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No. 120, Original

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In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF NEW JERSEY, PLAINTIFF

v.

STATE OF NEW YORK

ON EXCEPTIONS TO THE FINAL AND
SUPPLEMENTAL REPORTS OF THE SPECIAL MASTER

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE
IN PARTIAL OPPOSITION TO EXCEPTIONS**

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the artificially filled portion of Ellis Island is sovereign territory of New York by virtue of the Compact of 1834 (New York Exception No. 1).

2. Whether the artificially filled portion of Ellis Island is sovereign territory of New York under the doctrine of prescription and acquiescence (New York Exception No. 2).

3. Whether the artificially filled portion of Ellis Island is sovereign territory of New York under the doctrine of laches (New York Exception Nos. 3 and 4).

4. Whether New York's jurisdiction over the unfilled portion of Ellis Island extends to the low-water mark of the Island's 1833 coastline (New Jersey Exception No. 1).

5. Whether this Court may modify the sovereign boundary between New York and New Jersey on Ellis Island in response to concerns of practicality and convenience (New Jersey Exception No. 2).

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
A. Ellis Island	2
B. The Compact of 1834	4
C. The current litigation	7
Introduction and summary of argument	9
Argument:	
I. The Compact of 1834 does not vest New York with sovereignty over post-compact additions to Ellis Island	11
II. New York failed to establish that the filled portions of Ellis Island are within its sovereign territory under the doctrine of prescription and acquiescence	14
III. New York's claims of inequitable delay are adequately addressed through the doctrine of prescription and acquiescence	20
IV. New York's jurisdiction over Ellis Island extends to the original Island's low-water mark	22
V. The Court should decline to modify an interstate boundary based on considerations of practicality and convenience	24
Conclusion	30

TABLE OF AUTHORITIES

Cases:

<i>Arkansas v. Tennessee</i> , 310 U.S. 563 (1940)	18
<i>California v. Nevada</i> , 447 U.S. 125 (1980)	18
<i>Central R.R. v. Jersey City</i> , 209 U.S. 473 (1908)	12
<i>Collins v. Promark Prods., Inc.</i> , 956 F.2d 383 (2d Cir. 1992)	7

IV

Cases—Continued:	Page
<i>Cuyler v. Adams</i> , 449 U.S. 433 (1981)	29
<i>Georgia v. South Carolina</i> , 497 U.S. 376 (1990)	15
<i>Gibbons v. Ogden</i> , 22 U.S. (9 Wheat.) 1 (1824)	5
<i>Handly's Lessee v. Anthony</i> , 18 U.S. (5 Wheat.) 374 (1820)	22, 24
<i>Illinois v. Kentucky</i> , 500 U.S. 380 (1991)	10, 20, 21
<i>Indiana v. Kentucky</i> , 136 U.S. 479 (1890)	19
<i>Kansas v. Colorado</i> , 514 U.S. 673 (1995)	21
<i>Louisiana v. Mississippi</i> , 202 U.S. 1 (1906)	16
<i>Martin v. Waddell's Lessee</i> , 41 U.S. (16 Pet.) 367 (1842)	24
<i>Mayor of New Orleans v. United States</i> , 35 U.S. (10 Pet.) 662 (1836)	13
<i>Michigan v. Wisconsin</i> , 270 U.S. 295 (1926)	18-19
<i>New Jersey v. Delaware</i> , 291 U.S. 361 (1934)	20
<i>New Jersey v. New York</i> :	
28 U.S. (3 Pet.) 461 (1830)	5
30 U.S. (5 Pet.) 284 (1831)	5
31 U.S. (6 Pet.) 323 (1832)	5
510 U.S. 805 (1993)	2, 8
511 U.S. 1080 (1994)	2, 8
513 U.S. 924 (1994)	2
117 S. Ct. 2451 (1997)	2
<i>Penn v. Lord Baltimore</i> , 27 Eng. Rep. 1132 (1750)	26
<i>Phillips Petroleum Co. v. Mississippi</i> , 484 U.S. 469 (1988)	11, 24
<i>Rhode Island v. Massachusetts</i> , 37 U.S. (12 Pet.) 657 (1838)	26
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983)	30
<i>United States v. Alaska</i> , 117 S. Ct. 1888 (1997)	24
<i>United States v. California</i> :	
332 U.S. 19 (1947)	24
382 U.S. 448 (1966)	24
<i>Vermont v. New Hampshire</i> , 289 U.S. 593 (1933) ..	23

V

Cases—Continued:

	Page
<i>Virginia v. Tennessee</i> , 148 U.S. 503 (1893)	16
<i>Virginia v. West Virginia</i> , 246 U.S. 565 (1918)	26, 27
<i>Washington v. Oregon</i> , 211 U.S. 127 (1908)	11, 28, 29

Constitution, treaty and statutes:

U.S. Const.:

Art. I:

§ 8, Cl. 17 (Enclave Clause)	4
§ 10, Cl. 3 (Compact Clause)	1, 28, 29

Art. III	27, 28
----------------	--------

Art. IV, § 3	28
--------------------	----

Articles of Confederation:

Art. IX	27
---------------	----

Convention on the Territorial Sea and the Contiguous

Zone, Apr. 29, 1958, 15 U.S.T. 1606	24
---	----

Art. 1, 15 U.S.T. 1608	24
------------------------------	----

Art. 3, 15 U.S.T. 1608	24
------------------------------	----

Art. 10(1), 15 U.S.T. 1609	24
----------------------------------	----

Art. 10(2), 15 U.S.T. 1609	24
----------------------------------	----

Act of June 28, 1834, ch. 126, 4 Stat. 708	1, 2, 5
--	---------

Article First, 4 Stat. 709	5, 6, 8, 11, 12
----------------------------------	-----------------

Article Second, 4 Stat. 709	6, 8, 12, 13
-----------------------------------	--------------

Article Third, 4 Stat. 709-710	6
--------------------------------------	---

Articles Third-Seventh, 4 Stat. 709-711	6
---	---

Article Fourth, 4 Stat. 710	6
-----------------------------------	---

Article Fifth, 4 Stat. 710	6
----------------------------------	---

Article Sixth, 4 Stat. 710-711	6
--------------------------------------	---

Article Seventh, 4 Stat. 711	6
------------------------------------	---

Article Eighth, 4 Stat. 711	6, 7
-----------------------------------	------

Act of July 31, 1958, Pub. L. No. 85-575, 72 Stat.

455	29
-----------	----

Federal Tort Claims Act, 28 U.S.C. 1346(b)(1)	7
---	---

Proc. of May 11, 1965, No. 3656, 79 Stat. 1490	1, 4
--	------

1800 N.Y. Laws ch. 6	3
----------------------------	---

1808 N.Y. Laws ch. 51	3
-----------------------------	---

1880 N.Y. Laws ch. 196	3
------------------------------	---

Wash. Rev. Code Ann. §§ 43.58.050 *et seq.* (West

1983)	29
-------------	----

VI

Miscellaneous:	Page
Joseph Angell, <i>A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof</i> (1826)	24
Olin Browder, <i>The Practical Location of Boundaries</i> , 56 Mich. L. Rev. 487 (1958)	25
Hampton L. Carson, <i>The Supreme Court of the United States</i> (1891)	27
5 <i>Debates on the Adoption of the Federal Constitution</i> (J. Elliot ed., reprint 1987) (1888)	27
Max Farrand, <i>The Framing of the Constitution of the United States</i> (1913)	27
Merrill Jensen, <i>The Articles of Confederation</i> (1970)	26, 27
S.J. Res. 88, 61st Cong., 2d Sess., 36 Stat. 881 (1910) .	29
Hannis Taylor, <i>Jurisdiction and Procedure of the Supreme Court of the United States</i> (1905)	26, 27
Charles Warren, <i>The Supreme Court and Sovereign States</i> (1924)	12, 26, 27

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INTEREST OF THE UNITED STATES

This original action presents a dispute between New Jersey and New York over their sovereign rights respecting Ellis Island. The United States has an interest in this action because Ellis Island is currently part of the Statue of Liberty National Monument. See Proc. of May 11, 1965, No. 3656, 79 Stat. 1490. The United States also has an interest in this action because the suit involves interpretation of an interstate agreement that Congress approved under the Compact Clause, U.S. Const. Art. I, § 10, Cl. 3. See Act of June 28, 1834, ch. 126, 4 Stat. 708. The Court previously invited the Solicitor General to ex-

press the views of the United States in response to New Jersey's motion for leave to file a complaint. *New Jersey v. New York*, 510 U.S. 805 (1993).

STATEMENT

The State of New Jersey brought this original action against the State of New York to obtain a determination whether the artificially filled portion of Ellis Island is within the sovereign territory of New Jersey. New Jersey based its claim on the Compact of 1834, an agreement, ratified by both States, that Congress enacted into law. See Act of June 28, 1834, ch. 126, 4 Stat. 708. This Court granted New Jersey leave to file its complaint, *New Jersey v. New York*, 511 U.S. 1080 (1994), and appointed the Honorable Paul R. Verkuil to serve as the Special Master. 513 U.S. 924 (1994). Special Master Verkuil denied both States' motions for summary judgment, conducted a trial, and prepared a report summarizing his recommendations. On June 16, 1997, this Court received the Final and Supplemental Reports of the Special Master and invited the parties to file exceptions. 117 S. Ct. 2451 (1997).

A. Ellis Island

Ellis Island is a small land form located in the western portion of upper New York Bay. The Master's report describes its rich history, which is interwoven with the Nation's growth.

Henry Hudson made the first recorded notation of the feature now known as Ellis Island, describing its "soft ozie ground," during his 1609 search for the Northwest Passage. The Dutch settlers of "New Netherlands" purchased the Island from Native Americans in 1630. England seized the Dutch possessions in 1664, and King Charles II included them in his 1664 land grant to the Duke of York, which cre-

ated the Colony of New York. During the colonial era, Ellis Island, which was known as one of the Oyster Islands, was occasionally used to hang traitors and pirates. Samuel Ellis obtained possession of the Island in 1785, and it has since born his name. See Final Rep. 4 n.2, 33-34 & n.19.

Following the Revolutionary War and the ratification of the Constitution, the State of New York enacted a statute ceding "jurisdiction" of Ellis Island to the United States, subject to New York's continued right to serve judicial process there. 1800 N.Y. Laws ch. 6. New York later conveyed all of its "right, title and interest" in Ellis Island to the United States "for the purpose of providing for the defence and safety of the city and port" of New York. 1808 N.Y. Laws ch. 51. The United States constructed Fort Gibson on the uplands, which at that time consisted of less than three acres. The United States used Ellis Island for military purposes through most of the nineteenth century. See Final Rep. 8, 40 n.22, Apps. I and J (maps).

In the 1880s, the United States made plans to convert Ellis Island to other uses. The United States obtained New York's cession of "right and title" to and "jurisdiction over" submerged land surrounding Ellis Island. 1880 N.Y. Laws ch. 196. It later placed Ellis Island under the control of the Treasury Department for use as an immigration station. In 1890, the United States began enlarging Ellis Island by filling the surrounding submerged land. In 1904, the United States recognized that New Jersey had a claim of title to that land, and it obtained a deed from New Jersey conveying the property. N.J. Except. Br. App. C. Between 1890 and 1934, the United States filled approximately 24.5 acres surrounding the origi-

nal Ellis Island and built various buildings on the artificial uplands. See Final Rep. 8-9, Apps. F and K.

The United States used Ellis Island as its primary immigration station from 1892 to 1934. During that period of operation, 12 million immigrants passed through the station. Today, as many as 100 million Americans have ancestors who came to America by way of Ellis Island. See Final Rep. 34. In light of its historical significance, President Johnson proclaimed Ellis Island a part of the Statue of Liberty National Monument. See Proc. of May 11, 1965, No. 3656, 79 Stat. 1490. The United States, which continues to hold title to Ellis Island, has restored the immigration station in recognition of its important place in American history. Final Rep. 9, 34.¹

B. The Compact of 1834

The States of New Jersey and New York have disputed their sovereign boundary in the vicinity of Ellis Island since colonial times. Their competing claims originally rested on the terms of a land grant from the Duke of York, proprietor of the Colony of New York, to Lord Berkeley and Sir George Carteret, which created the Colony of New Jersey. The grant included lands west of Long Island and Manhattan Island, "bounded on the east part by the main sea, and part by Hudson's River." Although the Declaration of Independence transformed the Colonies into States, and the ratification of the Constitution brought those States into "a more perfect Union," New York and New Jersey soon found themselves in direct conflict

¹ The United States has not determined the extent to which the federal government exercises legislative jurisdiction over Ellis Island under the Enclave Clause. U.S. Const. Art. I, § 8, Cl. 17. That matter is not at issue in this case.

over the location of their boundary. See Final Rep. 6-7, 34-40.

In 1798, New York granted an exclusive franchise to Robert Livingston to operate steamboats on New York's waters. In connection with that monopoly, New York claimed that the terms of the Duke of York's conveyance preserved all of the Hudson River and New York Bay as New York's sovereign territory. New Jersey responded that the boundary lay at the midpoint of those waterways. In 1807, the States attempted, without success, to negotiate a settlement of the issue. The States then each attempted to exert control over commerce on those waters, precipitating this Court's landmark decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), which recognized the United States' power over interstate commerce. See Final Rep. 35-40.

The States attempted again to reach an agreement on their sovereign boundary in 1827, but those negotiations also failed, and New Jersey filed an original action in this Court to obtain a judicial determination of the issue. See *New Jersey v. New York*, 28 U.S. (3 Pet.) 461 (1830); see also 30 U.S. (5 Pet.) 284 (1831); 31 U.S. (6 Pet.) 323 (1832). While that action was pending, the States resumed negotiations and, in 1833, reached an agreement. Congress approved that agreement, which is commonly known as the Compact of 1834, and enacted it into federal law, Act of June 28, 1834, ch. 126, 4 Stat. 708. See Final Rep. 41-44.

Congress described the Compact as an agreement "settling the jurisdiction and territorial limits of the two states." 4 Stat. 709. Article First of the Compact provides:

The boundary line between the two states of New York and New Jersey, from a point in the middle

of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

Ibid. Article Second addresses the status of various islands, including Ellis Island, which lies on the New Jersey side of the Article First boundary. Article Second states:

The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

Ibid. Articles Third through Seventh follow a similar pattern of granting one State a measure of "jurisdiction" in waters on the other State's side of the boundary. *Id.* at 709-711.²

² Article Third grants New York "exclusive jurisdiction," subject to certain exceptions (including New Jersey's "exclusive right of property in and to the land under water"), in portions of the Hudson River and New York Bay. 4 Stat. 709-710. Article Fourth grants New York "exclusive jurisdiction" over "quarantine laws, and laws relating to passengers," in specified waterways on the New Jersey side of the boundary line. *Id.* at 710. Article Fifth, which follows precisely the pattern of Article Third, gives New Jersey "exclusive jurisdiction," subject to certain exceptions, in the sound between New Jersey and Staten Island. *Ibid.* Articles Sixth and Seventh grant each State the right to serve certain types of judicial process on waters within the boundary of the other State. *Id.* at 710-711. The final article, Article Eighth, states that the

C. The Current Litigation

New Jersey sought leave to file this original action to adjudicate its sovereign rights respecting the artificially filled portion of Ellis Island. See Final Rep. 3-4. Relying on the Compact of 1834, New Jersey specifically requested:

That the boundary line be declared to be the former mean high water line of the original natural island, approximately 3 acres in size, so that the original island is thereby declared to be within the territory and jurisdiction of the State of New York, and so that the balance of the island, approximately 24.5 acres in size, and the surrounding waters, are thereby declared to be within the territory and jurisdiction of the State of New Jersey.

N.J. Compl. at 15. New Jersey's complaint was prompted, in part, by a decision of the United States Court of Appeals for the Second Circuit, which ruled that New York had jurisdiction to prescribe tort law on the filled portions of Ellis Island. See *Collins v. Promark Prods., Inc.*, 956 F.2d 383 (1992).³

agreement shall become binding upon approval by the state legislatures and Congress. *Id.* at 711.

³ In *Collins*, a federal employee was injured while using a stump grinder on the filled portion of Ellis Island. He sued the grinder's manufacturer, and the manufacturer impleaded the United States under the Federal Tort Claims Act (FTCA), which imposes liability on the United States if a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The United States moved for summary judgment, arguing that New Jersey's workers compensation law governs the filled portions of Ellis Island and does not permit third-party actions against employers. The district court denied the motion. The court of appeals affirmed, ruling that, under

New York opposed New Jersey's motion for leave to file a complaint, and this Court invited the Solicitor General to express the United States' views. *New Jersey v. New York*, 510 U.S. 805 (1993). The United States suggested that there was no pressing need to decide the question of the States' authority over Ellis Island in light of the United States' current title to, and control over, the small acreage in question. The Court nevertheless granted New Jersey leave to file its complaint. 511 U.S. 1080 (1994). New York filed an answer contending that the Compact of 1834 granted New York "territorial and sovereign jurisdiction" over Ellis Island in its entirety. New York's answer also raised the affirmative defense of prescription and acquiescence. See Final Rep. 13-16.

The Special Master supervised pre-trial proceedings, denied both States' motions for summary judgment, and conducted a trial on the disputed issues of fact. The Master's Final Report sets out his recommended decision. Final Rep. 2-3. The Master resolved the dispute based on four fundamental determinations: (1) Article First of the Compact of 1834 establishes the boundary between New Jersey and New York at the midpoint of the Hudson River and New York Bay (*id.* at 89); (2) Article Second of the Compact of 1834 grants New York jurisdiction over Ellis Island as it existed in 1833, but does not address New York's authority over the portion of the Island that was later created by filling submerged lands (*ibid.*); (3) the artificially filled portion of Ellis Island is sovereign territory of New Jersey under the common law

Article Second of the 1834 Compact, New York law governed the impleader claim. Neither New York nor New Jersey was a party to that action, but both States participated as *amicus curiae*. See Final Rep. 81.

doctrine of avulsion (*id.* at 99); and (4) New York has not sustained its burden of showing that the artificially filled portion of Ellis Island is sovereign territory of New York under the doctrine of prescription and acquiescence (*id.* at 144-145).

The Master additionally concluded that the Court should not decree the States' sovereign boundary on Ellis Island by simply following the contours of Ellis Island as it existed in 1833. Final Rep. 162-167. He recommended that, to achieve "the most practical, convenient, just, and fair boundary line," the Court should recognize New York's sovereign territory as extending over an area of land that approximates the size of the original Island to the low-water mark, but reconstitutes it based on the location of the structures that the United States has restored on the Island. *Id.* at 164-165. The Master's Supplemental Report sets out a precise boundary line based on that approach. New Jersey and New York have filed exceptions to the Master's recommendations.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Special Master has prepared a thorough and scholarly analysis of whether New Jersey or New York is entitled to exercise sovereignty over the artificially filled portion of Ellis Island. New York has filed four exceptions, while New Jersey has filed three. We disagree with all four of New York's exceptions. We disagree with New Jersey's first exception, but concur, in important respects, in New Jersey's second exception. We take no position on New Jersey's third exception, which involves a narrow issue of disputed fact.

1. New York contends that the Compact of 1834, which preserves New York's "present jurisdiction" over Ellis Island, grants New York sovereignty over

the subsequently filled area surrounding the original Island. The Master correctly concluded that the 1834 Compact does not address the question whether filling submerged lands surrounding the Island extends New York's "present jurisdiction." He properly resorted to the common law doctrine of accretion and avulsion to resolve that issue. The Master correctly concluded that, because the filling was avulsive, it did not extend New York's sovereignty beyond the original Island.

2. New York next argues that it established prescriptive sovereignty over the filled portion of Ellis Island. The Master found, after a detailed examination of the evidence, that New York had failed to carry its burden of showing that it had asserted dominion over the filled portion with the acquiescence of New Jersey. The United States, which had recognized during the relevant time period that New Jersey had a colorable claim to the filled portion of Ellis Island, agrees with the Master's conclusion. The contrary evidence that New York cites is simply too episodic and inconclusive to provide a basis for divesting New Jersey of its sovereignty over the filled area.

3. New York contends, in its third and fourth exceptions, that the Court should apply the doctrine of laches to preclude New Jersey's claims. The Master correctly rejected that defense. This Court has recognized that, in the case of interstate boundary disputes, the defense of laches is subsumed within the doctrine of prescription and acquiescence. *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991).

4. New Jersey contends that New York's sovereignty over Ellis Island, as it existed in 1833, extended only to the high-water mark. The Master properly considered and rejected that contention. As a general common law principle, a State that holds up-

lands retains sovereign authority over the associated tidelands. See, e.g., *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). New Jersey has put forward no convincing reason to conclude that the States intended the Compact of 1834 to depart from that practice.

5. New Jersey also urges that, once the Court has located the interstate boundary by applying the pertinent principles of law, the Court should not make adjustments to that boundary based on considerations of practicality or convenience. We agree. The Constitution grants this Court original jurisdiction to adjudicate suits between States over the location of interstate boundaries. This Court has never asserted the power to reconfigure a boundary in the manner that the Master recommends. See *Washington v. Oregon*, 211 U.S. 127 (1908).

ARGUMENT

I. THE COMPACT OF 1834 DOES NOT VEST NEW YORK WITH SOVEREIGNTY OVER POST-COMPACT ADDITIONS TO ELLIS ISLAND

New York urges that the Compact of 1834 recognizes New York's sovereignty over all portions of Ellis Island, including the portion that was created, long after the Compact was ratified, by filling adjacent submerged lands. N.Y. Except. Br. 11-21. According to New York, the plain language of the Compact is "sufficient" to secure New York's sovereignty over both the original and the later filled portions of Ellis Island. *Id.* at 11. New York's construction is unpersuasive.

The Master correctly described the terms of the Compact. Article First of the Compact establishes the sovereign boundary between New Jersey and New

York as a continuous line following the midpoint of the waterways that separate their shores. 4 Stat. 709. Those waterways (from north to south) are the Hudson River, New York Bay, the waters between Staten Island and New Jersey, and Raritan Bay. See Final Rep. App. B (map). Articles Second through Seventh of the Compact then set out a series of exceptions allowing one State to exercise specified measures of “jurisdiction” within the boundary of the other State. Article Second expressly preserved New York’s “present jurisdiction” over Ellis Island, which lies on the New Jersey side of the boundary. 4 Stat. 709. See *Central R.R. v. Jersey City*, 209 U.S. 473 (1908) (Holmes, J.).⁴

New York contends that, because Article Second does not contain any metes and bounds limitations on the size of Ellis Island, Article Second authorizes New York to exercise “present jurisdiction” over artificially created additions to the Island. N.Y. Excerpt. Br. 11-13. The Master correctly rejected that conten-

⁴ In *Central Railroad*, Jersey City sought to tax privately owned submerged land below the low-water mark on the New Jersey side of New York Bay. The Court held that Article First of the 1834 Compact gave the State of New Jersey sovereignty over the submerged lands in New York Bay to the middle of the Bay and that Jersey City could therefore tax those lands. 209 U.S. at 478. The Court noted that the specific grants of “jurisdiction” in the Articles that followed conferred “something less” than complete sovereignty. *Id.* at 479. The Court specifically observed that Article Second’s reference to “present jurisdiction” seemed “on its face simply to be intended to preserve the *status quo ante*, whatever it may be.” *Ibid.* As that case demonstrates, there is nothing unusual in one State’s agreeing, by interstate compact, to allow another State to exercise limited sovereign powers within its borders. See Charles Warren, *The Supreme Court and Sovereign States* 69-72 & n.73 (1924) (citing other examples).

tion. The contracting States designated “Ellis’s Island” as the specific area over which New York was authorized to exercise jurisdiction. 4 Stat. 709. They had no need to include a “metes and bounds” description of that Island unless they wished to describe *something other than* Ellis Island as it then existed. By referring simply to Ellis Island, the States expressed their intention that New York would exercise “present jurisdiction” over that feature as they knew it, subject to the familiar common law doctrines of accretion and avulsion. See Final Rep. 60, 89, 90-92.⁵

New York also argues that the Compact did not need to make express reference to the possibility of future filling around Ellis Island, because the use of fill in New York Harbor was an accepted practice at the time and “extension of Ellis Island by landfill could have been foreseen by the Commissioners who devised the Compact.” N.Y. Except. Br. 13-15. The Master examined New York’s evidence of the historic practice and concluded that it was “too ambiguous to

⁵ The Master was also correct in rejecting New Jersey’s contention that the Compact’s reference to “present” jurisdiction categorically limits New York’s jurisdiction to Ellis Island’s 1833 dimensions. Final Rep. 60-62. As he explained:

It makes more sense to read “present,” as New York does and New Jersey does in part, to refer to the fact that Ellis Island was owned and operated by the United States at the time of the 1834 Compact, whereas the other islands were not.

Id. at 62. The Master properly concluded that the Compact is silent on the question of future additions, and the matter should be resolved by reference to the “age-old” common law doctrines of avulsion and accretion. *Ibid.* See *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 717 (1836) (noting that the common law rule of accretion applies to “public” rights).

permit a factual finding that the practice of fill or wharfing-out had been established and thus taken for granted during that time.” Final Rep. 92 n.39. Indeed, it seems highly unlikely that the contracting States anticipated and consented, through silence, to filling of the magnitude that took place on Ellis Island. As the Master pointed out, the filled additions have expanded Ellis Island to nine times its original size. *Id.* at 92.

New York’s argument is not only contrary to the reasonable construction of the Compact’s terms, but it would also lead to absurd results. As the Master pointed out, under New York’s construction of the Compact, there is no limit to how far New York’s jurisdiction might be extended. “New York theoretically could add to her territory an area as large as Governors Island within New Jersey’s sovereign territory.” Final Rep. 92. He correctly concluded that, “[i]f such territorial expansion of a small island were contemplated in 1833, some references to it would logically have been set forth in the 1834 Compact.” *Ibid.*

II. NEW YORK FAILED TO ESTABLISH THAT THE FILLED PORTIONS OF ELLIS ISLAND ARE WITHIN ITS SOVEREIGN TERRITORY UNDER THE DOCTRINE OF PRESCRIPTION AND ACQUIESCENCE

New York also challenges the Master’s application of the common law doctrine of prescription and acquiescence. N.Y. Except. Br. 21-40. New York claims that Ellis Island is within its sovereign territory, irrespective of the Compact of 1834, because “New York has sufficiently demonstrated both its prescriptive acts over Ellis Island and New Jersey’s acquiescence therein.” *Id.* at 21. The Master rejected that conten-

tion based on an exhaustive examination of New York's evidence. He correctly applied the standard for prescription set forth in *Georgia v. South Carolina*, 497 U.S. 376, 393 (1990), dividing his analysis into four distinct time periods in Ellis Island's history. See Final Rep. 100-103, 106-144.

In the first period, from 1834 to 1890, the Master observed that there was no landfill on Ellis Island over which New York could exercise prescription. Final Rep. 106. In the second period, from 1890 to 1934, he found that the United States exercised almost exclusive control over the Island through its immigration program, *id.* at 106, 110, that New York's intermittent prescriptive acts over the Island were inconclusive, *id.* at 114, and that New Jersey demonstrated its non-acquiescence through, among other things, a 1904 deed transferring its underwater territory around the island to the United States, *id.* at 123. In the third period, from 1934 to 1955, the Master determined that several events, including a continuing controversy among the United States, New York, and New Jersey over employment on Ellis Island, defeated New York's claim of prescription and acquiescence. *Id.* at 132-136. In the final period, from 1955 to the present, the Master found that New Jersey's opposition to New York's jurisdiction was "much too active" (*id.* at 106) to establish New Jersey's acquiescence. *Id.* at 136-142. The Master accordingly concluded that New York had failed to prove either its own prescription over the filled portions of Ellis Island, or New Jersey's acquiescence to those attempts. *Id.* at 144-145.

New York's challenges to the Master's factual findings are unpersuasive when viewed against the Master's detailed analysis. We highlight three

central considerations that support the Master's recommendation.

a. The Master found a number of systemic deficiencies in New York's evidentiary presentation. He noted that New York's basic theory was flawed because New York apparently believed that New Jersey was required to give "formal, direct notice of *her* acts of non-acquiescence to New York." Final Rep. 108-109; see *id.* at 118. The Master recognized that New York may prove prescription and acquiescence despite the United States' essentially complete occupation of Ellis Island, but he emphasized that New York must show prescription over the filled portion. *Id.* at 109-111. He found that much of New York's evidence was inconclusive precisely because it did not distinguish between the original and filled portions of the Island. *Id.* at 113, 115, 116, 117, 118. He specifically noted that New York's attempt to show—through maps, postcards, and other documentation—that the public perceived Ellis Island to be in New York does not resolve the question of prescriptive sovereignty over the filled area. *Id.* at 115-116. See *Virginia v. Tennessee*, 148 U.S. 503, 527 (1893); *Louisiana v. Mississippi*, 202 U.S. 1, 55 (1906).

b. The Master acknowledged that "New York through the City of New York probably had more contact than did New Jersey (or Jersey City) with Ellis Island—particularly with the Main Building on the original Island—during the crucial 1890 to 1934 period." Final Rep. 144. He also pointed out, however, that New York's greater relative contact with Ellis Island does not sustain New York's "burden of showing that she prescripted the filled portion of the Island during the critical eras." *Ibid.* He accurately characterized New York's evidence of prescriptive

acts as “intermittent, often inconclusive and certainly disputed.” *Ibid.*

For example, New York presented evidence of interaction between federal officials on Ellis Island and the New York City government. That evidence showed that, in 1897, the United States established an interim federal immigration station in New York City in 1897 after a fire destroyed several buildings on the Island; in the early 1900s, federal officials calculated federal contracts on the basis of New York wage rates; and, in 1915, a federal official invited New York City officials to use several buildings on the Island as homeless shelters. Final Rep. 113-114. The Master correctly observed that the evidence, which “simply describe[s] the general association between New York City and immigration through Ellis Island,” does not demonstrate that New York unambiguously asserted sovereignty over the filled portion of Ellis Island. *Id.* at 113.

New York also introduced evidence showing that New York City episodically provided Ellis Island with police and fire services. Final Rep. 114. But as the Master noted, it appears that there was “some involvement by New Jersey in policing the Island as well.” *Ibid.* New York presented 23 birth certificates, six marriage certificates, and 22 death certificates as evidence of its responsibility “for keeping records of the vital events that took place on Ellis Island.” N.Y. Except. Br. 24. The Master found that small body of vital statistics inconclusive: “New York was unable to prove that the births, marriages, and deaths she documented occurred on the Island, let alone the landfilled portion.” Final Rep. 115. New York recites hearsay of numerous marriage ceremonies on Ellis Island, see N.Y. Except. Br. 25, but those

recountings do not indicate where on the Island the ceremonies took place.

The Master's analysis shows that he carefully considered New York's evidence of prescription, but found it insufficient to show that New York had acquired dominion over New Jersey's sovereign territory. His recommendation is sound. This Court should not lightly infer that one State has acquired the territory of another. New York's evidence does not "demonstrate the unequivocal acts of prescription demanded by this Court's jurisprudence." Final Rep. 145; see *California v. Nevada*, 447 U.S. 125, 130-132 (1980); *Arkansas v. Tennessee*, 310 U.S. 563, 567-572 (1940).

c. The Master also concluded that New York had failed to overcome the evidence of New Jersey's assertions of sovereignty over the filled portions of Ellis Island and non-acquiescence in New York's prescriptive acts. Final Rep. 123-144. He recognized that perhaps the most important evidence was New Jersey's 1904 deed granting the United States title over submerged land surrounding the Island. *Id.* at 124.

Soon after the United States began filling the submerged land surrounding Ellis Island, New Jersey requested that the United States recognize its claim of title by securing a deed from New Jersey conveying those lands. The United States agreed to resolve the matter in that manner, and it received a deed from New Jersey on November 30, 1904, conveying the lands in question. Final Rep. 124-126; see N.J. Except. Br. Apps. C, D. New Jersey's express assertion of its claim of sovereign ownership is highly probative in showing that New Jersey did not acquiesce in New York's claim of dominion. See *Michigan v.*

Wisconsin, 270 U.S. 295, 316-319 (1926); *Indiana v. Kentucky*, 136 U.S. 479, 510 (1890).

The Master noted other evidence indicating that both the United States and New Jersey recognized New Jersey's sovereignty over the filled portion of Ellis Island. For example, at the end of the nineteenth century, the Army Corps of Engineers issued maps of the area bearing the legend "Ellis Island, New Jersey." Final Rep. 118-122, App. G. In 1933, the federal government applied for a New Jersey waterfront development permit for the Island; in 1937, the federal government applied for a New Jersey permit to construct a water main for the Island; and, from 1947 to 1949, the Department of Labor applied New Jersey's wage rates to contracts for work on the Island. *Id.* at 123, 134-136. In 1934, at the request of New Jersey officials, a New Jersey congresswoman attempted to secure federal employment for New Jersey workers on the island. *Id.* at 132-135. After 1955, New Jersey actively opposed New York's claims of jurisdiction over the filled portion of the Island. *Id.* at 136-144.⁶

Because the United States occupied Ellis Island, and New York's prescriptive acts respecting the filled portion were intermittent and equivocal, New Jersey often had little reason or occasion to challenge those specific acts. The evidence nevertheless shows that, when New Jersey's sovereign interests were directly threatened, New Jersey consistently asserted its

⁶ From 1904 to 1963, federal officials expressed various opinions on the merits of New Jersey's claim that Ellis Island is part of that State's sovereign territory. While those opinions are neither dispositive nor entirely congruous, they do reflect a consistent view that New Jersey asserted a claim of sovereignty to the filled portions of Ellis Island. See Final Rep. 125, 133-134, 139-141.

authority over the filled portion of Ellis Island. The Master properly concluded that New Jersey's actions were sufficient to defeat New York's claim of acquiescence. In the words of Justice Cardozo: "Acquiescence is not compatible with a century of conflict." Final Rep. 145 (quoting *New Jersey v. Delaware*, 291 U.S. 361, 377 (1934)).

III. NEW YORK'S CLAIMS OF INEQUITABLE DELAY ARE ADEQUATELY ADDRESSED THROUGH THE DOCTRINE OF PRESCRIPTION AND ACQUIESCENCE

New York challenges the Master's decision not to apply the doctrine of laches to this case. New York specifically objects to his conclusion that New York's concerns about New Jersey's delay in filing suit can be addressed by the doctrine of prescription and acquiescence. N.Y. Except. Br. 40-45. This Court addressed the relationship between those doctrines in *Illinois v. Kentucky*, 500 U.S. 380 (1991), and its decision in that case is controlling here. The Court concluded in *Illinois* that Kentucky was not entitled to invoke the doctrine of laches in an interstate boundary dispute. 500 U.S. at 388. It observed that "the laches defense is generally inapplicable against a State." *Ibid.* The Court determined that, in any event, the doctrine of laches is subsumed within the doctrine of prescription and acquiescence, stating:

Although the law governing interstate boundary disputes takes account of the broad policy disfavoring the untimely assertion of rights that underlies the defense of laches and statutes of limitations, it does so through the doctrine of prescription and acquiescence, see generally

Georgia v. South Carolina, *supra*, which Kentucky has failed to satisfy.

Ibid. That decision, by its terms, is directly applicable to this case.

New York contends that the question remains open in light of this Court's decision in *Kansas v. Colorado*, 514 U.S. 673 (1995). The Court stated in *Kansas* that it "has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact." *Id.* at 687. The Court made that statement, however, in the context of an interstate water dispute, where there is no equivalent to the doctrine of prescription and acquiescence that "takes account of the broad policy disfavoring the untimely assertion of rights." *Illinois*, 500 U.S. at 388.⁷

Although this case involves the interpretation of the Compact of 1834, it is, at bottom, an interstate boundary dispute. Under this Court's *Illinois* decision, New York, like Kentucky, should be limited to the defense of prescription and acquiescence.

⁷ The United States filed a brief *amicus curiae* in *Kansas* in which it urged that "this Court may take into account traditional equitable principles, such as the doctrine of laches, when resolving an equitable claim by one State against another State in an original action." U.S. Br. at 35, No. 105 Orig. We suggested that "[c]oncepts such as laches or acquiescence are applicable to actions to enforce a compact insofar as enforcement turns on equitable principles." *Id.* at 36. That position reflects our concern that the federal government's operation of interstate water resource projects may be impaired if States invoke their rights to water, and seek retroactive remedies, long after the water has been distributed. Those concerns are not present here.

IV. NEW YORK'S JURISDICTION OVER ELLIS ISLAND EXTENDS TO THE ORIGINAL ISLAND'S LOW-WATER MARK

New Jersey excepts to the Master's determination that New York has jurisdiction over the original Island as it existed in 1833 to the low-water mark. N.J. Except. Br. 28-38. According to New Jersey, "[t]he absence of any reference to low water" in the Compact of 1834 indicates the States' intention "to limit New York's jurisdiction on Ellis Island to the land area above the mean high water mark." *Id.* at 30. New Jersey's contention is incorrect. Article Second of the Compact of 1834 granted New York "present jurisdiction" over Ellis Island, but it did not expressly state whether that jurisdiction extended to the Island's high-water mark or its low-water mark. The Master therefore conducted a careful examination of the history of the Compact's development, beginning with the States' 1807 negotiations, to resolve that issue. See Final Rep. 70-72, 151-155.

As he recounted, New York initially claimed the entire Hudson River to the *high-water mark* of the New Jersey shore. Final Rep. 70. In response, New Jersey submitted that the States' boundary was the middle of the Hudson River and the New York Bay. *Id.* at 71. The States were unable to reach agreement, and the negotiations ended shortly thereafter. *Ibid.* After those negotiations ended, this Court held in *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820), that the boundary established by a river in that case extended to the low-water mark.

In 1827, when the States resumed negotiations, it appears that the *Handly's Lessee* decision may have influenced their negotiation positions. See Final Rep. 154; see also New York City Amicus Br. 17. New Jer-

sey, for example, proposed that “the islands called Bedlow’s Island, Ellis’ Island, Oyster Island and Robins Reef, *to the low water mark of the same*, be held to be and remain within the exclusive jurisdiction of the state to New-York.” Final Rep. 72. Similarly, New York offered New Jersey exclusive jurisdiction over all land on the west shore of the Hudson River “*to the low-water mark.*” *Id.* at 73.

The two States were ultimately unable to reach an agreement in 1827. The Master determined, however, that when the States negotiated the Compact of 1834, they carried forward their understanding that shoreline boundaries should be set at the low-water mark. Final Rep. 153-154. The Master concluded that “both sides seem[ed] to be assuming that the low-water mark, not the high-water mark, would define the respective territorial limits.” *Id.* at 154. “The conduct of the parties and the legal assumptions under which they were operating indicate that they intended to have the Island boundary extend to the low-water mark.” *Ibid.*

New Jersey contends that the Master erred in “rely[ing] upon the exchange of rejected negotiating points in 1827 as a basis for determining what the States intended.” N.J. Except. Br. 29-30. This Court has recognized, however, that when an interstate boundary agreement is being interpreted, the nature and history of the controversy “must be considered.” *Vermont v. New Hampshire*, 289 U.S. 593, 605 (1933). That is what the Master did in this case. He properly examined the 1827 negotiations and determined that they revealed how the positions of both States had evolved in the period before the formulation of the Compact. See Final Rep. 70-73, 151-155.

The Master’s recommendation is consistent with the general rules governing shoreline boundaries.

This Court has long recognized that the original 13 States possessed title to lands beneath inland navigable waters, including tidelands. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842); see also Joseph Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* (1826). The Court has likewise recognized that shoreline boundaries extend "down to the low water mark." *United States v. California*, 332 U.S. 19, 30 (1947); see *Handly's Lessee*, *supra*. The Master properly concluded that the Compact of 1834 should be read consistently with that understanding and that New York's right of "present jurisdiction" over Ellis Island should accordingly extend to the low-water mark of the 1833 Island.⁸

**V. THE COURT SHOULD DECLINE TO MODIFY
AN INTERSTATE BOUNDARY BASED ON
CONSIDERATIONS OF PRACTICALITY AND
CONVENIENCE**

New Jersey challenges the Master's recommendation that the Court employ a modified boundary line on Ellis Island. Based on his interpretation of the

⁸ New Jersey mistakenly relies on *United States v. Alaska*, 117 S. Ct. 1888 (1997), and *United States v. California*, 382 U.S. 448 (1966) (per curiam), for the proposition that an island includes only those lands above the high-water mark. See N.J. Except. Br. 30-31. Those cases recognize that the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." See Art. 10(1), 15 U.S.T. 1609. That definition does not determine, however, the seaward extent of an island. Rather, the Convention generally defines the "baseline" of a sovereign's land territory, including islands, as the low-water line along the coast. See Arts. 1, 3, 10(2), 15 U.S.T. 1608, 1609.

Compact of 1834 and the doctrine of avulsion, the Master determined that the sovereign boundary between New Jersey and New York on Ellis Island is located at the low-water mark of Ellis Island, as it existed in 1833. Final Rep. 146, 162. He also found that the 1833 boundary was reasonably ascertainable based on existing nineteenth century maps. See *id.* at 155-162. The Master concluded, however, that the use of that boundary “introduces impracticalities and inconveniences,” *id.* at 162, and “would create an overly literal status of divided sovereignty that would be neither just nor fair to New York,” *id.* at 163. He therefore proposes that the Court adopt a reconfigured boundary. *Id.* at 164-167. The United States submits that the boundary modification that the Master proposes appears to exceed the Court’s historic power.

Courts routinely determine boundaries based on judgments that resolve uncertainty over the location of the “true” line. See, e.g., Olin Browder, *The Practical Location of Boundaries*, 56 Mich. L. Rev. 487 (1958). The Master’s recommendation rests, however, on a different proposition. He suggests that this Court should modify a reasonably ascertainable boundary to provide “a remedy that is just, fair, and convenient to the parties and the public.” Final Rep. 146. His recommendation rests on concerns that a boundary based on the 1833 low-water mark would intersect a number of the historic structures on Ellis Island and would leave “relatively thin strips of New Jersey’s sovereign territory between New York and the ferry slip.” *Id.* at 162-163. He proposes to solve that problem by reconfiguring the boundary to maintain New York’s historic acreage, provide New York with ferry access, and avoid intersecting important historic buildings. *Id.* at 164-166.

The Master's recommendation reflects his conscientious attempt to fashion the best practical remedy, but it also exceeds the historic reach of this Court's original jurisdiction. As this Court has recognized, the foundations of that history were laid before the American Revolution. See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 738-748 (1838); see also *Virginia v. West Virginia*, 246 U.S. 565, 597-600 (1918).

The King of England established the boundaries of the original Colonies by royal prerogative, and he could adjust boundaries as an exercise of that power. *Rhode Island*, 37 U.S. (12 Pet.) at 739. See Hannis Taylor, *Jurisdiction and Procedure of the Supreme Court of the United States* § 52, at 82-83 (1905). Although the King, in council, could draw new boundaries or change existing ones, he could not resolve a boundary dispute if it arose out of compact or agreement between the proprietors of the Colonies. *Rhode Island*, 37 U.S. (12 Pet.) at 739-740; see *Penn v. Lord Baltimore*, 27 Eng. Rep. 1132, 1134 (1750). The King was obligated to refer such disputes to the English courts, where they were determined "in judicature according to the law." *Rhode Island*, 37 U.S. (12 Pet.) at 742.

The Declaration of Independence severed English rule, and the new States soon saw need to create a mechanism for resolving their boundary disputes. See Charles Warren, *The Supreme Court and Sovereign States* 4-5 (1924). On July 12, 1776, John Dickinson presented his draft of the Articles of Confederation, which provided that Congress would have the authority to settle "all Disputes and Differences now subsisting, or that hereafter may arise between two or more Colonies concerning Boundaries, Jurisdictions, or any other Cause whatever." Merrill

Jensen, *The Articles of Confederation* 258 (1970). See Charles Warren, *supra*, at 4-5. The States ultimately adopted an elaborate mechanism, set out in Article IX of the Articles of Confederation, for settling boundary disputes through the selection of a neutral tribunal. See Merrill Jensen, *supra*, at 266-267. That mechanism, however, proved ineffective. See *Virginia*, 246 U.S. at 598-599; Hannis Taylor, *supra*, § 52, at 83; Charles Warren, *supra*, at 12-13; Hampton L. Carson, *The Supreme Court of the United States* 69, 72 (1891).⁹

The States revisited the issue during the Constitutional Convention of 1787. The Committee of Detail's draft provided that the Senate would decide disputes involving "jurisdiction or territory" under a procedure virtually identical to that provided in the Ninth Article of Confederation. 5 *Debates on the Adoption of the Federal Constitution* 376, 379 (J. Elliot ed., reprint 1987) (1888). During subsequent debates, the Framers determined that the creation of the federal judiciary rendered the procedure unnecessary, and they agreed to delete it. *Id.* at 471. They "accepted without question" the principle that Article III should contain an explicit grant of original jurisdiction to determine controversies between States. Max Farrand, *The Framing of the Constitution of the United States* 156 (1913); see also *Virginia*, 246 U.S. at 600; Charles Warren, *supra*, at 31-37.

⁹ The Continental Congress employed an Article IX tribunal in only one instance, to resolve a long-running dispute between Connecticut and Pennsylvania, which had attracted widespread attention and had resulted in open hostilities and bloodshed. See Charles Warren, *supra*, at 5-8; Hampton L. Carson, *supra*, at 67-68.

The Constitution establishes a division of authority respecting boundaries that builds upon the distinction that had existed under English rule. Congress, through its political authority, can establish the boundaries of new States and approve interstate compacts that alter boundaries and settle boundary disputes. U.S. Const. Art. I, § 10, Cl. 3 and Art. IV, § 3. But once the boundaries are described by statute or compact, this Court, as a matter of judicial power, has authority to resolve boundary disputes between the States. U.S. Const. Art. III. Under that division of authority, Congress and the States may take into account “practicality” and “convenience” when deciding where, as a matter of political authority, to draw an interstate boundary. This Court, however, decides a boundary dispute based solely on its interpretation and application of the relevant law.

The Court’s decision in *Washington v. Oregon*, 211 U.S. 127 (1908), provides an instructive example. The State of Washington brought an original action to determine its southern boundary with the State of Oregon. The Act of Congress admitting Oregon into the Union provided, *inter alia*, that Oregon’s boundary with Washington would be “the middle of the north ship channel of the Columbia River.” *Id.* at 131. At that time, the Columbia River had two channels, and the northern channel was considered the better one for navigational purposes. *Ibid.* Over the course of several years, however, the northern channel grew shallow, and the southern channel had “become the one most used.” *Id.* at 133. Washington sought a declaration from this Court “that the true boundary line is the varying center or middle of that channel of the river which is best constituted and ordinarily used for the purposes of navigation.” *Id.* at 134.

The Court ruled that it lacked authority to change a clearly specified boundary, rejecting Washington's argument that its proposed boundary line was more consistent with the underlying congressional intent. 211 U.S. at 135-136. The Court, in a unanimous opinion, stated:

[W]hen Congress came to provide for the admission of Oregon * * * it provided that the boundary should be the middle of the north channel. The courts have no power to change the boundary thus prescribed and establish it at the middle of some other channel. That remains the boundary, although some other channel may in the course of time become so far superior as to be practically the only channel for vessels going in and out of the river.

Id. at 135. The Court acknowledged that unforeseen circumstances had diminished Washington's access to the Columbia River. It refused, however, to "ignor[e] the action of the Government in prescribing the boundary." *Ibid.* Congress later authorized those States to enter into an interstate compact to modify the boundary, see S.J. Res. 88, 61st Cong., 2d Sess., 36 Stat. 881 (1910), and they ultimately reached agreement on an appropriate line, see Act of July 31, 1958, Pub. L. No. 85-575, 72 Stat. 455; Wash. Rev. Code Ann. §§ 43.58.050 *et seq.* (West 1983).¹⁰

¹⁰ This Court has applied similar reasoning in cases involving interstate compacts. Under the Compact Clause, two States may not enter into an agreement without the express consent of the Congress. Once given, however, "congressional consent transforms an interstate compact within this Clause into a law of the United States." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). As a result, "unless the compact to which Congress has consented is somehow unconstitutional, no court

The *Washington* decision counsels that, once an interstate boundary is established by law, this Court lacks the authority to alter it in response to changed circumstances, even if the alteration would implement an underlying policy that Congress or one of the States might favor. That principle controls the issue here. We accordingly suggest that this Court should sustain New Jersey's exception and leave it to the States to determine, with the concurrence of Congress, whether the boundary established by law—the low-water mark of Ellis Island, as it existed in 1833—should be modified in light of current conditions.

CONCLUSION

The exceptions of the State of New York and exception number one of the State of New Jersey should be overruled. Exception number two of New Jersey should be sustained.

Respectfully submitted.

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may order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

