Tennessee Law Review

Volume 90
Issue 2 *Winter 2023*

Article 11

2023

Mississippi v. Tennessee

Jackson W. Welsh

MISSISSIPPI V. TENNESSEE

JACKSON W. WELSH

INTRODUCTION

The Supreme Court's decision in *Mississippi v. Tennessee* quietly marked a potential turning point for the once antiquated doctrine of equitable apportionment. This doctrine provides a framework for resolving disputes over the allocation of resources, usually water, that cross state boundaries, and has done so since the early 20th century. In this article, we will delve into the history of equitable apportionment, examining its evolution from 1907 to the present day. We explore the key cases that have slowly broadened the doctrine, with a particular focus on *Mississippi v. Tennessee* and its implications for the future of equitable apportionment. Through this analysis, we seek to provide a comprehensive understanding of the legal landscape surrounding this issue, as well as how it could become increasingly important in the next century.

The history of equitable apportionment is characterized by a steady expansion of the doctrine to resolve contemporary problems more appropriately. While the doctrine may seem antiquated, equitable apportionment could prove central to resolving the resource disputes of the future. Due to increasing population and the damaging effects of climate change, future interstate water disputes are almost a certainty. The Court took the opportunity in *Mississippi v. Tennessee* to reaffirm equitable apportionment and the underlying policy, while also opening the door to resolving these disputes outside of the Supreme Court.

I. ISSUE

The primary issues addressed in *Mississippi v. Tennessee* are whether the doctrine of equitable apportionment should be extended to apply to interstate aquifers, and if so, whether Mississippi should be granted leave to amend their complaint. In resolving these issues, the Court unanimously reaffirmed the century of precedent underlying equitable apportionment as the sole judicial tool for resolving interstate resource disputes. Further, the opinion also

began to lay the foundation for equitable apportionment's prominence in the century to come.

II. DEVELOPMENT OF THE ISSUE

Equitable apportionment is the primary doctrine federal courts use to resolve interstate water disputes. Equitable apportionment "aims to produce a fair allocation of a shared water resource between two or more States."[1] The doctrine was pioneered in 1907 with *Kansas v. Colorado*, when Colorado attempted to deprive Kansas of surface and groundwater flowing from the Arkansas river.[2] This established the starting principle that states have equal rights to an interstate water resource.[3] Thus, the Court must balance the rights of each state and ensure neither state infringes on the other's fundamental right to use the water.

Flowing from this decision, the Court has consistently applied equitable apportionment to the allocation of interstate waters for the last century.[4] Notably, the doctrine has expanded to include interstate river basins and situations where pumping groundwater affects the flow of interstate surface waters.[5] Perhaps most tenuously, *Idaho ex rel. Evans v. Oregon*, applied equitable apportionment to fish that migrate "through several states during their lifetime" holding each of the states in question has a right to the resource, regardless of where it originated.[6] The Court's history of equitable apportionment jurisprudence has been characterized by consistent application when states "'have an equal right to make reasonable use of a shared water resource."[7] It is apparent that this policy is the driving force behind equitable apportionment, and thus should guide any academic analysis of the equitable apportionment doctrine.

---

1. Colorado v. New Mexico, 459 U.S. 176, 183 (1982).

2. Kansas v. Colorado, 206 U.S. 46 (1907).

3. *Id.* at 96-97. *See also* Florida v. Georgia, 141 S. Ct. 1175 (2021).

4. South Carolina v. North Carolina, 558 U. S. 256 (2010); *Colorado v. New Mexico*, 459 U.S. at 183; Nebraska v. Wyoming, 325 U. S. 589 (1945); Wyoming v. Colorado, 259 U. S. 419 (1922).

5. Nebraska v. Wyoming, 515 U.S. 1, 14 (1995).

6. Idaho ex rel. Evans v. Oregon, 462 U.S. 1017, 1018–1019, 1024 (1983).

7. Mississippi v. Tennessee, 142 S. Ct. 31 (2021) (citing *Florida v. Georgia*, *supra* note 3.

III. ANALYSIS

With this framework in place, we can now analyze *Mississippi v. Tennessee*. The case arose when Mississippi sued Tennessee claiming a tortious taking of Mississippi's groundwater by the city of Memphis.[8] The Middle Claiborne Aquifer (the "Aquifer") is a reservoir that lies beneath parts of Tennessee and Mississippi, as well as several other states throughout the South and Midwest.[9] Mississippi alleged that the City of Memphis' excessive drilling of the Aquifer under Tennessee had increased the flow of groundwater to Tennessee from Mississippi.[10] Mississippi alleged this amounted to a tortious taking and sought over 600 million dollars in damages. Notably, Mississippi specifically disclaimed any equitable apportionment remedy.[11] However, the Court unanimously ruled that equitable apportionment is the only judicial remedy for interstate resource disputes. The Court held it is natural to expand equitable apportionment to interstate aquifers because interstate aquifers are sufficiently similar to past applications of the doctrine.[12] The main factors in their decision being that, similar to other equitable apportionment scenarios: (1) interstate aquifers cross state lines[13], (2) they naturally flows between states[14], and (3) the actions of one state in using an interstate aquifer affect another state.[15]

Once the Court concluded equitable apportionment applied to the Aquifer, they proceeded to dispense with Mississippi's primary claim in the case– that Mississippi has sovereign ownership of the Aquifer. This claim is based on a highly textual reading of *Kansas v. Colorado*, in which the court held that "each state has full jurisdiction over the lands within its borders, including the beds and streams of other waters."[16] While the court in *Mississippi v. Tennessee* does not dispute the holding of *Kansas v. Colorado*, they specify that this cannot extend

---

8. *Mississippi v. Tennessee*, 142 S. Ct. at 3.

9. *Id.* These states include Alabama, Arkansas, Illinois, Kentucky, Louisiana, and Missouri.

10. *Mississippi v. Tennessee*, 142 S. Ct. at 3.

11. Adam Smith, *Extraordinary Authority: The Supreme Court's Solidifying Equitable Appropriation Jurisprudence* (Environmental, Natural Resources, and Energy Law Blog, June 16, 2022) https://law.lclark.edu/live/blogs/195-extraordinary-authority-the-supreme-courts.

12. *Mississippi v. Tennessee*, 142 S. Ct. at 2.

13. Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 953 (1982).

14. *Kansas v. Colorado*, 206 U.S. at 98.

15. *Florida v. Georgia*, 141 S. Ct. at 1176.

16. *Kansas v. Colorado*, 206 U.S. at 93.

to "unfettered 'ownership or control' of flowing interstate waters themselves."[17] Thus, the Court has consistently denied that states may exercise *exclusive* control over interstate "waters flowing within her boundaries."[18]

Practically, Mississippi's proposed approach would allow an upstream state to completely cut off a downstream state, which is antithetical to the principle of equitable apportionment.[19] In further defense of its sovereign ownership claim, Mississippi argues *Tarrant* supports their position.[20] However, "*Tarrant* concerned whether one State could cross another's boundaries to access a shared water resource."[21] Here, Mississippi concedes all of Tennessee's wells are in Tennessee and drilled straight down as to not cross state lines.[22] However, Mississippi claims Tennessee's drilling has caused a groundwater imbalance which has accelerated the natural flow of groundwater from the aquifer into Tennessee.[23] In other words, Mississippi concedes that some water flows from the aquifer under Tennessee, but argues that Tennessee's excessive drilling is artificially speeding up the process.

In response, the Court held that the starting point of the resource was irrelevant.[24] It does not matter that some of the water drilled in Tennessee started in Mississippi, just like it does not matter that the river started in Colorado, or that a particular fish hatched in Idaho.[25] In other words, "[t]he origin of an interstate water resource *may* be relevant to the terms of an equitable apportionment. But that feature alone cannot place the resource above the doctrine itself."[26] Thus, Mississippi's claim that it has sovereign ownership over an interstate water resource is denied.[27]

After reaffirming that equitable apportionment is the sole judicial remedy for interstate water disputes, the Court then considered whether Mississippi would be granted leave to amend their

---

17. *Mississippi v. Tennessee*, 142 S. Ct. at 9 (quoting Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 102 (1938)).

18. *Id.*

19. *Mississippi v. Tennessee*, 142 S. Ct. at 10.

20. Tarrant Regional Water Dist. v. Herrmann, 569 U.S. 614 (2013).

21. *Mississippi v. Tennessee*, 142 S. Ct. at 3.

22. *Id.* at 10.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* (quoting *Colorado v. New Mexico*, 459 U.S. at 181 and *Idaho ex rel. Evans*, 462 U.S. at 1028.)

27. *Mississippi v. Tennessee*, 142 S. Ct. at 10-11.

complaint.[28] The Court decided against granting Mississippi leave to amend for three main reasons. Firstly, Mississippi "disavowed equitable apportionment entirely" in the original pleadings, and the Court declined to grant Mississippi something they did not request.[29] Secondly, granting Mississippi leave to amend would significantly complicate the matter. Should Mississippi be granted leave to amend and bring the case again as an equitable apportionment action, it would likely be improper because several other states would likely be necessary parties as per Federal Rule of Civil Procedure 19(a).[30] Finally, were Mississippi to bring this case under equitable apportionment, it would have to "prove by clear and convincing evidence some real and substantial injury or damage."[31] For those reasons, the Court declined to grant Mississippi leave to amend, setting the precedent for future interstate water disputes that the remedies are equitable apportionment, or nothing.[32]

IV. COMPELLING IMPLICATIONS OF *MISSISSIPPI V. TENNESSEE*

A. *The Future of Interstate Resource Disputes*

There are two main implications of this decision that are ripe to affect interstate resource disputes in the future. First, due to climate change, litigation over interstate water resources is likely to become even more prevalent in the century to come.[33] In 2021, the Court twice reaffirmed the precedent of equitable apportionment and the policy of collaborative resolution of interstate resource disputes.[34] Some scholars theorize that, read together, these cases "may reflect a creeping appreciation by the Court of the effects of climate change given the growing scarcity of water."[35] In *Florida v. Georgia*, the Court acknowledged Georgia's claim that climate change has exacerbated the injury to its oyster fisheries.[36] Here, Florida claimed Georgia's

28. *Id.* at 11.

29. *Id.*

30. *Id.*

31. *Idaho ex rel. Evans*, 462 U.S. at 1027.

32. Robin Craig, *In dispute over groundwater, court tells Mississippi it's equitable apportionment or nothing*, SCOTUSBLOG (Nov. 23, 2021, 2:18 PM), https://www.scotusblog.com/2021/11/in-dispute-over-groundwater-court-tells-mississippi-its-equitable-apportionment-or-nothing/.

33. *Id.*

34. *Florida v. Georgia*, 141 S. Ct.

35. Smith, *supra* note 11.

36. *Id.*

overconsumption of their shared water resource resulted in an increase in its salinity, which in turn caused a significant reduction of oyster stocks.[37] Conversely, Georgia argued the increase in salinity could have been caused by climate change.[38] While the Court avoided expressly adopting Georgia's theory, the opinion seems to imply a judicial concern for climate change. Specifically, the Court describes water as an "increasingly scarce"[39] resource and concedes that "evidence . . . indicates that the unprecedented series of multiyear droughts, as well as changes in seasonal rainfall patterns, may have played a significant role" in contributing to the injury."[40] Thus, while the Court avoided specifically endorsing the damaging effects of climate change, these two interstate water cases, decided within seven months of each other, may indicate the Court's increasing appreciation for the dangers of climate change and the likelihood of resulting litigation.[41]

B. The Expanding Role of Interstate Compacts

Secondly, the opinion specifically rejected Mississippi's application of *Tarrant* because *Tarrant* had an interstate compact regarding the allocation of resources, and *Mississippi v. Tennessee* did not.[42] Thus, *Tarrant* does not apply and the Aquifer is subject to equitable apportionment.[43] The Court "did not consider equitable apportionment because the affected States had taken it upon themselves to negotiate a compact that determined their respective rights."[44] This reasoning shows the Court's "preference for negotiation between states over litigation and equitable apportionment."[45] But how much freedom of contract will states be given? Will we begin to see upstream states ask for more and more consideration from downstream states in exchange for rights to water? Over a century ago, the Court held that upstream Colorado may not deprive downstream Kansas of surface and groundwater resources.[46] If the states had settled the matter out of court, what would have been the

37. *Florida v. Georgia*, 141 S. Ct at 1180.
38. *Id.* at 1181
39. *Id.* at 1182.
40. *Id.* at 1181.
41. Smith, *supra* note 11.
42. *Tarrant*, 569 U.S.; *Mississippi v. Tennessee*, 142 S. Ct.
43. *Mississippi v. Tennessee*, 142 S. Ct.
44. *Id.* at 10.
45. Smith, *supra* note 11.
46. *Kansas v. Colorado*, 206 U.S. at 183.

result? Theoretically, Colorado could have named its price, as Kansas had no alternative. If left unchecked, these contracts of adhesion could become commonplace among states dividing a shared resource.

Similarly, the Colorado River is a major source of water for California, "supplying roughly a third of all the water for Southern California cities and suburbs."[47] So does Colorado have this leverage over California too? Surely not. The Court explained earlier that an upstream state cannot entirely cut a downstream state off from an interstate water resource. However this conclusion was based on the justification that such conduct is against the policy underlying equitable apportionment.[48] However *Mississippi v. Tennessee* implied this may not be so objectionable if done under an interstate compact.[49] Following the decision in *Tarrant*, interstate compacts would be governed by "background principles of contract law", which protect a party from entering into an agreement that is unconscionable, formed under duress, and so on.[50] Yet these principles largely do not intervene simply to prevent lopsided deals. While judges certainly may use their discretion and determine some interstate compacts have too favorable of terms, the lack of consistency in such an important area of the law is troubling, especially for downstream states.

Many states have been able to make interstate compacts work well, specifically on the West coast. "Currently there are 26 water apportionment compacts in the United States, all of which are west of the Mississippi River."[51] While this is likely more evident of employing a different judicial philosophy to apply to a different environment, it proves that interstate compacts are a viable option for states competing for a shared water resource.[52] The advantages to resolving disputes privately is clear, yet the question remains how to protect states with unequal bargaining power.

Another significant advantage of interstate compacts is they allow states to avoid the rigorous standing requirements mentioned above.

---

47. https://www.ppic.org/wp-content/uploads/californias-water-the-colorado-river-november-2018.pdf.

48. *Mississippi v. Tennessee*, 142 S. Ct. at 10.

49. *Id.*

50. *Id.* (explaining the decision in *Tarrant*, 569 U.S.).

51. *See* "Interstate Water Resource Management Agreements and Organizations," Interstate Council on Water Policy, December 2020, available at https://icwp.org/wp-content/uploads/2020/12/Primer_ICWP-Interstate-Water-Agreements_FINAL_12_18_2020.pdf.

52. *Id.*; Smith, *supra* note 11. *See, e.g.*, Burke & Griggs, *Beyond Drought: Water Rights in the Age of Permanent Depletion*, 62 U. KAN. L. REV. 1263 (2014).

To sue for equitable apportionment, a state must show by clear and convincing evidence that it suffered a substantial injury.[53] In practice, this bar has proved a significant hurdle. In 2021, Florida failed to meet this standard even in the context of a surface waterway that fishes and endangered species depend upon.[54] This burden will likely be even harder to meet in groundwater context, as a substantial injury will be difficult to show without wells drying up or other concrete proof of insufficient groundwater.[55] Additionally, the opinion confirms that surface water and groundwater are both governed by equitable apportionment.[56] This makes it even more appealing for states to enter compacts because they can look at a holistic picture of the regional water supply and make more informed decisions.[57] Through creating these incentives, the Court has made it clear that it prefers States to negotiate and settle resource disputes privately.[58]

CONCLUSION

While *Mississippi v. Tennessee* is not necessarily the most talked about case of the term, it is an example of the Supreme Court quietly carrying out their mandate– interpreting federal law to apply to the evolving needs of modern America. Since its inception in 1907, the Court has consistently expanded equitable apportionment to resolve disputes among states over interstate resources.[59] This precedent was reaffirmed in *Mississippi v. Tennessee*, with the Court "unanimously solidifying both the jurisprudential and policy underpinnings of equitable apportionment."[60] Further, when read in tandem with *Florida v. Georgia*, the Court implicitly endorsed the dangers of climate change and its potential to affect interstate water resources, evidencing the Court's "creeping appreciation . . . of the effects of climate change given the growing scarcity of water."[61] In *Mississippi v. Tennessee*, the Court effectively presented states feuding over an interstate resource with a choice: the route of the Court and equitable apportionment, or the still unclear route of interstate compacts and unequal bargaining power. With interstate resource disputes only

53. *Idaho ex rel. Evans*, 462 U.S. at 1027.
54. *Florida v. Georgia*, 141 S. Ct at 1180; *see also* Craig, *supra* note 32.
55. *Florida v. Georgia*, 141 S. Ct at 1180.
56. *Id.*
57. *Id.*
58. Smith, *supra* note 11.
59. *See supra* Part III.
60. Smith, *supra* note 11.
61. *Id.*

becoming more common, it will be interesting to observe how states navigate this dilemma in the future.