FLORIDA V. GEORGIA (2021) LEAVES EQUITABLE APPORTIONMENT A DRIPPING FAUCET FOR DOWNSTREAM STATES

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Introduction

"A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."[1] This treasure stands to become increasingly coveted as climate change leads to growing water scarcity. A government-backed report released in March 2019 warned that many U.S. regions could see their freshwater supplies reduced by a third within the next fifty years,[2] and in August 2021, officials declared the first-ever water shortage on the Colorado River.[3] Water rationing is a reality now more than ever, setting the stage for increased conflicts between states asserting claims on this precious resource.

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1. New Jersey v. New York, 283 U.S. 336, 342 (1931).

2. Jon Heggie, *Why Is America Running Out of Water?*, Nat'l Geo. (Aug. 12, 2021), https://perma.cc/FY7S-AHRZ.

3. Karin Brulliard & Joshua Partlow, *First-Ever Water Shortage Declared on the Colorado River, Triggering Water Cuts for Some States in the West*, Wash. Post (Aug. 16, 2021), https://perma.cc/34Y9-FT8Z.

In April 2021, a unanimous Supreme Court decided *Florida v. Georgia*,[4] holding that Florida failed to prove by clear and convincing evidence that Georgia's "alleged overconsumption of [the Apalachicola] Basin waters" caused the collapse of Florida's oyster fisheries and seriously harmed Florida's river wildlife and plant life.[5] As the downstream state, Florida sought to assert its equal right to the Basin waters in the face of its upstream neighbor's growing consumption.[6] Florida sought equitable apportionment of the Basin waters, asserting an "equal right to the reasonable use of the waters at issue"[7] and objecting to Georgia having "free rein to consume as much [water] as it wants, regardless of the consequences for the Apalachicola Region."[8] The Court declined to grant Florida's requested relief and dismissed the case.[9]

Burgeoning competition for limited water resources will likely bring more water disputes before the Supreme Court than have ever been brought before.[10] Increased water demands from growing populations, coupled with climate change–induced shifts in precipitation patterns, warmer temperatures, and severe droughts, are likely to lead to greater water scarcity.[11] This conflict between eastern states is particularly ominous because the eastern states have usually had plentiful rain and water resources.[12] Increasing drought frequency and growing populations, however, have brought the water wars to the East. In addition, eastern water systems were not designed to cope well with droughts, unlike systems in the West.[13] Therefore, eastern states are vulnerable to water scarcity and could be left scrambling to secure water resources. This case carries impli-

4. 141 S. Ct. 1175 (2021).

5. *Id.* at 1175, 1182–83.

6. *See* Report of the Special Master at 32–33, Florida v. Georgia (*Florida I*), 138 S. Ct. 2502 (2018) (No. 142, Orig.) ("By Florida's count, Georgia's irrigated acreage has increased from under 75,000 acres in 1970 to more than 825,000 acres in 2014. Georgia's own estimates show a dramatic growth in consumptive water use for agricultural purposes." (citations omitted)); Exceptions to Report of the Special Master by Plaintiff State of Florida and Brief in Support of Exceptions at 39, Florida v. Georgia (*Florida II*), 141 S. Ct. 1175 (2021) (No. 142, Orig.) ("All told, Georgia's permitted acreage nearly doubled after it first acknowledged its problems with over-irrigation along the Flint in the early 1990s, grew by 40 percent since 1998, and grew by nearly 20 percent more after 2006.").

7. Exceptions to Report of the Special Master by Plaintiff State of Florida and Brief in Support of Exceptions at 2, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).

8. *Id.* at 15.

9. *Florida II*, 141 S. Ct. at 1183.

10. Catherine Danley, *Water Wars: Solving Interstate Water Disputes Through Concurrent Federal Jurisdiction*, 47 ENV'T L. REP. NEWS & ANALYSIS 10,980, 10,980 (2017).

11. *See id.*

12. *See* J.B. Ruhl, *Equitable Apportionment of Ecosystem Services: New Water Law for a New Water Age*, 19 J. LAND USE & ENV'T 47, 47 (2003).

13. Pamela King, *Climate Change Unleashes Interstate Water Wars*, E&E NEWS (May 6, 2021), https://perma.cc/54N6-MW8T.

cations for the rest of the country as well. Many cities unsustainably[14] draw on groundwater to fulfill their water uses.[15] Groundwater resources, however, are beginning to become limited and contested.[16] When groundwater sources around the country run out, cities will need to shift to surface water.[17] Atlanta already relies on surface water because Georgia's non-porous bedrock has prevented the city from relying substantially on groundwater.[18] As Georgia and Florida have experienced, however, surface water is more susceptible to climatic fluctuations (such as drought).[19] Thus, the water wars are likely to increase as states fight over diminishing groundwater sources and fluctuating, scarce surface water resources.

The Supreme Court is the only venue available for settling these water disputes between states. Although Congress has the power to apportion water between states under the Commerce Clause,[20] it is reluctant to do so and has only apportioned water on two occasions.[21] States in conflict with one another are constitutionally limited in terms of the available tactics for resolving their interstate disputes.[22] They are left with two options for resolving water conflicts: interstate compacts and state controversy suits.[23] Florida and Georgia ratified the Apalachicola-Chattahoochee-Flint River Basin Compact ("ACF Compact") governing the waters at issue in this case, but the ACF Compact failed in 2003.[24] Florida was left to pursue a state controversy suit. The Su-

14. Groundwater use is unsustainable when water is being withdrawn from the groundwater source at a rate greater than water is being put into that source. Brett Walton, *U.S. Food Trade Increasingly Leans on Unsustainable Groundwater*, CIRCLE BLUE (Jan. 23, 2020), https://perma.cc/ZMB7-UKA4.
15. Joseph Wehr, *The Canary in the Coal Mine: The Apalachicola-Chattahoochee-Flint River Basin Dispute and the Need for Comprehensive Interstate Water Allocation Reform*, 66 ALA. L. REV. 203, 212 (2014).
16. The Supreme Court recently heard arguments in *Mississippi v. Tennessee* for Mississippi's novel claim of exclusive rights to a groundwater source. Transcript of Oral Argument at 6–7, Mississippi v. Tennessee, No. 143, Orig. (U.S. Oct. 4, 2021).
17. Wehr, *supra* note 15, at 212.
18. *Id.*
19. Saurab Babu, *Is Groundwater a Reliable Source of Water for Communities?*, ECO-INTELLIGENT (May 3, 2018), https://perma.cc/RAE5-L2D8.
20. *See* U.S. CONST. art. I, § 8, cl. 3; Wehr, *supra* note 15, at 205.
21. Wehr, *supra* note 15, at 205.
22. *See* Robert D. Cheren, *Environmental Controversies "Between Two or More States"*, 31 PACE ENV'T L. REV. 105, 108–09 (2014); U.S. CONST. art. I, § 10; Kansas v. Colorado, 185 U.S. 125, 143 (1902) ("The states of this Union cannot make war upon each other. They cannot 'grant letters of marque and reprisal.' They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations, and make treaties.").
23. Cheren, *supra* note 22, at 113–21.
24. The Compact itself did not allocate water, but "was an agreement to agree on allocation of the water"; the states, however, failed to reach an agreement and the Compact expired. Alyssa S. Lathrop, *A Tale of Three States: Equitable Apportionment of the Apalachicola-Chattahoochee-Flint River Basin*, 36 FLA. ST. U. L. REV. 865, 870–71 (2009); *see also* Florida's

preme Court has original and exclusive jurisdiction to hear these suits between the States,[25] and the Court "has recognized for more than a century its inherent authority, as part of the Constitution's grant of original jurisdiction, to equitably apportion interstate streams between States."[26] Apportionment cases for interstate water resources have risen to become "the second most prominent category" of state controversy cases before the Supreme Court.[27]

The Supreme Court created the federal common law doctrine[28] of equitable apportionment to recognize "the equal dignity of the states" and their equal rights to water resources.[29] Nevertheless, as the doctrine of equitable apportionment has developed, it has grown to significantly privilege the water rights of upstream states. The hefty burden of proof the Court demands for equitable apportionment fails to accommodate the confounding factor of climate change. The Court's decision in *Florida v. Georgia* made the equitable apportionment doctrine rigid and unresponsive to changing conditions, thereby depriving downstream states of options for asserting their water claims.

Part I summarizes the historical basis, procedural posture, reasoning, and holding of *Florida v. Georgia*. Part II argues that the Court in *Florida v. Georgia* set incredible demands for states to establish causation, a bar that cannot accommodate the complexity of water claims and the complicating factor of climate change. Part II also argues that this high bar makes it exceedingly difficult for states to win on equitable apportionment claims, which takes away downstream states' leverage to ensure their share of water resources.

I. *Florida v. Georgia*

A. History of the Litigation

Florida and Georgia's dispute over the interstate waters of the Apalachicola-Chattahoochee-Flint River Basin ("ACF Basin") traces its roots to the

Motion for Leave to File a Complaint, Complaint, and Brief in Support of Motion at 5, *Florida I*, 138 S. Ct. 2502 (2018) (No. 142, Orig.).

25. U.S. Const. art. III, § 2, cl. 2 ("In all Cases . . . in which a State shall be Party, the Supreme Court shall have original Jurisdiction."); 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."); J. William Wopat III, Note, *Supreme Court Declines Original Jurisdiction in Lake Erie Pollution Case*, 25 U. Miami L. Rev. 794, 795 (1971) (noting that the Framers granted the Supreme Court original and exclusive jurisdiction over interstate controversies to prevent states from becoming subject to the "partiality" of the courts of other states).
26. Kansas v. Nebraska, 574 U.S. 445, 454 (2015).
27. Cheren, *supra* note 22, at 125.
28. *See* Colorado v. New Mexico, 459 U.S. 176, 183 (1982) ("Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream.").
29. Cheren, *supra* note 22, at 126.

1980s and to a common theme of water wars: drought. Florida and Georgia suffered severe droughts in the 1980s as well as from 1998–2002, 2006–2008, and 2011–2012.[30] The ACF Basin is a vital resource for both Florida and Georgia; however, its waters are insufficient to meet the demands of both states in addition to those of neighboring Alabama.[31] The ACF Basin is comprised of three rivers.[32] The Chattahoochee River is the Atlanta metropolitan area's primary source of water, and the Flint River provides the irrigation supply for Georgia's $4.7 billion agricultural industry.[33] The two rivers feed Lake Seminole on the Georgia-Florida border.[34] The third river, the Apalachicola River, flows out of the southern end of Lake Seminole, through the Florida Panhandle, and empties into Apalachicola Bay, near the Gulf of Mexico.[35] The Apalachicola River has historically nourished the Apalachicola Region and sustained its rich ecosystem.[36] The Apalachicola Bay is a major fishery for oysters, shrimp, and finfish[37] and has been recognized as one of the most productive estuaries of the Northern Hemisphere.[38] Ninety percent of Florida's oyster harvest comes from the Bay.[39] Florida considers the Bay's fisheries and oyster harvest to be the "cornerstone of the region's economy" and to bear significant cultural importance.[40]

Given the competing demands on the ACF Basin waters, it is hardly a surprise that the added pressures of the 1980s drought spawned litigation and negotiation that has persisted until today. Beginning in 1990, Georgia, Florida, and Alabama were involved in a series of suits relating to the operation and allocation of the water supply in the ACF Basin by the U.S. Army Corps of Engineers ("the Corps").[41] The Corps operates five dams within the ACF Basin.[42] These dams are operated as a unit "to support various purposes including

30. Joseph W. Dellapenna, *Interstate Struggles over Rivers: The Southeastern States and the Struggle over the 'Hooch*, 12 N.Y.U. ENV'T L.J. 828, 828 (2005); Georgia's Reply to Florida's Exceptions to the Report of the Special Master at 18, *Florida II*, 141 S. Ct. 1175 (2021) (No. 142, Orig.).
31. Dellapenna, *supra* note 30, at 880.
32. Florida's Motion for Leave to File a Complaint, Complaint, and Brief in Support of Motion at 1–2, *Florida I*, 138 S. Ct. 2502 (2018) (No. 142, Orig.).
33. Georgia's Reply to Florida's Exceptions to the Report of the Special Master at 4, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).
34. *Florida II*, 141 S. Ct. at 1178.
35. *Id.* at 1178–79.
36. Report of the Special Master at 8–10, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).
37. *Id.* at 8.
38. *Florida I*, 138 S. Ct. at 2509.
39. Report of the Special Master at 9, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).
40. Exceptions to Report of the Special Master by Plaintiff State of Florida and Brief in Support of Exceptions at 5, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).
41. *See In re* MDL-1824 Tri-State Water Rts. Litig., 644 F.3d 1160, 1165 (11th Cir. 2011).
42. *See* Brief in Support of Motion for Leave to File a Complaint at 4, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

flood control, hydroelectric power generation, navigation, recreation, water supply, water quality, and fish and wildlife conservation."[43] The Corps regulates how much water it releases from its reservoirs and determines this, in part, based on the inflow to the ACF Basin.[44] This water flows downstream to Florida.

In 1992, Alabama, Florida, Georgia, and the Corps initiated a comprehensive study of the water supply in the Basin in an effort to resolve this litigation.[45] In response, Congress passed the ACF Compact, which all three States ratified.[46] In the ACF Compact, the three States agreed to "develop an allocation formula for equitably apportioning the surface waters of the ACF Basin . . . while protecting the water quality, ecology, and biodiversity of the ACF."[47] The States also recognized that water usage could continue to develop during the negotiation period for the ACF Compact, but the States agreed that those uses would not become "permanent, vested or perpetual rights to the amounts of water used between January 3, 1992, and the date on which the Commission [would] adopt[ ] an allocation formula."[48] After years of negotiation, the States failed to agree to an allocation formula, and the ACF Compact expired in 2003.[49] Although in 2014 Congress recognized that drought, growing populations, and increased agricultural irrigation had created an urgent need for equitable apportionment of the ACF Basin waters, the States could not reach an amicable agreement.[50] The States were left to petition the Court for resolution.

In 2013, Florida sought equitable apportionment of the interstate waters of the ACF Basin.[51] In its 2013 complaint, Florida argued that Georgia took advantage of the time between the 1992 start of the Comprehensive Study and the 2003 failure of the ACF Compact to increase its consumptive use.[52] Florida therefore asked for Georgia's water use to be capped at the level from January 3, 1992, and for Florida to receive its equitable share of the waters.[53]

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43. *Id.*

44. Complaint for Equitable Apportionment and Injunctive Relief at 9, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

45. *See In re MDL-1824*, 644 F.3d at 1174; Complaint for Equitable Apportionment and Injunctive Relief at 4–5, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

46. *In re MDL-1824*, 644 F.3d at 1174; Complaint for Equitable Apportionment and Injunctive Relief at 5, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

47. H.R. Rep. No. 105-369, at 4 (1997).

48. *Id.* at 5.

49. *Florida I*, 138 S. Ct. at 2510.

50. *See id.*

51. Florida's Motion for Leave to File a Complaint at 1, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

52. Complaint for Equitable Apportionment and Injunctive Relief at 5, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

53. *Id.* at 22.

B. First Trip to the Supreme Court

Florida's 2013 complaint claimed that Georgia's upstream storage and consumption of water from two of the Basin's rivers "reduced freshwater inflows to the Apalachicola Bay," causing the collapse of Florida's oyster fishery and serious harm to its river ecosystem.[54] Georgia contested the allegations that its consumption was responsible for the harm to Florida.[55]

In response to Florida's 2013 request for equitable apportionment, the Court appointed Special Master[56] Ralph Lancaster "to take evidence and make recommendations."[57] The Special Master returned his report in February 2017, concluding that "Florida ha[d] not proven by clear and convincing evidence that its injury c[ould] be redressed by an order equitably apportioning the waters of the Basin."[58] Despite the Corps' role in determining how much water is released from its reservoirs, the Corps was not made party to the case because the United States declined to waive its sovereign immunity.[59] Florida argued that Georgia was nevertheless the party at fault because its storage and consumption reduced inflows to the ACF Basin, thereby reducing the amount of water the Corps releases downstream.[60] Special Master Lancaster, however, doubted that Florida's injury could "effectively be redressed . . . without the presence of the Corps as a party in this case."[61] Although Court-imposed caps on Georgia's consumptive use may have caused more water to flow from the Chattahoochee and Flint Rivers and into Lake Seminole, the Corps decides whether that water flows into the Apalachicola River and down into Florida.[62]

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54. *Id.* at 19; *Florida II*, 141 S. Ct. 1175, 1179 (2021).

55. State of Georgia's Opposition to Florida's Motion for Leave to File a Complaint at 26–29, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

56. The Court considers appointment of Special Masters to be its "standard practice" in original jurisdiction cases and delegates the Special Master the authority to "issue subpoenas, rule on motions, obtain witness testimony, collect evidence, and, in some cases, preside over trials." Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 627–28 (2002). Special Masters are usually senior or retired federal judges; however, there are no set qualifications for the Special Master role. *Id.* at 645. In water apportionment and diversion cases, the Court has sometimes appointed non-judges who have "specific substantive expertise" in the area. *Id.* at 648. The goal of the Special Master is to collect information that will be useful to the Court. *See id.* at 656. Special Master investigations can last for years and culminate with a report to the Court. *Id.* at 705.

57. *Florida I*, 138 S. Ct. at 2508.

58. Report of the Special Master at 3, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

59. *Florida I*, 138 S. Ct. at 2511.

60. Complaint for Equitable Apportionment and Injunctive Relief at 9, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

61. Report of the Special Master at 30–31, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

62. *See Florida I*, 138 S. Ct. at 2520.

Special Master Lancaster therefore recommended that Florida's request for relief be denied.[63]

In 2018, the Supreme Court held that Special Master Lancaster imposed too strict a standard when he concluded that "Florida ha[d] not proven by clear and convincing evidence that its injury [could] be redressed."[64] Special Master Lancaster rested his recommendation on the "threshold question" of redressability, so the Court considered only redressability.[65] The Court held that before it would be able to determine if there was a workable remedy, findings needed to be made about how much water would be needed to alleviate the harm.[66] The Court pointed out that in past cases involving water conflicts, the "clear and convincing" evidence standard had been applied to show that the plaintiff sustained a substantial harm but had never been applied to the remedy issue.[67] The Court stated that to "require more definite proof at the outset" made "little sense."[68]

The Court concluded that Florida had made a "legally sufficient showing" that it was possible to fashion an effective remedy by limiting Georgia's consumptive use.[69] The availability of an effective remedy would likely have depended on whether any extra water flowing into Lake Seminole would be released downstream into Florida.[70] Based on the record, the Court concluded it was likely the Corps would allow this additional water to flow downstream,[71] or, at the very least, that additional findings were needed on this question.[72] A state is only entitled to equitable apportionment if "the benefits of the [apportionment] substantially outweigh the harm that might result."[73]

For this reason, the Court remanded the case to a new Special Master, Paul Kelly,[74] to engage in "equitable-balancing"[75] and to investigate "to what

63. Report of the Special Master at 70, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

64. *Florida I*, 138 S. Ct. at 2516; Report of the Special Master at 70, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

65. *Florida I*, 138 S. Ct. at 2518.

66. *Id.* at 2516.

67. *Id.* at 2517.

68. *Id.* at 2516.

69. *Id.* at 2527.

70. *Id.* at 2520.

71. Justice Thomas, joined by Justices Alito, Kagan, and Gorsuch dissented from the opinion in this case. Justice Thomas argued that it was not "highly probable" that a cap on Georgia's consumption would result in a meaningful increase of water flowing into Florida and therefore, Florida was not entitled to equitable apportionment, and he would have denied Florida relief. *See Florida I*, 138 S. Ct. at 2546 (Thomas, J., dissenting).

72. *Id.* at 2521 (majority opinion).

73. *Id.* at 2527 (quoting Colorado v. New Mexico, 459 U.S. 176, 187 (1982)).

74. Special Master Lancaster had retired at this point, necessitating the appointment of a new Special Master. *Florida II*, 141 S. Ct. 1175, 1179 (2021).

75. *Florida I*, 138 S. Ct. at 2518.

extent would a cap on Georgia's water consumption increase the amount of water that flows" into Florida[76] and whether "the amount of extra water that reaches the Apalachicola [would] significantly redress the economic and ecological harm that Florida has suffered."[77] On remand, Special Master Kelly did not find clear and convincing evidence that Georgia's consumption was the cause of Florida's injury, nor did he determine that the benefits of apportionment would substantially outweigh the potential harm.[78] He also concluded that even though Georgia's use of the Basin waters had increased, this use was neither unreasonable nor inequitable.[79] The report was issued in December 2019, based on the existing record collected by Special Master Lancaster.[80]

C. The 2021 Supreme Court Ruling

On the case's second appearance before the Supreme Court, the Court dismissed Florida's complaint, denying Florida relief.[81] Writing for a unanimous Court, Justice Amy Coney Barrett affirmed the findings of Special Master Kelly and ruled that Florida failed to prove by clear and convincing evidence that Georgia's overconsumption caused the collapse of Florida's oyster fisheries or the harm to Florida's river wildlife and plant life.[82]

In the December 2019 report, Special Master Kelly reasoned that the existing record was sufficient for addressing the questions at issue and that further evidentiary proceedings would only cause delay.[83] As part of its argument, Florida claimed that the oyster fishery collapse was due to low flows in the Apalachicola River, which were insufficient to dilute the seawater of the Apalachicola Bay and inadequate "to provide nutrients needed at the base of the food chain."[84] Florida also argued that the "increased salinity allowed saltwater predators to flourish" and decimate the oyster population.[85] Special Master Kelly, however, concluded that Florida's mismanagement was a more significant cause of the oyster fisheries' decline and that drought, rather than Georgia's consumption, was a more significant cause of the low flows.[86] He also found no evidence of any harm inflicted by Georgia to the river ecosystems and

76. *Id.* at 2527.

77. *Id.* at 2525.

78. Report of the Special Master at 7, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).

79. *Id.* at 7.

80. *Id.* at 1.

81. *Florida II*, 141 S. Ct. at 1183.

82. *Id.*

83. Report of the Special Master at 5, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).

84. *Id.* at 9.

85. *Id.*

86. *Id.* at 14.

floodplain.[87] Due to this lack of "clear and convincing" evidence, Special Master Kelly recommended that the Court deny Florida's request for equitable apportionment.[88]

The Court required Florida to prove two points by clear and convincing evidence to obtain equitable apportionment.[89] First, Florida had to prove either a "threatened or actual injury of 'serious magnitude' caused by Georgia's upstream consumption."[90] Second, Florida had to show that the benefits of the equitable apportionment would "substantially outweigh" the potential harm.[91] The Court also acknowledged that "because Florida and Georgia are both riparian[92] States, the 'guiding principle' of this analysis is that both States have an 'equal right to make a reasonable use' of the Basin waters."[93]

To answer the first question of whether Georgia's alleged overconsumption was the source of the injury, the Special Master and the Court considered testimony from a variety of different experts. Georgia pointed to "unprecedented levels of oyster harvesting" and a failure to adequately re-shell oyster bars as evidence of Florida's own mismanagement producing the injury.[94] Florida argued that the decreased flow of freshwater into the Bay was a result of Georgia's consumption and caused the collapse of the oyster fisheries.[95] The Court found Florida's argument unconvincing and determined that even if the collapse was due to increased salinity and predation, the proof was insufficient to establish that this was significantly attributable to Georgia's overconsumption due to the confounding factor of the recent droughts.[96] Thus, Georgia succeeded in its attempt to "shift the blame" onto changes in climate.[97] The Court concluded that Florida had failed to show that it was "highly probable" Georgia's alleged overconsumption played anything more than a trivial role in the oyster fisheries' collapse.[98] Finally, with regard to Florida's claim that its river wildlife and plant life had experienced injury due to Florida's overcon-

87. *Id.* at 22.

88. *Id.* at 81.

89. *Florida II*, 141 S. Ct. at 1180.

90. *Id.* (quoting Colorado v. New Mexico, 459 U.S. 176, 187 (1982)).

91. *Id.* (quoting Colorado v. New Mexico, 459 U.S. at 187).

92. There are two legal regimes governing water rights—eastern states use a riparian rights regime, which gives "land adjacent to water the right of reasonable use." Ruhl, *supra* note 12, at 49. Western states use the doctrine of prior appropriation, which is based on first use of the resource. *Id.*

93. *Florida II*, 141 S. Ct. at 1180 (footnote added) (quoting *Florida I*, 138 S. Ct. 2502, 2513 (2018)).

94. *Id.* at 1181.

95. *See id.* at 1181–82.

96. *Id.* at 1182.

97. Exceptions to Report of the Special Master by Plaintiff State of Florida and Brief in Support of Exceptions at 28 n.3, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).

98. *Florida II*, 141 S. Ct. at 1182.

sumption, the Court agreed with Special Master Kelly that the evidence was lacking.[99] As a result, the Court stated it could not "find it 'highly probable' that these species have suffered serious injury, let alone as a result of any overconsumption by Georgia."[100] The Court did not consider the second question after concluding that Florida had failed to prove Georgia was the cause of its injury.[101]

II. Evolution of the Equitable Apportionment Doctrine

Water is a finite resource shared by many users and consequently suffers from the classic tragedy of the commons problem—users lack incentive to share the water, instead allocating the water for their own purposes.[102] The ACF Basin is illustrative of this dilemma; Georgia has no incentive to allow water to flow downstream to Florida when Georgia could keep the water for its own crops and drinking water.[103] Thus, downstream states are at a disadvantage—the upstream state could theoretically keep all the water for itself. When water is scarce, an upstream state has all the more incentive to keep the limited water resources. Consequently, downstream states need a means for either bringing the upstream state to the negotiating table or for winning their fair share from a court. The doctrine of equitable apportionment recognizes states' equal right to the "natural resources within [their] boundaries,"[104] but maintains that "a state may not preserve [these resources] solely for its own inhabitants."[105] Equitable apportionment also provides a state with a remedy, should it be deprived of those natural resources by another state.[106] The Court's holding in *Florida v. Georgia*, however, requires the complaining state (usually the downstream state) to meet a high evidentiary burden in order to win equitable apportionment. This not only makes it incredibly difficult for a downstream state to win a remedy in the Court, it also impairs downstream states' bargaining power in water negotiations. As a result, upstream states are given a significant advantage in water disputes, a drastic departure from the original purpose of equitable apportionment.

99. *Id.* at 1182–83.

100. *Id.* at 1183.

101. *See generally id.*

102. Lathrop, *supra* note 24, at 866–67.

103. *Id.* at 867.

104. Michael D. Tauer, *Evolution of the Doctrine of Equitable Apportionment*—Mississippi v. Memphis, 41 U. Memphis L. Rev. 897, 907 (2011).

105. Ruhl, *supra* note 12, at 51.

106. Cheren, *supra* note 22, at 127 ("As the likelihood of the states reaching an efficient agreement is increased if the downriver state has a remedy against a non-cooperative upriver state, the Court recognized the cause of action for equitable apportionment of interstate waters in the *Kansas v. Colorado* controversy in 1906.").

The equitable apportionment doctrine was first announced by the Supreme Court in 1907 in *Kansas v. Colorado*.[107] *Kansas v. Colorado* established three principles of equitable apportionment.[108] First, states cannot be regulated by other states, and each has equal right to the benefits of the natural resources within its borders.[109] Second, an equitable apportionment analysis must involve balancing the costs and benefits to each state of the use of the shared resource.[110] Third, for the Court to adjudicate the dispute, the "complaining State" must first "demonstrate harm that is actual, present, and substantial."[111] The *Florida v. Georgia* Court focused on this third point and ultimately decided that Florida's apportionment claims died when Florida failed to meet the "clear and convincing" evidence burden.[112]

A. A Heightened Evidentiary Burden

The substantial harm requirement has solidified into a heightened standard of proof that is rarely satisfied, thus denying states access to equitable apportionment. Of the ten equitable apportionment cases the Supreme Court has ruled on,[113] the Court has only granted equitable apportionment in three.[114] The last time the Court ruled in favor of equitable apportionment was in 1945.[115]

In an early case, *Connecticut v. Massachusetts*,[116] the Court strengthened the evidentiary showing of substantial harm a complaining state must meet in order to obtain equitable apportionment.[117] The Court declined "to control the conduct of one state at the suit of another, unless the threatened invasion of rights

107. 206 U.S. 46, 118 (1907). Kansas sought to enjoin Colorado's diversion of water from the Arkansas River. *Id.* at 47. The Court denied Kansas equitable apportionment because the great benefit to Colorado from the water withdrawals outweighed the "detriment" to Kansas. *Id.* at 114.

108. Tauer, *supra* note 104, at 907.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See Florida II*, 141 S. Ct. 1175, 1176, 1180 (2021).

113. *See generally* Kansas v. Colorado, 206 U.S. 46; Wyoming v. Colorado, 259 U.S. 419 (1922); Connecticut v. Massachusetts, 282 U.S. 660 (1931); New Jersey v. New York, 283 U.S. 336 (1931); Washington v. Oregon, 297 U.S. 517 (1936); Nebraska v. Wyoming, 325 U.S. 589 (1945); Arizona v. California, 373 U.S. 546 (1963); Colorado v. New Mexico, 467 U.S. 310 (1984); South Carolina v. North Carolina, 558 U.S. 256 (2010); *Florida II*, 141 S. Ct. 1175.

114. *See generally* Wyoming v. Colorado, 259 U.S. 419; New Jersey v. New York, 283 U.S. 336; Nebraska v. Wyoming, 325 U.S. 589.

115. *See* Nebraska v. Wyoming, 325 U.S. at 656.

116. *See generally* 282 U.S. 660 (1931) (Connecticut brought suit to enjoin Massachusetts from diverting waters of the Connecticut River watershed to Boston and neighboring towns).

117. *See* Bernadette R. Nelson, *Muddy Water Blues: How the Murky Doctrine of Equitable Apportionment Should Be Refined*, 105 Iowa L. Rev. 1827, 1841 (2020).

is of serious magnitude and established by clear and convincing evidence."[118] Finding that Connecticut failed to satisfy its burden of proof of "substantial injury or damage" resulting from Massachusetts' diversions, the Court did not apportion the waters.[119] Other equitable apportionment cases have faltered on this point as well. In *Washington v. Oregon*,[120] the Court found that Washington had failed to prove serious injury by clear and convincing evidence.[121] The Court reasoned that there was "no satisfactory proof" that Oregon's water consumption lessened the water available for Washington.[122]

Complaining states have only successfully obtained equitable apportionment when the Court either did not apply the "serious magnitude" test or applied it in a more flexible manner.

Wyoming v. Colorado[123] marked the second time the Court considered an equitable apportionment case and the first time it awarded equitable apportionment to the complaining state.[124] *Wyoming v. Colorado* was also decided prior to the Court raising the evidentiary burden in *Connecticut v. Massachusetts*. The Court's opinion focused largely on the States' "equality of right" to the shared waters and applied the prior appropriation doctrine[125] to determine the seniority of uses before enjoining Colorado from diverting more than a set amount of water.[126] The Court later clarified in *Wyoming v. Colorado* that "the only showing of injury or threat of injury was the inadequacy of the supply of water to meet all appropriative rights,"[127] instead of demanding proof of the "significant cause" of the harm of "serious magnitude."

New Jersey v. New York[128] was the second case in which the Court awarded equitable apportionment. Here, the Court rested its decision on the "equality of

118. Connecticut v. Massachusetts, 282 U.S. at 669; *see also* Colorado v. Kansas, 320 U.S. 383, 392 (1943) ("The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule.").

119. Connecticut v. Massachusetts, 282 U.S. at 672–74.

120. 297 U.S. 517 (1936). Washington sued Oregon for diversion of the waters of the Walla Walla River and asked for apportionment of the waters. *Id.* at 518–19.

121. *Id.* at 524.

122. *Id.* at 526.

123. 259 U.S. 419 (1922).

124. *See id.* at 496.

125. Both Wyoming and Colorado use the prior appropriation doctrine. *See Overview of Prior Appropriation Water Rights*, NAT'L SEA GRANT L. CTR. (2021), https://perma.cc/EZ3W-NL6L.

126. Wyoming v. Colorado, 259 U.S. at 460–66, 489, 496; *see* Nelson, *supra* note 117, at 1841.

127. Nebraska v. Wyoming, 325 U.S. 589, 610 (1945) (summarizing Wyoming v. Colorado, 259 U.S. 419).

128. 283 U.S. 336 (1931) (New Jersey sought to enjoin New York from diverting the waters of the Delaware River or its tributaries).

right" principle as well. The Court ruled that New York may not divert water "in excess" and reasoned that:

> New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may.[129]

The causation question in *New Jersey v. New York* was more straightforward than in *Florida v. Georgia*—New York had proposed diverting a large amount of water in order to increase New York City's water supply.[130] It is notable, however, that the Court in *Florida v. Georgia* never considered "equality of right," a seemingly more flexible test than the causation test.[131] Special Master Kelly only assessed the "equality of right" because he had been instructed "to make a full range of factual findings"; otherwise, he would have stopped after determining Georgia's consumption was not the source of the harm.[132] Thus, the Court's reasoning in *Florida v. Georgia* completely focused the equitable apportionment doctrine on the far more rigid causation test. In firming up the causation test, the Court made it harder for downstream states to win and moved further away from this understanding that downstream states are dependent on upstream states letting water through.

In the third case awarding equitable apportionment, *Nebraska v. Wyoming*,[133] the Court recognized that "the deprivation of water in arid or semiarid regions cannot help but be injurious," and equated this reasoning to that of the Court in *Wyoming v. Colorado*.[134] In both cases, the Court accepted the inadequacy of the water supply to meet the appropriative uses as a sufficient showing of injury and did not demand the complaining state satisfy a "clear and convincing" burden.[135] Though not western states in an "arid region," Florida and Georgia are in similar circumstances, having weathered multiple historic droughts leading up to this litigation. The *Florida v. Georgia* opinion, however,

129. *Id.* at 342–43.

130. *Id.* at 341.

131. *See Florida II*, 141 S. Ct. 1175, 1180 (2021) ("To resolve this case, we need address only injury and causation.").

132. Report of the Special Master at 25, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).

133. 325 U.S. 589 (1945). Nebraska sued Wyoming for diverting water to which Nebraska claimed to be equitably entitled. *Id.* at 591–92. The Court granted a decree apportioning the natural flow of the North Platte River. *Id.* at 656.

134. *Id.* at 610.

135. *Id.*

made no mention of *Nebraska v. Wyoming* nor *Wyoming v. Colorado*. Nor did it consider reducing the clear and convincing evidence standard. If anything, the Court strengthened the standard. With the supporting precedent of these two cases, it would not have been unreasonable for the Court to lower the evidentiary burden for Florida, in recognition of the pressure the drought placed on Florida's water resources, and therefore Florida's increased vulnerability to any diversions by Georgia. The Court also placed far more emphasis on establishing clear causation than it did in either *Nebraska v. Wyoming* or *Wyoming v. Colorado*. Considering that climate change will amplify and extend the injuries of water scarcity, it is significant that the Court has chosen to tighten the evidentiary requirements and solidify the "clear and convincing evidence" standard. This heightened burdened of proof leaves downstream states with little leverage to secure water rights, as upstream states fiercely cling to the limited water resources.

B. Difficulties in Establishing Causation

A clear and convincing evidence standard becomes particularly burdensome when the alleged source of injury is not the only source of injury, but one of several sources. Chief Justice John Roberts raised the difficulty of causation twice at oral argument: He addressed questions to both the plaintiff and defense about how to analyze the case if Georgia was the contributing cause, but not a sufficient cause by itself.[136] Florida's attorney responded that the presence of other contributing causes did not prevent Georgia's consumption from being a substantial cause, whereas Georgia's attorney claimed that Florida had failed to prove causation under any standard.[137]

Downstream states have faced the difficulty of establishing causation for their injury in other instances of water litigation as well. Interstate water pollution conflicts, another category of original jurisdiction cases, portray the challenge of deducing one culpable cause when there are several contributing factors. In *Missouri v. Illinois*,[138] Missouri sought to enjoin Chicago's discharge of sewage into the Mississippi River, which allegedly gave Missouri's residents typhoid and made the water "unfit for drinking, agricultural, or manufacturing purposes."[139] The Court, however, dismissed the case, concluding that the defendant had failed to establish Chicago's discharge as the cause of Missouri's injury.[140] As in *Florida v. Georgia*, the Court had not ruled out the idea that Missouri's own behavior caused the injury. Just as Florida's overharvesting and insufficient re-shelling were possible causes of the oyster fisheries collapse in

136. Transcript of Oral Argument at 5, 38, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).
137. *Id.*
138. 200 U.S. 496 (1906).
139. *See id.* at 517, 522.
140. *See id.* at 526.

Florida v. Georgia, so too were Missouri's own discharges a suspected culprit in *Missouri v. Illinois*. The presence of other possible pollution sources prevented Missouri from winning relief from its injury.[141] The case is illustrative of the Court's inability to sort through causation in the presence of multiple contributing factors. By demanding complaining states prove the source of their injury through "clear and convincing" evidence, the Court puts water-scarce states, like Florida, in an analogous situation where the various confounding factors make it incredibly difficult to meet the evidentiary burden. To add insult to injury, downstream states are left with the consequences of any bad actions of the upstream state but lack the legal strength to hold the upstream state accountable.

The difficulty in satisfying a clear and convincing standard is particularly well-illustrated by the conflicting conclusions Special Masters Lancaster and Kelly reached, despite considering the exact same record with all the same evidence. Special Master Kelly concluded that Florida "has not suffered any harm from Georgia's consumption."[142] He found that "overharvesting and a lack of re-shelling were significant causes of the collapse" and that the collapse was "unconnected with any consumptive use by Georgia."[143] Nor did he express any concern about Georgia's mismanagement of the water.[144] On the other hand, Special Master Lancaster stated in his report that "there is little question that Florida has suffered harm from decreased flow in the River."[145] Although he did not go so far as to name Georgia's overconsumption the cause of that harm, Special Master Lancaster did find "likely misuse of resources by Georgia"[146] and described Georgia's agriculture water use as "largely unrestrained"[147] with "no limitations on the amount of irrigation water than can be used by farmers."[148] Special Master Lancaster was unconvinced by Georgia's argument that the oys-

141. *See id.* at 522. In response to the inability of the federal common law to handle the complexity and technicality of water pollution cases, Congress enacted the Federal Water Pollution Act Amendments of 1972. *See generally* 33 U.S.C. §§ 1251–1387; City of Milwaukee v. Illinois, 451 U.S. 304, 325 (1981) (noting that using federal common law over legislation is "peculiarly inappropriate in areas as complex as water pollution control . . . . Not only are the technical problems difficult . . . but the general area is particularly unsuited to the approach inevitable under a regime of federal common law. Congress criticized past approaches to water pollution control as being 'sporadic' and 'ad hoc,' apt characterizations of any judicial approach applying federal common law." (citations omitted)).

142. Report of the Special Master at 25, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).

143. Report of the Special Master at 16–17, *Florida I*, 138 S. Ct. 2502 (2018) (No. 142, Orig.).

144. Report of the Special Master at 25, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.) ("I conclude that Georgia does not take too much water from its portion of the ACF Basin including from the Flint River.").

145. Report of the Special Master at 31, *Florida I*, 138 S. Ct. 2502 (No. 142, Orig.).

146. *Id.*

147. *Id.* at 39.

148. *Id.* at 33.

ter fishery collapse was caused by overfishing and insufficient shelling.[149] Instead, he concluded that the increased water salinity led to the collapse.[150] Special Master Lancaster concluded that Florida had been seriously harmed and that Georgia's use was unrestrained, whereas Special Master Kelly saw Georgia's use as reasonably employed for the satisfaction of Georgia's own needs.

The Supreme Court concluded its opinion in *Florida v. Georgia* with a seemingly empty promise to Florida, noting in the second-to-last sentence of the opinion that the Court "emphasize[s] that Georgia has an obligation to make reasonable use of Basin waters in order to help conserve that increasingly scarce resource."[151] This command is unlikely to be meaningfully enforced for three reasons.

First, the high burden of establishing clear and convincing injury *caused by* the use of another state makes this obligation nearly unenforceable. Special Master Kelly concluded that Georgia's use could not be unreasonable because Florida had failed to prove its injury was due to Georgia's consumptive use.[152] Special Master Kelly cited Justice Joseph Story: "'[T]he true test' of reasonable use is whether it injures other users."[153] Thus, the "obligation of reasonable use" is no end run around the clear and convincing evidence burden, as Florida would still have to establish injury due to Georgia's use.

Second, the Court has never before apportioned water away from a state due to wasteful or inefficient use. In *Colorado v. New Mexico*,[154] the Court considered incorporating conservation principles[155] into equitable apportionment and went so far as to state that "wasteful or inefficient uses will not be protected."[156] The Special Master in that case recommended granting Colorado its requested diversion on the grounds that conservation measures could help compensate New Mexico for its loss.[157] The Court, however, held that Colorado had failed to prove by clear and convincing evidence that the conservation mea-

149. *Id.* at 32.

150. *Id.* at 31.

151. *Florida II*, 141 S. Ct. 1175, 1183 (2021).

152. Report of the Special Master at 54, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).

153. *Id.* (citing Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827)).

154. 459 U.S. 176, 177, 190 (1982). Colorado sought to divert waters of the Vermejo River for future uses, and the Court remanded for further fact finding. *Id.* In the subsequent rehearing, Colorado failed to satisfy its evidentiary burden for equitable apportionment. Colorado v. New Mexico, 467 U.S. 310, 323–24 (1984).

155. Colorado v. New Mexico, 459 U.S. at 186 ("We conclude that it is entirely appropriate to consider the extent to which reasonable conservation measures by New Mexico might offset the proposed Colorado diversion and thereby minimize any injury to New Mexico users. Similarly, it is appropriate to consider whether Colorado has undertaken reasonable steps to minimize the amount of diversion that will be required.").

156. *Id.* at 184.

157. *See* Colorado v. New Mexico, 467 U.S. at 310.

sures would "adequately compensate for the reduction" and that the benefits would outweigh the harms.[158] This was despite the Special Master's belief that New Mexico could improve its water management practices to reduce inefficiency and waste.[159]

Finally, the Court has a strong, and not unreasonable, preference for the status quo. The consequences for "disrupting established uses [are] certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote."[160] Thus, the Court protects "existing economies"[161] by demanding clear and convincing evidence of the benefit of the diversion. Downstream states are left to fight an uphill battle.

C. Injuries, the Environment, and Climate Change

The Court missed an important opportunity in *Florida v. Georgia* to update its equitable apportionment doctrine in accordance with modern environmental law, and our "understandings of environmental interrelationships and the values of ecosystem services."[162] Florida's injuries were based on the Apalachicola River's role in maintaining the oyster fisheries and vibrant, biodiverse ecology of the Apalachicola Bay.[163] Traditionally, the Court's equitable apportionment jurisprudence has recognized more extractive, use-based injuries.[164] States have complained of loss of water for manufacturing[165] and irrigation,[166] as well as impairment of stream navigability and capacity to discharge sewage,[167] to name a few. The high standard of injury also favors the interests of states rapidly developing water uses over states interested in water conservation.[168] This is due to the Court's traditional focus on economic injury.[169]

158. *Id.* at 323–24. The Court in *Florida v. Georgia* never considered if the benefits outweighed the harms because it first concluded that Florida had failed to prove substantial injury due to Georgia's consumption. *Florida II*, 141 S. Ct. at 1183.

159. *See* Colorado v. New Mexico, 467 U.S. at 318. It is of note that Colorado was actually the upstream state bringing the case to divert water for future uses. New Mexico, as the downstream user, had fully appropriated the waters of the Vermejo River, which had previously gone unused by Colorado. Colorado v. New Mexico, 459 U.S. at 177.

160. Colorado v. New Mexico, 459 U.S. at 187.

161. *Id.*

162. Michael Muñoz, *A River Basin Runs Through It: Evolving Understandings of Equitable Apportionment and Water Rights at the Florida-Georgia Line*, 27 DUKE ENV'T L. & POL'Y F. 179, 180 (2016).

163. *See id.* at 185.

164. *Id.* at 180–81, 200.

165. *See* Kansas v. Colorado, 206 U.S. 46, 52 (1907); Colorado v. New Mexico, 467 U.S. 310, 312 (1984).

166. *See* Kansas v. Colorado, 206 U.S. at 52; Washington v. Oregon, 297 U.S. 517, 526 (1936).

167. *See* Connecticut v. Massachusetts, 282 U.S. 660, 664 (1931).

168. Ruhl, *supra* note 12, at 51.

169. *Id.* at 52.

The Court has recognized ecosystem-based injuries elsewhere. In *New York v. New Jersey*, the Court found that New York's water diversion would significantly harm New Jersey's river recreation and oyster fisheries.[170] While in this case, New York's proposed diversion was an easily identifiable potential source of harm, conclusively identifying one significant cause of a harm can pose a serious challenge. Natural resource injuries struggle to meet traditional causation standards due to the natural variability of the environment, the presence of multiple harms, the synergistic effects of harms, and the lack of baseline understanding of ecosystems.[171] This was less of a problem for equitable apportionment cases when the alleged harms were use-based versus ecosystem-based, which might explain why previous cases placed far less emphasis on determining the "sole" or "significant cause" of the injury.[172] As climate change increases the prevalence of droughts, however, even use-based injuries might struggle with establishing causation. The pressures of climate-induced water scarcity will compound the pressures of high water use demands, and vice versa, to create injuries.[173] The presence of multiple causes makes it difficult to determine that any one of them is a significant cause satisfying the clear and convincing standard. The Court in *Nebraska v. Wyoming* seemed to recognize this problem when it applied a lower evidentiary burden due to the dual pressures of water deprivation and arid conditions.[174]

In *Florida v. Georgia*, however, the Court declined to lower the evidentiary burden for Florida's ecosystem-based injuries, a decision out of touch with the reality of the environmental circumstances. It is vital that downstream states be able to win suits to protect against overconsumption upstream and to provide sufficient flows to their ecosystems. Ecosystems provide a number of ecosystem services, from flood control to nutrient regulation.[175] These ecosystem services also have economic value—in the Apalachicola Region this value has been estimated around $5 billion per year.[176] Yet, this ecological complexity also creates difficulty in proving causation, due to the presence and interaction of multiple stressors, both natural and man-made.[177] Ecosystems are also constantly evolving, and this makes it difficult to identify injuries and their causes, by compar-

170. New Jersey v. New York, 283 U.S. 336, 345 (1931).

171. Sanne H. Knudsen, *The Long-Term Tort: In Search of a New Causation Framework for Natural Resource Damages*, 108 Nw. U. L. Rev. 475, 480, 496 (2014); *see also* Susan J. Nichols et al., *Challenges for Evidence-Based Environmental Management: What Is Acceptable and Sufficient Evidence of Causation?*, 36 Freshwater Sci. 240, 240 (2016).

172. *Florida II*, 141 S. Ct. 1175, 1176 (2021).

173. *See* Knudsen, *supra* note 171, at 482.

174. Nebraska v. Wyoming, 325 U.S. 589, 610 (1945).

175. *See* Ruhl, *supra* note 12, at 53.

176. *Id.*

177. *See* Knudsen, *supra* note 171, at 492.

ing past to present.[178] Furthermore, despite all the capabilities for collecting and analyzing data, there are still limits to what science can prove.[179] With its *Florida v. Georgia* decision, the Court failed to recognize ecosystem injuries and to update equitable apportionment to match the needs and complexity of these types of claims.

The Court's holding in *Florida v. Georgia* created an equitable apportionment doctrine at odds with the purpose it is intended to serve. The strict causation standard combined with the complex, multifaceted nature of cause-and-effect prevents the doctrine from putting downstream states on equal footing with upstream states. The Court even acknowledged the uncertainty in causation: "The precise causes of the Bay's oyster collapse remain a subject of ongoing scientific debate. As judges, we lack the expertise to settle that debate and do not propose to do so here."[180]

Instead the Court said it would settle the case based on the evidence in the record—on which the two Special Masters reached conflicting conclusions—and based on "Florida's heavy burden of proof," which heavily disadvantages the downstream state.[181] Some of that evidence was data from years with average rainfall that Special Master Kelly concluded showed no "clear and convincing evidence of harm."[182] Essentially, because Florida was not experiencing harms during non-drought periods, the drought had to be the culprit. This ignores the relationship between droughts and upstream state water usage. Upstream states may respond to their own water scarcity by drawing more from other sources that normally would make their way to the downstream state. Although the drought may be one contributing cause, this does not mean it is the only cause. With precipitation variability expected to increase as a result of climate change,[183] it will become increasingly difficult to separate out climate-based causes from man-made causes. The strict causation test the Court employed in *Florida v. Georgia* is too rigid an approach, and downstream states pay the price.

Conclusion

Special Master Kelly noted in his report that "[t]he question, then, is to what extent the two states should share the burdens of drought."[184] The Court's answer seems to be that the burden falls on the downstream state. Equitable

178. *See id.* at 491.
179. *See id.* at 482.
180. *Florida II*, 141 S. Ct. 1175, 1181 (2021).
181. *Id.*
182. Report of the Special Master at 8, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).
183. Angeline G. Pendergrass et al., *Precipitation Variability Increases in Warmer Climate*, 7 Sci. Rep. 1, 1 (2017).
184. Report of the Special Master at 53, *Florida II*, 141 S. Ct. 1175 (No. 142, Orig.).

apportionment is supposed to be a "flexible doctrine"[185] that allows for the "just and equitable"[186] allocation of contested waters. The Court's robust application of the clear and convincing standard, however, makes equitable apportionment seem anything but flexible and just. Instead, plaintiffs and downstream states are left to satisfy enormous evidentiary burdens. Considering that the source of injury and likelihood of benefit are confounded by several other factors, this is no small feat. Not only does this prevent downstream states from seeking remedy in court, it also significantly impairs the bargaining power of the state.[187] While this is hardly to say that the interests of upstream states are without importance, and indeed the Court has many legitimate reasons for protecting these interests, the scales are significantly tipped in favor of the upstream states. Thus, downstream and upstream states are not on the equal footing the equitable apportionment doctrine sought to recognize for equal sovereigns. The equitable apportionment doctrine has failed to provide downstream states with the tools to enforce their equal interests. Consequently, downstream states are showing up to the water wars only to find out that not only do they lack the water, but the Court has taken away their water gun too.

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

186. Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

187. *See* Cheren, *supra* note 22, at 127 (noting that by recognizing equitable apportionment, the Court provides downstream states with a cause of action and remedy should the upstream state prove uncooperative).