity sold or produced, so it would seem appropriate to levy a use tax on the total amount involved. It does not seem to the Special Master that the apportionment requirement has any application here, unless the tax is so large as to put a barrier in the path of interstate commerce. If it does in fact obstruct or hinder interstate commerce it is bad; but that is a factor which would have to be developed in a full hearing. *Cf. Pennsylvania v. West Virginia,* 262 U.S. 553 (1923).

Probably the case which on its facts is closest to this one is *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157

(1954). In that case Texas levied what it termed an occupation tax on "gathering" gas, an activity the regulation of which is left to the States by the terms of the Natural Gas Act. 15 U.S.C. 717 (b). In the artificial definition of "gathering" prescribed by the Texas law, it included "taking" gas from the outlets of a scrubbing plant, where the liquid and liquefiable hydrocarbons are separated from the wet gas and dry gas suitable for pipeline transportation is produced. The Court found that after this "taking" there was no separable local activity not an integral part of the flow of interstate commerce. The "taking" the Court held was not a local event separable from the interstate transportation. It was not an activity like producing natural gas, generating electricity, or mining ore, activities upon which a tax may be levied if it is fair and not a burden or hindrance. A real "gathering" tax might be different. Applying the *Michigan-Wisconsin Pipeline* case to Louisiana's uses as defined in the act would result in some of the acts being too intimately connected with interstate transmission to survive. However, the statute has a separability clause. La. Rev. Stat. 47:1307, Sec. 2. Some of the uses may be constitutionally taxable even though others are bad. Probably the best cases can be made for the "uses" defined as "processing for the extraction of liquefiable component products or waste materials" or as "use in manufacturing." La. Rev. Stat. 47:1302(8).

There is a very real dispute among the parties as to the legal effect of the "processing" use. The plaintiffs would have the Court hold that the processing does not interrupt the transportation process and that the gas delivered at the outlet of the processing plant is the same gas received at the entry with impurities and hydrocarbons removed. Louisiana would analogize the processing process as being similar to the manufacture of a new product. They would like to prove that it changes the chemical content of the gas so that what comes out of the plant is different from what goes in.[20]

[20]The parties have not addressed the significance of the "use in manufacturing" use, but since it must take place within the State to be taxable one can assume that the tax credits and exclusions referred to above would minimize any tax on this use.

In passing upon the constitutionality of other use taxes, this Court has said:

> Not the tax in a vacuum of words but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. *Nippet v. Richmond,* 327 U.S. 416, 431 (1946).

If it were not for the time factor which favors Louisiana and permits it to continue to collect a quarter of a billion dollars a year and to gain an enormous financial advantage from the use of the funds even if required to give a refund in the end, it would be obviously advantageous to permit the parties to support their divergent positions by evidence relevant to the interpretation and administration of the law, the physical features of the entire process, and the economic impacts on and adjustments by buyers and sellers and consumers. However, the plaintiffs have not asked for interim relief. The best way to minimize the time factor is to press the proceedings forward as expeditiously as possible. I cannot conclude that the time factor justifies the Court in granting the motion on the pleadings.

RECOMMENDATIONS

The Special Master recommends that:

1) The motion of the defendant for the dismissal of the complaint be denied.

2) The plaintiffs' motion for judgment on the pleadings be denied without prejudice to a reconsideration of the issues raised on the basis of further proceedings.

Respectfully submitted,

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Special Master

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