

IN THE

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Supreme Court of the United States

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF IN SUPPORT OF EXCEPTIONS AND SUR-REPLY BRIEF IN SUPPORT OF EXCEPTIONS

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Dated: September 15, 1997

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STATE OF NEW YORK,

Defendant.

**MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF
IN SUPPORT OF EXCEPTIONS**

In this original jurisdiction action, the Court on June 16, 1997, issued an order receiving the Report of the Special Master and establishing a schedule for the filing of Exceptions to the Report and Replies to these Exceptions. 117 S.Ct. 2451 (1997). The State of New York timely filed its Exceptions, and the State of New Jersey timely filed its Reply thereto. The United States has also filed a Brief *Amicus Curiae* almost uniformly supporting New Jersey's positions. New York now seeks leave to file the attached sur-reply brief in response to New Jersey's Reply and to the Brief *Amicus Curiae* of the United States.

New York's posture in this case is analogous to that of the petitioner in a case in which the Court has granted a writ of certiorari. In such a case, the petitioner has an unqualified right, under Rule 25.3 of this Court, to file a reply brief within thirty days after receiving respondent's brief. We note, in addition, that under Rule 17.5, a state seeking leave to file a complaint in an original jurisdiction case has the right to file a reply brief. Moreover, in its most recent original jurisdiction case, the Court authorized the filing of sur-reply briefs on the merits by both sides. See *United States v. Alaska*, 116 S.Ct. 1823 (1996) (No. 84 Orig.).

The brief will be especially useful to the Court because certain issues that are not addressed in New York's Brief on Exceptions are raised in New Jersey's Reply and/or in the United States' brief. These include, *inter alia*, (1) the significance of the fact that Articles Third and Fifth of the 1834 Compact between New York and New Jersey mention "improvements" to shorelines, whereas Article Second, relied on by New York, does not; (2) the argument that New York's 1800 cession to the United States of a measure of jurisdiction over Ellis Island left no room for any exercise of authority by New York over the Island; (3) New Jersey's reliance on events occurring after 1955 to dispute New York's entitlement to sovereignty over Ellis Island by virtue of the doctrine of prescription and acquiescence; (4) New Jersey's insistence that a 1986 "Memorandum of Understanding" between the Governors of New York and New Jersey, evidencing an agreement never adopted by the New York legislature to share tax revenues from Ellis Island and Liberty Island, demonstrates New York's "admission" that New Jersey is entitled to such revenues from Ellis Island; and (5) the United States' attempt to retreat from the position, taken only two years ago in *Kansas v. Colorado*, 514 U.S. 673 (1995), that laches applies in cases involving interstate compacts.

Permitting New York to address these points in a sur-reply brief will help focus the issues of the case for the Court. It will place New York on an equal footing with a petitioner or appellant in a case not involving this Court's original jurisdiction, and with the litigants in the Court's most recent original jurisdiction case. Accordingly, we request that the Court grant New York's motion for permission to file the attached sur-reply brief.

Dated: Albany, New York
September 15, 1997

Respectfully submitted,

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TABLE OF CONTENTS

Page

ARGUMENT

POINT I

UNDER ARTICLE SECOND OF THE COMPACT,
NEW YORK HAS JURISDICTION OVER THE
FILLED PORTION OF ELLIS ISLAND 1

POINT II

NEW YORK HAS OBTAINED SOVEREIGNTY
OVER ELLIS ISLAND THROUGH ITS EXERCISE
OF DOMINION OVER THE ISLAND AND NEW
JERSEY'S ACQUIESCENCE IN THAT
EXERCISE 6

- A. New York Exercised Prescriptive Authority
Over Ellis Island 6
- B. New Jersey's Acquiescence in New York's
Exercise of Authority Over Ellis Island Enti-
tles New York to Sovereignty Over The
Island 10

POINT III

NEW JERSEY IS GUILTY OF LACHES BY VIRTUE
OF ITS DELAY IN COMMENCING THIS
ACTION 14

- A. Laches Applies to Original Jurisdiction Cases
Involving Interstate Compacts 14

B.	New Jersey's Failure Timely to Commence This Action Prejudiced New York	15
----	--	----

POINT IV

THE SPECIAL MASTER WAS EMPOWERED TO MODIFY WHAT HE ERRONEOUSLY BELIEVED TO BE THE BOUNDARY LINE BETWEEN THE STATES ON ELLIS ISLAND	18
---	----

CONCLUSION	20
------------------	----

TABLE OF AUTHORITIES

PageCases

Chicago, R.I. & P. Ry. Co. v. McGlinn, 114 U.S. 542 (1885)	6
Guarini v. New York, 521 A.2d 1362 (N.J. Super. Ct. Ch. Div.), <i>aff'd</i> , 521 A.2d 1294 (N.J. Super. Ct. App. Div. 1986), <i>cert. denied</i> , 484 U.S. 817 (1987)	13
Joines v. Patterson, 274 U.S. 544 (1927)	11
Kansas v. Colorado, 514 U.S. 673 (1995)	14
Michigan v. Wisconsin, 270 U.S. 295 (1926)	12
Montoya v. Gonzales, 232 U.S. 375 (1914)	11
Murray v. Joe Gerrick & Co., 291 U.S. 315 (1934)	7
New Jersey v. Delaware, 291 U.S. 361 (1934)	18
Paul v. United States, 371 U.S. 245 (1963)	7
Pollard's Lessee v. Files, 43 U.S. (2 How.) 591 (1844)	3
United States v. California, 332 U.S. 19 (1947)	18
Virginia v. Tennessee, 148 U.S. 503 (1893)	11
Washington v. Oregon, 211 U.S. 127 (1908)	18

Miscellaneous

Buck Act, 49 Stat. 1938 (1936) 7

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ARGUMENT

POINT I

**UNDER ARTICLE SECOND OF THE COMPACT,
NEW YORK HAS JURISDICTION OVER THE
FILLED PORTION OF ELLIS ISLAND**

As demonstrated in New York's Brief on Exceptions (Exceptions pp 11-21),¹ the plain language of Article Second of the

¹Parenthetical citations preceded by "Exceptions" are to New York's Brief on Exceptions. Parenthetical citations preceded by "NJ Br" are to New Jersey's
(continued...)

1834 Compact between New York and New Jersey, especially when viewed in light of the widespread use of landfill by both states in New York Harbor and the states' concern with maintaining New York's control over commerce and navigation in the Harbor, indicates that the entirety of Ellis Island is subject to New York's jurisdiction. Nothing in the arguments of either New Jersey or *amicus curiae* United States undermines either the factual predicates or legal reasoning of New York's argument.

Thus, neither New Jersey nor the United States can refute New York's showing (Exceptions pp 13-14) that, by 1834, landfill had been extensively employed to expand both Manhattan Island and the two New Jersey cities nearest Ellis Island. Nor, as demonstrated in New York's Reply Brief (pp 13-16), can New Jersey credibly contend that Ellis Island itself had not been extended by landfill by the time of the Compact. The United States (US p 14) merely offers the Special Master's observation that "the filled additions have expanded Ellis Island to nine times its original size." This fact has no real significance. Ellis Island was in 1834 and remains today a small island: the total area awarded New Jersey by the Special Master is less than four one-hundredths of a square mile.

Indeed, New Jersey's own arguments support New York's interpretation of the Compact. New Jersey first notes (NJ Br p 2) that, while "Article II contains no reference to future improve-

¹(...continued)

Reply Brief. Parenthetical citations preceded by "US" are to the United States' Brief *Amicus Curiae*. Parenthetical citations preceded by "NY" are to the numbered exhibits submitted by the State of New York, and those preceded by "NJ" are to the numbered exhibits submitted by the State of New Jersey. Parenthetical citations preceded by "T" are to the trial transcript, and those preceded by "R" are to the Final Report of the Special Master.

ments or filling . . . Articles III and V explicitly provide that New Jersey and New York shall have jurisdiction over improvements 'made and to be made' on their respective shores." The provisions in question award "exclusive jurisdiction" over "improvements" on the shore of New Jersey and of Staten Island to New Jersey and New York respectively. There could be no better illustration that, as New Jersey here intimates but elsewhere disputes, the Commissioners who drafted the Compact clearly envisioned the states' expansion of their territory in New York Harbor by means of landfill. *See, e.g., Pollard's Lessee v. Files*, 43 U.S. (2 How.) 591, 592 (1844) (equating "fill[ing] up" of subaqueous land with "improvement").

New Jersey suggests that the mention of "improvements" in Articles Third and Fifth but not in Article Second is fatal to New York's argument. In fact, it strengthens New York's case. "Exclusive jurisdiction" over "improvements made and to be made" on the New Jersey shore is awarded to New Jersey in Article Third as an exception to the otherwise "exclusive jurisdiction" of New York "of and over all the waters of the bay of New York," and the same is granted to New York in Article Fifth as an exception to New Jersey's otherwise "exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey." Without these exceptions, New York's jurisdiction over surface traffic and commerce in the Harbor could arguably have included authority over improvements on the New Jersey shore, or New Jersey might arguably have claimed authority over development of portions of the Staten Island shoreline. By contrast, the exclusive jurisdiction over the waters surrounding the islands in New York Bay,² as well as exclusive jurisdiction over the lands beneath these waters and jurisdiction over the islands themselves, lies with New York.

²As the Compact makes clear, Staten Island is not in New York Bay.

Because there was no possibility of conflict between New York's Article Third "exclusive jurisdiction" over "the waters of the bay" and its Article Second jurisdiction over the islands in the Bay, there was no need to specify that New York retained jurisdiction over "improvements" on these islands. The only other possible explanation—that the states in 1834 envisioned that improvements, including landfill, would be placed upon the New Jersey and Staten Island shores but no place else in the Harbor, leaving the remaining islands bereft of wharves, docks and fill—is unsupported by the historical record and contrary to reason and common sense.

New Jersey also suggests that the Compact's central purpose of retaining New York's control over commerce and navigation in New York Harbor did not, as New York argues (Exceptions pp 15-17), entail an award to New York of sovereignty over an expanded Ellis Island. New Jersey contends (NJ Br pp 6-7) that nothing supports New York's claim that "control of the Island and surrounding fill were [*sic*] a necessary ingredient to its authority to promote 'the interests of commerce and navigation.'" But New Jersey, refuting its own argument, demonstrates this necessity elsewhere in its brief. According to New Jersey (NJ Br p 14), New York's exclusive jurisdiction, which vindicates "the interests of commerce and navigation," applies only "in the waterways" of the Harbor. Thus, New Jersey reasons, "[o]nce the submerged lands around the original Island were filled, there was no longer any basis upon which New York could exercise jurisdiction over navigation and commerce" (NJ Br p 14).

New Jersey's position illustrates perfectly why the Compact awarded New York Ellis Island in its entirety. As a matter of common sense, exclusive jurisdiction over commerce and navigation cannot be confined literally to "the waters" of New York Harbor. Regulation of commerce and navigation necessar-

ily entails regulation not only of "the waters" *per se* but also of the land masses in and around them, in order to permit meaningful control over the military and commercial traffic traveling between these land masses.³ Under New Jersey's interpretation of the Compact, however, any filling of the subaqueous land surrounding Ellis Island would extinguish the "basis upon which New York could exercise jurisdiction over navigation and commerce" around the Island.

New Jersey's brief thus starkly dramatizes the choice offered the Court between the states' competing interpretations of the Compact. According to New Jersey, its sovereignty over subaqueous land empowered it to surround Ellis Island (as well as Bedloe's Island and any other island west of the mid-point of the Bay) with landfill and thus both to cut Ellis Island off from the remainder of the Harbor and to neutralize the retention of control over navigation and commerce that was New York's great object in negotiating the Compact. These results cannot have been what the Commissioners who forged the Compact intended. By granting New York sovereignty over "Ellis Island" and other islands in the Bay, without limitation, the Compact assured that these results would not come to pass.

³The history of New York Harbor illustrates the inseparability of jurisdiction over the islands in the Harbor and jurisdiction over "the waters" thereof. When, in 1900-1901, the entrepreneur Edward Cragin sought to create an artificial hundred-acre island in New York Bay not far from Ellis Island, the federal Harbor Line Board declined to authorize a modification of harbor lines to accommodate the project, in part because of its probable interference with navigation (NJ 331-334).

POINT II

NEW YORK HAS OBTAINED SOVEREIGNTY OVER ELLIS ISLAND THROUGH ITS EXERCISE OF DOMINION OVER THE ISLAND AND NEW JERSEY'S ACQUIESCENCE IN THAT EXERCISE

A. New York Exercised Prescriptive Authority Over Ellis Island

New York's Brief on Exceptions recites the many instances of New York's exercise of dominion over Ellis Island (Exceptions pp 22-30). Nothing in the arguments of New Jersey or the United States vitiates New York's overwhelming showing that it alone, and not New Jersey, acted on the filled portions of the Island.

New Jersey (NJ Br pp 24-26) suggests that the federal government's possession and occupation of the Island left no room for the exercise of any jurisdiction by New York. The cases of this Court, however, indicate otherwise. Even when a state's cession of jurisdiction to the federal government over territory within the state is total, there remain many areas in which a state may exercise its authority. As the Court has noted, state laws do not "become inoperative within [federal territory] upon the cession to the United States of exclusive jurisdiction over it." *Chicago, R.I. & P. Ry. Co. v. McGlinn*, 114 U.S. 542, 546 (1885). Rather, "the municipal laws of the [state] -- that is, laws which are intended for the protection of private rights -- continue in force until abrogated or changed by the new government or sovereign." *Id.*

[W]ith respect to . . . laws affecting the possession, use, and transfer of property, and designed to

secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.

Id. at 546-47 (Kansas statute, "being in no respect inconsistent with any law of the United States, and never having been changed or abrogated," remained in force after cession to United States).

Nor is it only statutes in force at the time of a state's cession of jurisdiction that may be applied in federal territory. If "the same basic scheme" of regulation has been "in effect since th[e] time" of the cession, "the current [scheme], albeit in the form of different regulations," also applies. *Paul v. United States*, 371 U.S. 245, 269 (1963) (California laws modified since time of cession were enforceable in federal enclave). It is presumably for this reason that, for example, the authorities on Ellis Island applied New York marital law even after that law changed in 1907 (NY 657).

State law can, moreover, also be applied on federal territory when Congress expressly so authorizes. Thus, for example, in the wake of *Murray v. Joe Gerrick & Co.*, 291 U.S. 315 (1934), which had held that state workmen's compensation laws had no effect in federal enclaves, Congress passed the Buck Act, 49 Stat. 1938 (1936), authorizing application to all United States property "which is within the exterior boundaries of any State" of that state's workmen's compensation law. As noted in New York's Brief on Exceptions (Exceptions pp 26-27), both before and after this remedial legislation, New York's workmen's compensation law was applied to claims arising from work on

the filled portions of Ellis Island (NY 283, 284, 306, 363, 795, 802).

Thus, even if New York's cession of jurisdiction to the United States had been broader than it was, there were extensive areas in which New York's "municipal laws" could be applied. It is, moreover, New York's laws that were applied in these areas. What is most striking about the evidence on this subject is its uniformity. It is undisputed that between 1890 and 1955 New Jersey issued no birth, death or marriage certificates connected with Ellis Island. The New Jersey Legislature, unlike both the New York Legislature and the people of New York, never passed any enactment expressly pertaining to New Jersey's sovereignty over Ellis Island. Neither the New Jersey state courts nor the federal courts in New Jersey ever asserted jurisdiction over events occurring on the filled portions of Ellis Island or over the residents of the Island, and no court ever applied New Jersey law to those events or those residents. The Island's residents were registered to vote not in New Jersey's elections, but in New York's. New Jersey, unlike New York, never included either the whole of Ellis Island or its filled portions within its boundaries for state census purposes (and likewise there is no evidence that it ever protested the federal government's inclusion of the entirety of the Island, including its population residing on fill, within New York rather than New Jersey for federal census purposes). With one exception, later acknowledged to be an error,⁴ New Jersey wage or construction standards were never applied to Ellis Island. Neither the President nor Congress nor the Immigration and Naturalization Service (INS) ever spoke of "Ellis Island, New Jersey." No individual employee of a federal agency suggested that Ellis Island was in New Jersey without correcting himself or being

⁴This is discussed in New York's Brief on Exceptions at pp 38-39.

corrected in short order. And no private citizen appears ever to have believed that Ellis Island was anywhere but in New York. All extant evidence indicates that during the immigration period Ellis Island was, and was believed to be, in New York.

Even after New York's cession of jurisdiction over Ellis Island to the federal government, the exercise of authority "designed to secure good order and peace in the community, and promote its health and prosperity" remained with a state. All the evidence in this case indicates that the state was New York. Unable to produce any direct documentary evidence to refute this proof of prescription and acquiescence, New Jersey attaches talismanic significance to a single historian's view of its legal import. Do all extant death certificates from Ellis Island come from New York? No matter, for INS historian Marian Smith "could not find any regulation or policy of the State or City, or the federal government, that would support a finding that Ellis Island deaths were routinely recorded in New York" (NJ Br p 28). Are all extant Ellis Island birth certificates likewise from New York? New Jersey says it must nonetheless prevail, for Smith opines that "there was no proof that the federal government had any policy of recording all Ellis Island births in New York" (NJ Br p 29). Does record evidence reveal that the New York City police investigated matters on Ellis Island? This is immaterial, for Smith "ha[s] yet to see any evidence of the New York City or State police on the Island exercising any of their powers" (NJ Br p 31). Do the recollections of an interpreter who worked on Ellis Island include the memory of "hundreds and hundreds of weddings of all nationalities and types" (NY 74 p 409)? This cannot be, says Smith, for she has found no evidence of marriages held on Ellis Island, even though she has attempted to do so (T 1358). Does INS correspondence from Ellis Island throughout the immigration period originate in "New York," and did a high ranking INS official in 1923 write that "the Bureau has always considered

Ellis Island as a part of the State of New York" (NY 971)? This is not probative, says New Jersey, for Smith "testified that the agency acknowledged . . . New Jersey's sovereignty over the filled lands" (NJ Br p 36).

The pattern is clear. On the one hand, New York offers abundant and uniform documentary evidence indicating that, in the area of "municipal law" in which state authority remained to be exercised after cession of jurisdiction over Ellis Island to the United States, it was always New York, never New Jersey, whose laws applied on the Island. On the other hand, there is the *ipsa dixit* of a trial witness who was present for none of the events at issue. The direct evidence of New York's exercise of prescriptive authority over the Island is overwhelming, and is in no way neutralized by New Jersey's resort to a historian's testimony.

B. New Jersey's Acquiescence in New York's Exercise of Authority over Ellis Island Entitles New York to Sovereignty over the Island

As demonstrated in New York's Brief on Exceptions (pp 30-40), New Jersey acquiesced in New York's exercise of sovereignty over Ellis Island during the immigration period. Although New Jersey (NJ Br pp 37-44) and the United States (US pp 18-19) attempt, unsuccessfully,⁵ to dispute New York's character-

⁵ The position of the United States on the issue, and indeed its presence as *amicus* in this case, are something of a mystery. The United States (US pp 1-2) avows no particular interest in any issue involved, and its brief demonstrates no familiarity with any exhibit, testimony, expert report or document other than the Special Master's Report. On the one issue on which the United States might have something to contribute -- namely, New Jersey's contention (NJ Br p 28)

(continued...)

ization of New Jersey's asserted acts of "counter-prescription" as sparse, brief, obscure and erroneous, New Jersey devotes more of its argument (NJ Br pp 15-24) to an irrelevant proposition that no one disputes: that there is sufficient evidence of New Jersey's non-acquiescence after 1955, when the immigration period had concluded. By 1955, however, New Jersey's acquiescence throughout the immigration period had already assured New York of its sovereign rights over the entirety of Ellis Island, and what New Jersey did thereafter made no difference.

As demonstrated by New York in its Brief on Exceptions (Exceptions pp 21-22), and as now conceded by New Jersey (NJ Br p 44 n 20), the doctrine of prescription and acquiescence is "akin to adverse possession." Under adverse possession, possession of property for a given length of time entitles the possessor to title to the property, regardless of where the title originally lies. The adverse possession simply perfects with the expiration of the designated period. *See, e.g., Joines v. Patterson*, 274 U.S. 544, 552-554 (1927); *Montoya v. Gonzales*, 232 U.S. 375, 377-378 (1914). Similarly, a state's possession of territory "for a certain length of time . . . excludes the claim of every other." *Virginia v. Tennessee*, 148 U.S. 503, 524 (1893). The only difference is that adverse possession is governed by a strict statute of limitations, whereas no express limitation period controls prescription and acquiescence.

The question, then, is not what New Jersey did after 1955, but whether the period of New York's exercise of dominion over Ellis Island and New Jersey's acquiescence in that exercise was

⁵(...continued)

that "[t]he federal government has consistently held the opinion that the portions of Ellis Island created by fill are subject to New Jersey sovereignty" -- it says nothing.

sufficiently long to entitle New York to permanent possession of the Island. New Jersey does not address this question, to which the answer must be yes. If, as New York demonstrates (Exceptions pp 30-31), New Jersey's insistence on granting to the United States a deed to the subaqueous land on which the Ellis Island landfill was placed was not an assertion of sovereignty over the Island itself, then the prescriptive period ran for 65 years, from 1890 (when the Island was expanded by landfill) to 1955. If the pronouncements of the New Jersey Board of Riparian Commissioners with respect to the subaqueous land are deemed assertions of sovereign authority over Ellis Island, then the prescriptive period begins in 1904. However it is measured, the period ran for more than fifty years—years during which, as demonstrated in New York's Brief on Exceptions, any suggestions that New Jersey owned Ellis Island were infrequent, brief, concededly erroneous, obscure, and not in the nature of assertions of sovereignty. Although the shortest prescriptive period recognized in the cases of this Court is sixty years, *see Michigan v. Wisconsin*, 270 U.S. 295, 317 (1926), New York can discover, and New Jersey offers, no reason why a period of more than fifty years should not likewise be sufficient.

Thus, what happened after 1955 made no difference; the matter was effectively resolved in New York's favor by then, although (as with any adverse possession) it has required legal action to ratify it. Nonetheless, New Jersey makes so much of one post-1955 episode (NJ Br pp 23-24), and is so mistaken in what it says, that its comments require a response.

In 1986, the Governors of New York and New Jersey executed a Memorandum of Understanding, declaring that

"[t]here is now pending a lawsuit⁶ that seeks to determine the respective sovereignty and jurisdiction of the States of New Jersey and New York over Liberty and Ellis Islands," expressing the desire "that such conflicts be avoided," and dedicating tax revenues "attributable directly to Ellis and Liberty Islands" to a Fund whose purpose "shall be to provide aid to homeless persons within the States of New Jersey and New York" (R App H). To New Jersey, this Memorandum "conclusively establishes that New Jersey had not acquiesced in any claim by New York to jurisdiction over the filled land," and constitutes an "admission . . . that New Jersey was entitled to a portion of the tax revenue collected on the Island" (NJ Br pp 23-24).

The most obvious flaw in New Jersey's argument is that the Memorandum of Understanding expressly required adoption by each state's legislature to take effect—an event that never occurred. Because the New York Legislature refused to enact it into law, the Memorandum remained an unsuccessful proposal and a legal nullity. Moreover, it cannot be news to New Jersey that such proposals among states, like the dealings between any other contracting parties, entail trade-offs and concessions on matters as to which the conceding party is confident of its correctness. Indeed, New Jersey has insisted throughout this litigation, and insists yet again in its brief (NJ Br p 3), that much of what New York was awarded in the 1834 Compact consisted of territories and powers to which New Jersey believed itself indisputably entitled.

⁶The case was *Guarini v. New York*, 521 A.2d 1362 (N.J. Super Ct. Ch. Div.), *aff'd*, 521 A.2d 1294 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 484 U.S. 817 (1987). This case, in which New Jersey conceded that, as of 1984, New York and only New York was exercising taxing authority over Ellis Island (NY 950-951), belies New Jersey's contention (NJ Br p 30) that there is no proof that New York exercised taxing authority over Ellis Island before 1991.

Ultimately, however, the circumstances and terms of the 1986 Memorandum of Understanding are not an issue in this case. More than thirty years earlier, New York's continuous exercise of prescription over the filled portions of Ellis Island and New Jersey's acquiescence in that exercise gave rise to New York's indefeasible right of sovereignty over the entire Island. Nothing that occurred thereafter could change that result.

POINT III

NEW JERSEY IS GUILTY OF LACHES BY VIRTUE OF ITS DELAY IN COMMENCING THIS ACTION

A. Laches Applies to Original Jurisdiction Cases Involving Interstate Compacts

Neither New Jersey nor the United States makes any effort to respond on its merits to New York's argument that laches should be and has been applied to boundary disputes involving interstate compacts. In *Kansas v. Colorado*, 514 U.S. 673 (1995), this Court was urged by the United States to recognize the validity of the laches defense in interstate compact cases. Without deciding whether laches applied in such cases, the Court analyzed the matter before it by determining that Colorado had failed to prove an indispensable element of its laches defense. *Id.* at 687-689. Two years later, backpedaling vigorously, the United States insists (US p 21) that its position in *Kansas v. Colorado* that laches is "applicable to actions to enforce a compact" applies only "in the context of an interstate water dispute." Nothing in either the United States' brief in *Kansas v. Colorado* or this Court's opinion in that case suggests that, if laches applies to interstate compacts, it does not apply to compacts that establish interstate boundaries.

New York's Brief on Exceptions demonstrates (pp 40-45) that this Court has applied both laches and prescription and acquiescence in an interstate boundary dispute based on a compact and that both these doctrines, which vindicate different equitable principles, should be applied in the present case. Neither the United States nor New Jersey offers a reasoned response to a single point of New York's argument. Having recognized the potential applicability of laches in interstate compact cases, the Court should apply the doctrine in the present case.

B. New Jersey's Failure Timely to Commence this Action Prejudiced New York

Of the two elements of the laches defense, New Jersey concedes one of them. It makes no effort to excuse its lack of diligence in commencing a suit to seize Ellis Island. It concentrates instead (NJ Br pp 47-49) on the question of whether its delay has caused prejudice to New York. New Jersey fails, however, to undermine New York's showing that New Jersey's delay in bringing this suit has rendered valuable documentary and testimonial evidence unavailable.

Part of New Jersey's error stems from its focus on the availability of evidence that is not pertinent to New York's exercise of prescriptive dominion over Ellis Island. Noting that the Brief of *amici curiae* New York Historical Society, *et al.*, relies on publicly-accessible evidence that was not introduced at trial, New Jersey rebukes New York (NJ Br pp 48-49 n 22) for its "fail[ure] to locate these materials" and present them at trial. This simply misses the point. The materials cited in the brief by *amici* date from the 1830s and earlier, and are pertinent only to the issue of Compact interpretation. It is not, however, evidence of the intentions of the Compact's framers in 1834, but evidence of prescription and acquiescence relating to the immigration

period of 1890 to 1954, that New Jersey's delay has rendered unavailable.

Indeed, the contrast between evidence relevant to Compact interpretation and evidence bearing on New York's exercise of dominion over Ellis Island demonstrates the validity of New York's laches argument. The materials probative of the meaning of the Compact (or any other agreement between sovereigns) are, without exception, either documents memorializing formal acts of state or documents originating or connected with prominent statesmen. These are precisely the sorts of materials that are likeliest to be protected from the damage inflicted by time. By contrast, the materials pertinent to the questions connected with prescription and acquiescence—what ordinary people, unaware that there was any disagreement about sovereignty over Ellis Island, did, said, and thought—are far less likely to have been intentionally preserved or to have withstood the passage of years.

New Jersey labels "incredulous" (*sic*) New York's suggestion that, abandoned in leaky buildings for more than twenty years, documents relevant to the case might have vanished or been destroyed (NJ Br pp 47-48). It complains that, although the population of Ellis Island at no time exceeded a few hundred, and forty-two years passed between abandonment of the Island by the INS and trial of this case, New York's claim "that the recollections of the individuals who worked and lived on Ellis Island have been lost to time" lacks "common sense" (NJ Br p 49). It rebukes New York for neglecting "the [preserved] oral histories of dozens of individuals who passed through Ellis Island," (NJ Br p 49), while ignoring the likelihood that these recollections, themselves now many years old, say nothing about the then-noncontroversial subject of New York's sovereignty over Ellis Island.

In short, New Jersey argues, "New York's claim of prejudice is grounded on nothing more than baseless speculation that evidence supporting [its] position was destroyed prior to the time that this action was commenced" (NJ Br p 47). Like many other things, this contention is more interesting turned on its head: New Jersey's argument is premised on its baseless speculation that nothing was destroyed.⁷ In view of the long neglect of the physical plant at Ellis Island, the informality and hence the ephemerality of the documents most relevant to New York's claim of prescription, and the many decades that passed before New Jersey commenced this suit, it seems most improbable that nothing significant was lost.

There is no telling what such evidence might be. Perhaps, for example, an official INS document modifying that agency's stated view that all of Ellis Island is in New York has vanished forever. Perhaps a letter from New Jersey Senator Hamilton Kean retracting his public position that the filled portion of the Island is part of New York (NY 292) has been destroyed. The existing record evidence, however, gives rise to a strong presumption that the records which have been lost were comparable to those which have survived, all of which support New York's position. And this likelihood aside, we can be certain that New Jersey's delay has rendered probative evidence unavailable to New York. That is enough to make New Jersey guilty of laches.

⁷ If, for example, New Jersey imagines that seventy-, eighty-, or ninety-year-old birth certificates, death certificates, and marriage certificates have all been preserved in pristine condition and in accessible locations, why has it produced no such documents?

POINT IV

THE SPECIAL MASTER WAS EMPOWERED TO MODIFY WHAT HE ERRONEOUSLY BELIEVED TO BE THE BOUNDARY LINE BETWEEN THE STATES ON ELLIS ISLAND

As noted in New York's Reply Brief (pp 16-17), although the Special Master erred in dividing Ellis Island between New York and New Jersey, his modification of the boundary was a valid exercise of his equitable powers. The Special Master recognized that actions to determine sovereign boundaries "are in the nature of equitable proceedings," *United States v. California*, 332 U.S. 19, 26 (1947), and understood that a strict "template" approach to Ellis Island boundaries would be inconvenient for both states and unfair to New York (R 146-150, 162-167). Now, however, the United States (US pp 24-30), relying on *Washington v. Oregon*, 211 U.S. 127 (1908), argues that "the boundary modification that the Master proposes appears to exceed the Court's historic power."

A more recent case, relied on by the Special Master (R 148-150) but not addressed by the United States, demonstrates that the Court may consult equity and convenience in establishing interstate boundaries. In *New Jersey v. Delaware*, 291 U.S. 361 (1934), the question before the Court was whether to draw the boundary between the states at the "geographical center" of the Delaware River and Delaware Bay, or at "the middle of the main shipping channel" or "Thalweg." *Id.* at 379. A strict application of the relevant law suggested that the boundary be the Thalweg at some points and the geographical center at others. But this approach, the Court said, would produce "a crooked line . . . without relation to the needs of shipping." *Id.* at 385. The "inconvenience" thus produced was "a reason for following the

Thalweg consistently through the river and bay alike," and thus "follow[ing] the course furrowed by the vessels of the world."
Id.

The Special Master was similarly guided by practicality in fixing the boundary of Ellis Island. The template approach would have divided three different buildings on the Island and left New York landlocked. The Special Master's modification of this boundary was within his equitable powers, and should be disturbed only in order to award the entirety of Ellis Island to New York.

CONCLUSION

FOR THE FOREGOING REASONS, THE COURT SHOULD REJECT THE REPORT OF THE SPECIAL MASTER RECOMMENDING THAT THE STATE OF NEW JERSEY BE DECLARED SOVEREIGN OVER THE LANDFILLED PORTIONS OF ELLIS ISLAND, AND ISSUE A DECREE DECLARING THAT THE ENTIRETY OF ELLIS ISLAND IS THE TERRITORY AND SUBJECT TO THE SOVEREIGNTY OF THE STATE OF NEW YORK.

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September 15, 1997

Respectfully submitted,

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