AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Constitutional Litigation

**Arizona v. California, \_\_\_ U.S. \_\_\_ (2020)**

*California imposed a “doing business tax” on all companies that had merely invested in a California corporation or LLC. California insisted that persons opposed to the tax could bring refund actions only in California courts. State law permitted state officials to demand payment from a taxpayer’s out-of-state bank and made the bank liable for the tax if the bank refused to comply. Arizona objected to this policy as violating the due process rights of Arizona citizens and violating the state’s sovereign interest in regulating banks within Arizona. In February 2019, Arizona requested permission from the Supreme Court to file a Bill of Complaint against California.*

 *The Supreme Court rejected that motion by a 7-2 vote. Justice Thomas objected to that decision on the ground the Supreme Court in cases between two states has mandatory exclusive and original jurisdiction. On what basis does Thomas think the Supreme Court had mandatory jurisdiction in this case? Why might the majority have disagreed? What position would you take? Thomas notes that if the justices refused this case, no other court would have jurisdiction. Consider that claim in light of the Supreme Court’s decision in* Rucho v. Common Cause *(2019) declaring gerrymanders to raise non-justiciable political questions? Is there a difference between this lawsuit and* Rucho *that explains why some issues must be and some issues may not be litigated in federal court?*

The motion for leave to file a bill of complaint is denied.

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I2a69a555361911eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2a69a555361911eaadfea82903531a62), with whom JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I2a69a555361911eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2a69a555361911eaadfea82903531a62) joins, dissenting from denial of motion for leave to file complaint.

Today the Court denies Arizona leave to file a complaint against California. Although we have discretion to decline review in other kinds of cases, we likely do not have discretion to decline review in cases within our original jurisdiction that arise between two or more States.

The Constitution establishes our original jurisdiction in mandatory terms. Article III states that, “[i]n all Cases ... in which a State shall be [a] Party, the supreme Court *shall* have original Jurisdiction.” In this circumstance, “[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” *Cohens v. Virginia* (1821).

Our original jurisdiction in suits between two States is also “exclusive.” As I have previously explained, “[i]f this Court does not exercise jurisdiction over a controversy between two States, then the complaining State has no judicial forum in which to seek relief.”  Denying leave to file in a case between two or more States is thus not only textually suspect, but also inequitable.

The Court has provided scant justification for reading “shall” to mean “may.” It has invoked its “increasing duties with the appellate docket,” and its “structur[e] ... as an appellate tribunal.”  But the Court has failed to provide any analysis of the Constitution’s text to justify our discretionary approach.

Although I have applied this Court's precedents in the past, I have since come to question those decisions. Arizona invites us to reconsider our discretionary approach, and I would do so. I respectfully dissent from the denial of leave to file a complaint.