ARTICLE III, SECTION 2, CLAUSE 2—ORIGINAL JURISDICTION OF THE UNITED STATES SUPREME COURT—IN AN INTERSTATE BOUNDARY DISPUTE, NEW JERSEY WAS GRANTED SOVEREIGN AUTHORITY OVER THE LANDFILLED PORTION OF ELLIS ISLAND, WITH NEW YORK RETAINING SOVEREIGN AUTHORITY OVER THE ORIGINAL PORTION, PURSUANT TO THE EXPRESS TERMS OF THE STATES' COMPACT OF 1834—*New Jersey v. New York*, 118 S. Ct. 1726 (1998).

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I. INTRODUCTION

For many Americans, the words "Ellis Island" elicit more than just thoughts of an island territory near the Statute of Liberty.[1] Instead, Ellis Island[2] symbolizes the place where the American Dream began for more than twelve million immigrants between 1892 and 1954,[3] significantly more people than the handful that landed at either Jamestown or Plymouth Rock.[4] As a re-

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[1] For a map illustrating the location of Ellis Island in relation to New York Harbor and New Jersey, see *infra* Appendix A1.

[2] Hereinafter "the Island" or "Ellis Island."

[3] Prior to 1892, immigrants were received in lower Manhattan at Castle Garden, the nation's first immigrant reception station, which began operations in 1855. *See* MICHAEL COFFEY & TERRY GOLWAY, THE IRISH IN AMERICA 39 (1997). Castle Garden operated for more than thirty years and processed more than eight million immigrants. *See id.* For a chronology of major developments on Ellis Island, see *infra* Appendix B.

[4] *See* Final Report of the Special Master at 34, New Jersey v. New York, 118 S. Ct. 1726 (1998) (No. 120 Orig.) [hereinafter *Report of the Special Master*]. In original jurisdiction cases, the Supreme Court customarily appoints a special master, who receives the evidence and prepares the record for the Court's review. *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.3, at 89 (2d ed. 1992); *see also infra* notes 44-46 and accompanying text. In the present case, the Court's appointment for special master was Paul R. Verkuil, Esq., who is currently the Dean of Cardozo Law School. *See* Benjamin N. Cardozo School of Law, *Faculty* (visited Apr. 19, 1999) <http://www.yu.edu/cardozo/law/faculty.html>.

sult, some one hundred million Americans, approximately 40% of the citizen population, can trace the start of their American journey back to Ellis Island.[5] Despite the Island's "hold on the American psyche,"[6] the sovereignty of the Island has been contested between New York and New Jersey since the Colonial period.[7] The dispute finally culminated in the Supreme Court's 1998 decision in *New Jersey v. New York*.[8]

The dispute between New Jersey and New York rekindles the notion that, although the United States is one nation comprised of fifty states, those states nonetheless remain separate sovereigns.[9] Disputes between such sovereigns often result in one state invoking the original jurisdiction of the United States Supreme Court to settle the matter.[10] The significance of this forum cannot be

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[5] *See* The Statue of Liberty-Ellis Island Foundation, Inc., *The Ellis Island Immigration Museum* (visited Mar. 9, 1999) <http://www.ellisisland.org/ellis.html >; *see also Report of the Special Master*, *supra* note 4, at 34.

[6] *Report of the Special Master*, *supra* note 4, at 34.

[7] *See id.* at 33.

[8] *See* New Jersey v. New York, 118 S. Ct. 1726 (1998) (No. 120 Orig.). Since October 1, 1961, the Supreme Court has used continuous consecutive numbering in managing its original jurisdiction docket. *See* Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of its Original Jurisdiction Docket since 1961*, 45 ME. L. REV. 185, 185 n.1 (1993). Accordingly, under this system, *New Jersey v. New York* was the 120th case filed pursuant to the Court's original jurisdiction. *See id.* Prior to 1961, the Court gave new numbers each term to cases carried over from the previous term. *See id.*; Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665 (1959). The Stanford Law Review note surveyed all original jurisdiction cases with at least one published opinion during the Court's first 170 years (prior to the Court's 1961-62 term). *See generally* Note, *supra*. The McKusick article surveyed the Court's original jurisdiction cases from the Court's 1961-62 term up to April 26, 1993, but did not include the present case, *New Jersey v. New York*, which was filed on that date. *See* McKusick, *supra*, at 665.

[9] Historian Shelby Foote best described the "separate sovereigns" concept by stating that "[b]efore the [Civil] war, it was said, 'The United States are . . .' Grammatically, it was spoken that way and thought of as a collection of independent states. After the war, it was always 'The United States is . . .'—as we say today without being self-conscious at all. And that sums up what the [Civil] war accomplished. It made us an 'is'." GEOFFREY WARD et al., THE CIVIL WAR, AN ILLUSTRATED HISTORY 273 (1990) (the quote is from an interview with Mr. Foote).

[10] Under the nation's first constitution, the Articles of Confederation, the power of the national government was extremely limited. *See* JAMES MADISON et al., THE FEDERALIST PAPERS 20 (Isaac Kramnick ed., 1987). The states acted as independent sovereigns, and interstate boundary disputes were among the many problems under this regime. *See id.*

understated, for in the international context, disputes between sovereign nations are settled through diplomacy, or worse, military conflict.[11]

The Supreme Court is vested with the authority to adjudicate disputes between states under both the United States Constitution[12] and the Judiciary Act established by Congress.[13] Article III, Section 1 of the Constitution places the

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[11] *See* McKusick, *supra* note 8, at 185; Note, *supra* note 8, at 669. The author of the Stanford Law Review Note remarked that both American and foreign observers have been impressed by the Court's resolution of interstate disputes and have suggested that the Court would be an excellent model on which to base a similar international tribunal. *See id.* at 669. In the ultimately successful attempt to persuade the New York Convention to ratify the Constitution, Alexander Hamilton expressed the need for an independent tribunal to adjudicate disputes between the states, which was not available under the Articles of Confederation. *See* THE FEDERALIST NO. 80, at 447 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Hamilton stated:

> The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is . . . essential to the peace of the Union. . . . History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the IMPERIAL CHAMBER by Maximilian towards the close of the fifteen century, and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.

Id. at 446-47; *see also* William S. Dodge, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role"*, 100 YALE L.J. 1013 (1991). The Court declared in *Georgia v. Pennsylvania Railroad Company* that "[t]he traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative." *Id.* at 1028 (quoting Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 450 (1945)).

[12] *See* U.S. CONST. art. III, § 2, cl. 2. Specifically, the Constitution provides:

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id.

[13] Within six months of the newly ratified Constitution, Congress passed the first Judiciary Act of 1789. *See* Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449, 463 (1884).

nation's judicial power with the United States Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish."[14] Article III, Section 2 allocates the Court's judicial power between original and appellate jurisdictions.[15] While the Court's appellate jurisdiction generated considerable debate during the ratifying process of the Constitution, the Court's original jurisdiction provision was not very controversial.[16]

The Constitution created two main categories of cases under the Court's original jurisdiction: "state party" cases and "ambassador" cases.[17] The purpose of the original jurisdiction clause was to ensure that these sensitive classes of disputes, with consequences that could result in war, were granted a forum with the nation's highest Court.[18] In *Ames v. Kansas* ex rel. *Johnston*,[19] the Court noted that the Framers of the Constitution were concerned that states, as dignified parties, be given an equally dignified forum in which to air their disputes.[20] In providing a neutral forum for adjudicating interstate disagreements,[21] the Court has developed and relied upon federal common law prece-

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[14] U.S. CONST. art. III, § 1.

[15] *See id.* at § 2.

[16] *See* Dodge, *supra* note 11, at 1022.

[17] *See* McKusick, *supra* note 8, at 186-87. The "ambassador" category includes those in the Constitutional provision for "cases affecting Ambassadors, other public Ministers and Consuls," and the "state party" category derives form "those in which a State shall be a Party." U.S. CONST. art. III, § 2; *see also* Dodge, *supra* note 11, at 1025-26.

[18] *See* Dodge, *supra* note 11, at 1014, 1022-23.

[19] 111 U.S. 449 (1884).

[20] *See id.* at 464. Writing for the *Ames* Court, Chief Justice Waite noted that "[t]he evident purpose [of the grant of original jurisdiction] was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made." *Id.* Alexander Hamilton stated that "[i]n cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." THE FEDERALIST NO. 81, at 455 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

[21] *See* Note, *supra* note 8, at 680-82. When dealing with state parties, the Court has announced that "[o]ne cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." *Id.* at 683 n.121 (quoting Kansas v. Colorado, 206 U.S. 46, 97 (1907)).

dents for these matters and, by doing so, has avoided application of the *Erie* doctrine.[22]

Although the Constitution expressly provides Congress with the authority to regulate the Court's appellate jurisdiction, Congress cannot increase the limits of the Court's original jurisdiction.[23] Nonetheless, the First Judiciary Act of 1789,[24] as well as its most recent version,[25] effectively segregated some types

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[22] *See id.* at 681. The *Erie* doctrine emerged from one of the Court's landmark decisions, *Erie Railroad Company v. Tompkins*, regarding the proper law to apply in federal courts sitting in diversity. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). In *Erie*, the Court held that federal courts could not apply federal common law in diversity suits, as this would be an unconstitutional encroachment on state power. *See id.* at 78-80; Note, *supra* note 8, at 681 nn.112-13. The *Erie* Court, however, specifically excepted matters governed by the Constitution from its holding; thus, the Court avoids *Erie* analysis in applying federal common law in original jurisdiction cases. *See Erie*, 304 U.S. at 78-80; Note, *supra* note 8, at 681 nn.112-13.

[23] *See* 17 CHARLES ALAN WRIGHT et al., FEDERAL PRACTICE AND PROCEDURE § 4043, at 175 (2d. ed. 1988). In one of the Court's most famous decisions, *Marbury v. Madison*, Chief Justice Marshall reasoned that Congress cannot expand the Court's original jurisdiction and proclaimed that "in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-75 (1803); *see also* Dodge, *supra* note 11, at 1022; Note, *supra* note 8, at 666. Edmund Randolph's first draft of Article III would have given Congress the authority to expand the Court's original jurisdiction, but this power was removed in a later draft and never resurfaced. *See* Dodge, *supra* note 11, at 1023.

[24] *See* Judiciary Act of 1789, ch. 20, §13, 1 Stat. 73 (1789). The statute provided:

> That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.

Id. at 80.

[25] *See* 28 U.S.C.A. § 1251 (West 1998). The statute describes the Supreme Court's original jurisdiction as follows:

> (a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

of cases over which the Court has exclusive original jurisdiction from those that the Court had concurrent jurisdiction with lower federal or state courts.[26] Most notably, the "ambassador" class of cases has recently been moved to the concurrent jurisdiction category;[27] thus, disputes between two states are the only original jurisdiction cases that presently must be heard by the Supreme Court.[28] In spite of these statutory provisions delineating the Court's original jurisdiction, the Court has emphatically asserted that its jurisdiction derives directly from the express provisions of Article III.[29]

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

Id.

[26] *See* Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449, 463 (1884) (recognizing Congress' authority to grant concurrent original jurisdiction to other courts); WRIGHT, *supra* note 23, at 187.

[27] The Court only has exclusive jurisdiction over cases between two states pursuant to 28 U.S.C.A. § 1251(a), whereas 28 U.S.C.A. § 1251(b) lists the categories of cases in which the Court has concurrent jurisdiction with lower courts. *See* 28 U.S.C.A. § 1251 (West 1998). Prior to 1978, the Court had exclusive jurisdiction over cases involving ambassadors and consuls, but 1978 amendments to the statute transferred these cases to the concurrent category of 28 U.S.C. § 1251(b)(1). *See* WRIGHT, *supra* note 23, at 178-79 n.9. The Court rarely accepts jurisdiction in the following types of cases because they can be heard at the district court level: cases between a state and the United States, cases filed by a state against another state's citizens or aliens, and cases in which the parties include ambassadors, or consuls of foreign states. *See* ROTUNDA & NOWAK, *supra* note 4, at 89. Although the Supreme Court has original jurisdiction, these cases can be heard in federal district court pursuant to their concurrent jurisdiction with the Court. *See id.*

[28] *See* ROTUNDA & NOWAK, *supra* note 4, at 88.

[29] *See* California v. Arizona, 440 U.S. 59 (1979) (No. 78 Orig.). Justice Stewart, writing for the Court, stated that "[t]he original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation . . . . Congress has broad powers over the jurisdic-

Notwithstanding the Constitution's express authority to adjudicate original jurisdiction cases, the Court rarely hears them[30] and has considered at least five reasons for its conservative approach in accepting cases under its original jurisdiction.[31] First, while the Court's appellate workload continues to increase, the number of justices on the Court remains at nine, and the Court constantly faces pressure to address only the most important federal questions.[32] Second, many original jurisdiction cases, even interstate boundary disputes, seem less significant than the federal questions regarding major political and social issues.[33] Third, the lower federal courts are no longer seen as "undignified" places for "dignified" states to litigate their claims.[34] Fourth, the Court's competing appellate docket restricts its ability to conduct itself as a trial court.[35] Finally, there may be an increased risk of error when a case is heard only at one level

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tion of the federal courts . . . but it is extremely doubtful that they include the power to limit . . . the original jurisdiction conferred upon this Court by the Constitution." *Id.* at 65-66.

[30] During the Court's 1993 term, the year New Jersey filed its complaint in the present case, the Court disposed of 6,676 cases, of which only one was on its original jurisdiction docket, and the Court had only a total of eleven original jurisdiction matters pending on that docket. *See The Supreme Court, 1993 Term*, 108 HARV. L. REV. 23, 376 (1994).

[31] *See* McKusick, *supra* note 8, at 189.

[32] *See* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971) (No. 41 Orig.); McKusick, *supra* note 8, at 190-91. Writing for the majority in *Wyandotte Chemicals*, Justice Harlan denied Ohio's motion invoking the Court's original jurisdiction, although he explicitly stated that the case fell within the Court's original jurisdiction. *See Wyandotte Chems. Corp.*, 401 U.S. at 495. The majority reasoned that Ohio's claim was founded on "local law," and that "[t]his Court's paramount responsibilities to the national system lie almost without exception in the domain of federal law." *Id.* at 497.

[33] *See Wyandotte Chems. Corp.*, 401 U.S. at 499; McKusick, *supra* note 8, at 191. The majority in *Wyandotte Chemicals* observed that "[w]hat gives rise to the necessity for recognizing such discretion is pre-eminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court." *Wyandotte Chems. Corp.*, 401 U.S. at 499.

[34] *See* McKusick, *supra* note 8, at 192.

[35] *See id.* at 192-193. In *Wyandotte Chemicals*, Justice Harlan stated that the Court's primary function was as an appellate forum and, as such, was not well suited for fact-finding. *See Wyandotte Chems. Corp.*, 401 U.S. at 498. *But see id.* at 505 (Douglas, J., dissenting). Justice Douglas countered the majority's reasoning on this issue by pointing out that complex factual issues in original jurisdiction matters are handled efficiently by the Court's appointment of a special master. *See id.* at 505, 511 (Douglas, J., dissenting).

with no opportunity for appellate review.[36]

In light of this conservative judicial policy as to hearing original jurisdiction cases, the Supreme Court has established certain "gate-keeping" rules which restrict access to the Court so that only "appropriate cases" are accepted.[37] Although any court may dismiss a case for lack of jurisdiction, standing, or justiciability, the Supreme Court also typically applies a highly discretionary "appropriateness" test in considering whether to hear a particular case.[38] Analysis using the "appropriateness" test relies on three factors: 1) the configuration of the parties; 2) the "seriousness and dignity" of the subject matter; and 3) the availability of an alternative forum.[39] The Court will almost always accept cases between two or more states, however, the Court does strictly construe the definition of a "state" for this purpose.[40] With respect to subject matter, the Court almost invariably accepts cases involving disputes over water rights and interstate boundary disputes because such matters are "the paradigm subject matter for original jurisdiction case[s]."[41] Finally, the availability of an alternative forum in a lower federal court or a state court is the primary basis for the Court's rejection of a case.[42] Considering the Court's reluctance to

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[36] *See Wyandotte Chems Corp.*, 401 U.S. at 493-94.

[37] *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.3, at 7 (2d ed. Supp. 1999); McKusick, *supra* note 8, at 194-96; *see also* Maryland v. Louisiana, 451 U.S. 725, 760 (1981) (No. 83 Orig.) (Rehnquist, J., dissenting).

[38] *See* McKusick, *supra* note 8, at 196.

[39] *See id.* at 196-97.

[40] *See id.* at 194, 197. For example, political subdivisions within a state are not "states" for these purposes. *See* ROTUNDA & NOWAK, *supra* note 4, at 88 n.2 (citing Illinois v. Milwaukee, 406 U.S. 91 (1972)).

[41] McKusick, *supra* note 8, at 198. At the turn of the century, the Court typically accepted the following subject matter in interstate disputes: interstate boundaries, water rights, abatement of interstate pollution, enforcement of interstate contracts, and state regulation. *See id.* By 1939, the Court began accepting interstate tax disputes, and in 1961 the Court heard interstate disputes involving the escheat of uncashed checks. *See id.* at 198-99.

[42] *See id.* at 201-02; *see also* Louisiana v. Mississippi, 488 U.S. 990 (1988) (No. 114 Orig.). *Louisiana v. Mississippi* is the only interstate boundary dispute case in which the Court denied the motion for leave to file a bill of complaint. *See id.* Justice White, joined by Justices Stevens and Scalia, penned a short but vehement dissent lamenting that no other court could hear Louisiana's complaint against Mississippi. *See id.* (White, J., dissenting). Eventually, the matter again reached the Supreme Court, who finally accepted jurisdiction. *See* Louisiana v. Mississippi, 516 U.S. 22, 23-24 (1995) (No. 121 Orig.). Vincent L.

hear certain types of cases, the Court's frequently cited maxim is that "our original jurisdiction should be invoked sparingly."[43]

Even when the Court accepts a case onto its original jurisdiction docket, the Court will often delegate its factfinding function to a special master,[44] who will conduct a trial and prepare a report for the Court's review.[45] The appointment of a special master, however, does not end the Justices' factfinding role because the Supreme Court must still independently review the special master's report and any evidence received.[46] Justice Rehnquist's dissent in *Maryland v. Louisiana*[47] noted that such appraisals, even with the assistance of a special master, tend to interfere with the Court's appellate docket.[48] Accordingly,

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McKusick, who penned *Discretionary Gatekeeping: The Supreme Court's Management of its Original Jurisdiction Docket since 1961* (referenced in note 8), was formerly the Chief Justice of the Maine Supreme Judicial Court and was appointed special master in *Louisiana v. Mississippi*. *See id.* at 24.

[43] Maryland v. Louisiana, 451 U.S. 725, 760 (1981) (No. 83 Orig.) (Rehnquist, J., dissenting) (quoting Utah v. United States, 394 U.S. 89, 95 (1969)).

[44] A special master is "appointed to act as the representative of the court in some particular act or transaction." BLACK'S LAW DICTIONARY 975 (6th ed. 1990). The Federal Rules of Civil Procedure provide that "[t]he court in which any action is pending may appoint a special master therein. As used in these rules the word 'master' includes a referee, an auditor, an examiner, and an assessor." FED. R. CIV. P. 53(a). The practice of delegating certain functions to special masters traces back to the English chancery courts and has been employed in America since colonial times. *See* James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 800-01 (1991). Special masters are appointed specifically for one case, and they are typically retired judges, law professors, or attorneys. *See id.*

[45] Federal Rule of Civil Procedure 53(e) requires the master to prepare a report, including a transcript of the proceedings and of the evidence, and the original exhibits. *See* FED. R. CIV. P. 53(e).

[46] *See* Colorado v. New Mexico, 467 U.S. 310, 325-26 (1984) (No. 80 Orig.) (Stevens, J., dissenting). Justice Stevens observed that "[i]n the exercise of our original jurisdiction it may well be appropriate for us to make a de novo review of the record. The Master's report is, after all, merely a recommendation and there is no rule of law that requires us to accord it any special deference." *Id.* at 325 (Stevens, J., dissenting). In a dissenting opinion in *Maryland v. Louisiana*, Justice Rehnquist cautioned that the Court is the primary factfinder when accepting or rejecting a special master's conclusions. *See* Maryland v. Louisiana, 451 U.S. 725, 763 (1981) (No. 83 Orig.) (Rehnquist, J., dissenting).

[47] 451 U.S. 725 (1981) (No. 83 Orig.).

[48] *See Maryland v. Louisiana*, 451 U.S. at 760 (Rehnquist, J., dissenting). Justice Rehnquist quoted one of Chief Justice Stone's dissenting opinions: "In an original suit, even when the case is first referred to a master, this Court has the duty of making an independent

Justice Rehnquist's concerns demonstrate how the special master device should not permit the Court to take its original jurisdiction lightly.[49]

The majority and dissenting opinions in *Ohio v. Wyandotte Chemicals Corporation*[50] illustrate two opposing views regarding the Supreme Court's ability to act as a trial court. In *Wyandotte Chemicals*, the Court declined to extend its original jurisdiction to hear Ohio's complaint against several chemical companies which allegedly disposed of mercury into waterways that eventually contaminated Lake Erie.[51] Justice Harlan, writing for the majority, acknowledged that the case fell within the Court's original jurisdiction since the matter concerned a dispute between a state and the citizens of another state, yet the Court declined to exercise its jurisdiction.[52] Although the availability of an alternative forum was one of the reasons cited in declining jurisdiction,[53] Justice Harlan also pointed to the Court's inability to properly sit as a trial court.[54] In dissent, however, Justice Douglas would have accepted jurisdiction because of the serious nature of the issue involved: water pollution.[55] Moreover, Justice Douglas would not have let the complexity of such a case preclude the Court from accepting jurisdiction because of the Court's ability to appoint a special

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examination of the evidence, a time-consuming process which seriously interferes with the discharge of our ever-increasing appellate duties." *Id.* at 763 (quoting Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 470 (1945) (Stone, C.J., dissenting)).

[49] *See id.* at 762-63. Justice Rehnquist did not question the competency of special masters or their ability to provide a quality workproduct; rather, Justice Rehnquist's concern was that the Court would not be able to devote the proper time and care as a trial court, even with the assistance of a special master. *See id.*

[50] 401 U.S. 493 (1971) (No. 41 Orig.).

[51] *See id.* at 494.

[52] *See id.* at 495.

[53] *See id.* The Court followed the Judiciary Act, which provides that the court has original but not exclusive (i.e., concurrent) jurisdiction in actions by a State against the citizens of another State. *See* 28 U.S.C.A § 1251(b)(3) (West 1998).

[54] *See Wyandotte Chems. Corp.*, 401 U.S. at 498. Writing for the majority, Justice Harlan opined that "[t]his Court is, moreover, structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." *Id.* Justice Harlan concluded by saying: "[t]o sum up, this Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage." *Id.* at 504.

[55] *See id.* at 506 (Douglas, J., dissenting).

master.[56]

The Court often requires a special master's assistance when it resolves allegations that a state has breached an "interstate compact" with another state.[57] The Constitution provides for interstate compacts between states.[58] An interstate compact is basically a contract because it is an agreement among two or more states, but a compact also requires approval by Congress.[59] Interstate

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[56] *See id.* Justice Douglas stated:

> Much is made of the burdens and perplexities of these original actions . . . . If in these original actions we sat with a jury, as the Court once did, there would be powerful arguments for abstention in many cases. But the practice has been to appoint a Special Master which we certainly would do in this case. We could also appoint—or authorize the Special Master to retain—a panel of scientific advisors.

Id. at 510-11(Douglas, J., dissenting).

[57] *See, e.g.*, Kansas v. Colorado, 514 U.S. 673 (1995) (No. 105 Orig.); Oklahoma v. New Mexico, 501 U.S. 221 (1991) (No. 109 Orig.); Texas v. New Mexico, 462 U.S. 554 (1983) (No. 65 Orig.); Arizona v. California, 373 U.S. 546 (1963) (No. 8 Orig.); Virginia v. West Virginia, 206 U.S. 290 (1907) (No. 7 Orig.).

[58] *See* U.S. CONST. art. I, § 10, cl. 3.

[59] *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 12.5, at 94-95 (2d ed. 1992). The Compact Clause of the Constitution provides that "[n]o State shall, without the Consent of Congress, . . . enter into an Agreement or Compact with another State." U.S. CONST. art. I, § 10, cl. 3; *see also* ROTUNDA & NOWAK, *supra*, at 92. The Treatise discusses two seminal Compact Clause cases forging the Court's jurisprudence on the subject: *Holmes v. Jennison* and *Virginia v. Tennessee*. *See id.* at 92-93. In the context of a state forming a treaty with a foreign nation, Chief Justice Taney's plurality opinion in *Holmes v. Jennison* absolutely affirmed that states cannot enter into treaties with other countries, as forbidden in the Constitution. *See id.* (citing Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840)). The relevant portion of the Constitution provides that "[n]o State shall enter into any Treaty, Alliance, or confederation . . . ." U.S. CONST. art. I, § 10, cl. 1. In the context of two states entering into a compact, Justice Field in *Virginia v. Tennessee*, distinguished between "agreements" and "compacts." *See* ROTUNDA & NOWAK, *supra*, at 92-93 (citing Virginia v. Tennessee, 148 U.S. 503 (1893)). Justice Field viewed an agreement as concerning matters not of significance to the nation as a whole, and, accordingly, Congressional consent was not required. *See id.* at 93. A compact, on the other hand, required congressional approval, as the nature of the agreement would affect the political power of a state or would interfere with the supremacy of the federal government. *See id.* at 93-94. For example, Justice Field postulated the compact in which two states agreed to change their boundary lines, which would certainly require congressional approval because one or both of the states would likely have a change in political power. *See id.* Boundary compacts were among the most common types of compacts during that time, and Justice Powell's majority decision in *United States Steel Corporation v. Multistate Tax Commission* alluded to the Court's primary concern in interpreting compacts: a compact's

compacts are designed to facilitate cooperation among states in addressing regional issues while maintaining a middle ground between "overbearing" federal regulation and ineffective state law.[60] Indeed, interstate compacts have been acclaimed for "encouraging imaginative solutions to regional problems through cooperative federalism."[61]

As seen in the seminal case of *West Virginia* ex rel. *Dyer v. Sims*,[62] the Supreme Court is the final arbiter in resolving questions of compact interpretation,[63] although the case presented three differing views concerning the rationale underlying the Court's Compact Clause jurisprudence. First, Justice Frankfurter's majority opinion noted that, just as the Court has jurisdiction to settle litigation between states when no compact is at issue, the Court also has the power to interpret a compact's meaning and validity.[64] Alternatively, Justice Reed's concurring opinion in *Sims* suggested that the Court's power to interpret a compact should rest on the Supremacy Clause,[65] rather than an implied federal authority to interpret a state law.[66] Finally, Justice Jackson's concurrence relied on an estoppel theory grounded in contract law that should prevent a state from breaching an interstate compact into which it voluntarily entered and upon which other states relied.[67] These differing views were de-

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potential ability to encroach upon federal power. *See* L. Mark Eichorn, Note, Cuyler v. Adams *and the Characterization of Compact Law*, 77 VA. L. REV. 1387, 1391-93 (1991) (citing United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978)).

[60] *See* Marlissa S. Briggett, Comment, *State Supremacy in the Federal Realm: The Interstate Compact*, 18 B.C. ENVTL. AFF. L. REV. 751, 753 (1991). Over time, the use of interstate compacts has evolved from a means to determine interstate boundaries to a way to solve more complex problems. *See id.*

[61] *See* Eichorn, *supra* note 59, at 1389.

[62] 341 U.S. 22 (1951).

[63] *See id.* at 28; ROTUNDA & NOWAK, *supra* note 59, at 95-98.

[64] *See Sims*, 341 U.S. at 28.

[65] *See* U.S. CONST. art. VI, cl. 2. Article IV, clause 2 provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." *Id.* The practical effect of the Supremacy Clause is that state and local laws are preempted if they conflict with federal law. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 3-4 (1997).

[66] *See Sims*, 341 U.S. at 33 (Reed, J., concurring).

[67] *See id.* at 35 (Jackson, J., concurring).

finitively settled thirty years later in *Cuyler v. Adams*,[68] where Justice Brennan, writing for the majority, held that interpreting a Congressionally approved interstate compact presents a federal question for the Court because "congressional consent transforms an interstate compact within this [Compact] Clause into a law of the United States."[69]

Underlying the Court's Compact Clause jurisprudence is the principle that no court should restructure the terms of an interstate compact, even to make its terms more equitable to the parties, since the terms of such compacts are approved by Congress.[70] The Court is therefore bound to the terms of the compact "unless the Compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its expressed terms."[71]

This Casenote will evaluate the Court's analysis in *New Jersey v. New York* regarding application of the Compact of 1834, which was formed between New Jersey and New York as a means to resolve the states' interstate boundary and the jurisdiction over Ellis Island. The majority properly concluded that New York's evidence concerning the common law doctrines of prescription and acquiescence were insufficient to overcome the Compact's express terms. The Court's holding, regrettably, did not take the Special Master's equitable considerations into account, such as the practicalities of an oddly shaped boundary line that intersects several buildings. Nonetheless, the case demonstrates how the Court's use of a special master in original jurisdiction cases is an efficient means to assist the Court's factfinding mission in original jurisdiction controversies. This device enables the Court to focus on its appellate duties while simultaneously maintaining accessibility to the nation's most "dignified" legal forum, the United States Supreme Court, to equally "dignified" state parties.

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[68] 449 U.S. 433 (1981).

[69] *See id.* at 438; *see also* ROTUNDA & NOWAK, *supra* note 59, at 97. Congressional approval transforms interstate agreements into Compacts; thus "[t]he Cuyler test can be condensed into the simple statement that the consent of Congress alone determines whether a pact is a compact." Eichorn, *supra* note 59, at 1393. Viewing compact law as federal law is also known as the "law of the Union doctrine," which originated in *Pennsylvania v. Wheeling & Belmont Bridge Company*. *See* Briggett, *supra* note 60, at 761-62 (citing Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 566 (1853)). In characterizing compact law as federal law, however, the *Cuyler* decision has been criticized for minimizing states' roles in contexts "where state autonomy is a prime concern." Eichorn, *supra* note 59, at 1390.

[70] *See* ROTUNDA & NOWAK, *supra* note 59, at 97-98.

[71] Texas v. New Mexico, 462 U.S. 554, 564 (1983) (No. 65 Orig.).

II. STATEMENT OF THE CASE

Invoking the Court's original jurisdiction, the State of New Jersey sought leave to file a bill of complaint[72] against the State of New York in April 1993.[73] Specifically, the complaint alleged that New Jersey, rather than New York, had sovereign authority over the portion of Ellis Island created by landfill, representing 24.5 acres of the Island's total 27.5 acres.[74] Although Ellis Island is located on the New Jersey side of the states' common boundary, the Compact of 1834 executed between the two states provided New York with jurisdiction over the Island, which was only three acres in size when the compact was formed.[75] The Island's size remained essentially unchanged until 1891, when the federal government began filling around the shoreline to accommodate the Island's new use as an immigrant receiving station.[76] Between 1891 and 1934, the National Government added 24.5 acres to the Island's original three acres. [77] Although New Jersey did not dispute New York's authority over the original

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[72] *See* Sup. Ct. R. 17. Rule 17 governs Supreme Court procedure in original jurisdiction matters. *See id.* Significantly, this procedures requires that a plaintiff request permission to file its complaint: "The initial pleadings shall be preceded by a motion for leave to file." Sup. Ct. R. 17(3). In *Ohio v. Wyandotte Chemicals Corporation*, Justice Harlan, writing for the majority, observed that the Court's discretion in accepting original jurisdiction cases is the exception to the Anglo-American common law axiom that a court possessing jurisdiction must employ it. *See* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 496-97 (1971) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).

[73] *See* New Jersey v. New York, 118 S. Ct. 1726, 1731 (1998).

[74] *See id.* at 1730; *see also Report of the Special Master*, *supra* note 4, at 4. New Jersey claimed jurisdiction over the filled portion of Ellis Island "for the purpose of taxation, zoning, environmental protection, elections, education, residency, insurance, building codes, historic preservation, labor and public welfare laws, civil and criminal law, and for all other purposes related to the jurisdiction of any state." *Report of the Special Master*, *supra* note 4, at 4. New Jersey also expressed concern that New York was expanding its authority over filled portions of the Island and that development proposals for the Island were engendering the need for a resolution over the boundary dispute. *See id.* at 14. The Main Immigration Building was restored by 1990, at a cost of $186 million, although many millions more will be needed to restore the remaining buildings. *See* John McLaughlin, *Visions of Ellis Island. We Won. We Own It. Now What?*, THE STAR LEDGER, Mar. 7, 1999, § 10, at 1.

[75] *See New Jersey v. New York*, 118 S. Ct. at 1732.

[76] *See id.* at 1733. The United States purchased title to the submerged tidal lands surrounding Ellis Island from New Jersey pursuant to a deed recorded in 1904. *See Report of the Special Master*, *supra* note 4, at 8 (citing N.J. STAT. ANN. § 12:3-1 (West 1990)).

[77] *See New Jersey v. New York*, 118 S. Ct. at 1731; *see also Report of the Special*

three-acre portion of the Island, New Jersey claimed sovereignty over the filled portion of the Island.[78]

The Court granted New Jersey's motion to file a bill of complaint.[79] Subsequent to New Jersey's filing, the Court appointed Paul R. Verkuil as the Special Master to hear the case and to prepare a report for the Court.[80] Both parties' motions for summary judgment were denied,[81] and the Special Master conducted trial from July 10, 1996 through August 15, 1996.[82] Following the trial, the Special Master prepared his report, which the Court received on June 16, 1997.[83]

The Special Master concluded that New Jersey had sovereignty over the filled portion of Ellis Island, with New York retaining jurisdiction over the original three acres.[84] Although Article First of the Compact of 1834 provides that the boundary between the two states is the midpoint of the Hudson River, Article Second of the Compact of 1834 granted sovereignty of Ellis Island to New York, with its jurisdictional boundary as the low-water mark of the original three acres.[85] While the Compact of 1834 failed to address the issue of

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Master, *supra* note 4, at 4, 97. The Special Master reported that the size of the present Island is over nine hundred percent larger than that of the original island. *See id.*

[78] *See New Jersey v. New York*, 118 S. Ct. at 1734.

[79] *See* New Jersey v. New York, 511 U.S. 1080 (1994) (mem.).

[80] *See* New Jersey v. New York, 513 U.S. 924 (1994) (mem.).

[81] *See Report of the Special Master*, *supra* note 4, at 23-25. The Special Master denied both States' motions for summary judgment at a hearing on April 11, 1996. *See id.* at 19. The Special Master cited three reasons for the denial. *See id.* at 23. First, there were many factual issues in this case (by the conclusion of the trial, the States had proffered 1,017 findings of fact), and the Special Master's understanding of the Court's original jurisdiction jurisprudence requires a "full and liberal factual development . . . because of the lofty historical, territorial, and financial implications of these cases to the states involved." *Id.* at 23-24 (citing United States v. Texas, 339 U.S. 707, 715, *modified*, 340 U.S. 848 (1950)). Second, Mr. Verkuil hoped that the ambiguity in the Compact of 1834 would be resolved through an evidentiary proceeding. *See id.* at 24-25. Third, the Special Master believed that New York should be permitted to advance evidence regarding prescription and acquiescence. *See id.* at 25.

[82] *See New Jersey v. New York*, 118 S. Ct. at 1731.

[83] *See* New Jersey v. New York, 117 S. Ct. 2451 (1997) (mem).

[84] *See New Jersey v. New York*, 118 S. Ct. at 1735.

[85] *See id.*

subsequent filling, the Special Master concluded that the filled portions of the Island are subject to New Jersey sovereignty pursuant to the common law doctrine of avulsion.[86] The Special Master rejected New York's affirmative defenses of prescription and acquiescence and also rejected New York's alternative defense that laches barred New Jersey's complaint.[87]

In drawing an on-island boundary between the two states, the Special Master recommended two changes to the boundary set forth in the Compact of 1834 in the interests of practicality and convenience.[88] First, an area formerly covered by a pier was treated as part of the original island, and second, the main immigration building and its immediate vicinity were considered part of New York.[89]

After the Special Master's report was filed, both parties filed exceptions,[90] which were then reviewed by the Court.[91] The Court denied all three of New York's exceptions.[92] First, the Court rejected that New York had sovereignty over the filled portion of the Island pursuant to Article Second of the Compact of 1834.[93] Second, the Court did not accept New York's argument that its prescriptive acts on the filled portion of the Island, together with New Jersey's acquiescence to those acts, were sufficient to afford New York sovereignty over the entire Island.[94] Finally, the Court rejected New York's claim that New Jersey's delay in filing the complaint barred the action through the equitable doc-

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[86] *See id.*; *see also* discussion *infra* Part III.A.

[87] *See New Jersey v. New York*, 118 S. Ct. at 1735; *see also* discussion *infra* Parts III.A., IV.A.2-3.

[88] *See New Jersey v. New York*, 118 S. Ct. at 1735.

[89] *See id.*

[90] An exception is defined as an "[o]bjection to order or ruling of trial court. A formal objection to the action of the court, during the trial of a cause . . . implying that the party excepting does not acquiesce in the decision of the court, but will seek to procure its reversal, and that he means to save the benefit of his request or objection in some future proceeding." BLACK'S LAW DICTIONARY 559 (6th ed. 1990).

[91] *See New Jersey v. New York*, 118 S. Ct. at 1735.

[92] *See id.*

[93] *See id.* at 1735-38; *see also* discussion *infra* Part IV.A.1.

[94] *See New Jersey v. New York*, 118 S. Ct. at 1738-47; *see also* discussion *infra* Part IV.A.2.

trine of laches.[95]

The Court denied all but one of New Jersey's three exceptions.[96] The Court agreed with New Jersey that the present boundary through the Island must follow the line pursuant to the Compact of 1834, and that the Court had no authority to readjust the boundary simply as a matter of convenience.[97] Accordingly, the Court sustained New Jersey's exception regarding the Special Master's recommendation to redraw the boundary line on the Island.[98] The Court did overrule New Jersey's other exceptions, however, which requested that the boundary be the high-water mark of the original Island and that the Island's pier be deemed part of New Jersey's sovereign.[99]

III. PRIOR CASE HISTORY

In *New Jersey v. New York*, the Court cited many previous interstate boundary dispute cases to explore its prior jurisprudence on this subject. The Court also analyzed the Nineteenth Century boundary dispute between New Jersey and New York, which ultimately resulted in the formation of the Compact of 1834. Lastly, the Court then reviewed past cases interpreting the terms of the Compact of 1834.

A. INTERSTATE BOUNDARY DISPUTE CASES

Two significant interstate boundary dispute cases decided by the Court within the past decade are *Georgia v. South Carolina*[100] and *Illinois v. Ken-*

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[95] *See New Jersey v. New York*, 118 S. Ct. at 1748; *see also* discussion *infra* Part IV.A.3.

[96] *See New Jersey v. New York*, 118 S. Ct. at 1750-51; *see also* discussion *infra* Parts IV.A.4-5.

[97] *See New Jersey v. New York*, 118 S. Ct. at 1750-51. For a map illustrating the Special Master's proposed boundary line, which was rejected by the Court, and the boundary line of the Island in 1834, which was accepted by the Court as being the proper interstate boundary, see *infra* Appendix A2.

[98] *See New Jersey v. New York*, 118 S. Ct. at 1750; *see also* discussion *infra* Parts IV.A.5.

[99] *See New Jersey v. New York*, 118 S. Ct. at 1750; *see also* discussion *infra* Part IV.A.4.

[100] 497 U.S. 376 (1990) (No. 74 Orig.).

tucky.[101] These cases discuss the important doctrines of avulsion, prescription and acquiescence, as well as the equitable doctrine of laches, all of which are legal issues vital to determining many boundary disputes.[102]

Georgia v. South Carolina involved a dispute concerning the states' common boundary along the Savannah River and the proper jurisdiction of islands located within the river.[103] The states' boundary had been disputed on numerous occasions dating back to 1732,[104] but the boundary was set by the Treaty of Beaufort in 1787.[105] The Treaty of Beaufort stated that the interstate boundary was the northernmost stream of the Savannah River and that islands within the river were under Georgia's sovereignty;[106] however, the Treaty did not end dispute on the matter, as the states subsequently litigated the boundary issue in 1876 and 1922.[107]

Despite the express terms of the 1787 Treaty, the Court nonetheless granted jurisdiction to South Carolina of several islands[108] that existed at the time of the

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[101] 500 U.S. 380 (1991) (No. 106 Orig.).

[102] *See* discussion *infra* Parts IV.A.1-3.

[103] *See Georgia v. South Carolina*, 497 U.S. at 379.

[104] *See id.* at 380. The Court's background section of the opinion described letters from King George II characterizing the boundary between the Colony of Georgia and the Colony of South Carolina as "the most northern part of a stream or river there, commonly called the Savannah." *Id.* (citing F. VAN ZANDT, BOUNDARIES OF THE UNITED STATES AND THE SEVERAL STATES (Geological Survey Professional Paper 909) 100 (1976)).

[105] *See id.* at 380-81. It is important to note that although the Treaty of Beaufort was ratified by the Continental Congress, it was created prior to the ratification of the Constitution, which specifically forbids states from entering into "treaties." *See* U.S. CONST. art. I, § 10, cl. 1. Since the ratification of the Constitution, an agreement between two states would more properly be called a "compact." *See id.* at cl. 3.

[106] *See Georgia v. South Carolina*, 497 U.S. at 379-81.

[107] *See id.* at 382-83. The 1876 dispute was decided in *South Carolina v. Georgia*, 93 U.S. 4 (1876), and the 1922 dispute was decided in *Georgia v. South Carolina*, 257 U.S. 516 (1922). *See id.* at 383-84.

[108] *See id.* at 388. The Barnwell Islands existing at the time of the Treaty were under Georgia's sovereignty pursuant to the Treaty's provisions. *See id.* Although these islands were originally located within the Savannah River, subsequent filling of the area by the Army Corps. of Engineers resulted in their being affixed to South Carolina's southern shore. *See id.* Although Georgia conceded that one former island, Rabbit Island, belonged to South Carolina, Georgia claimed sovereignty over the Barnwell Islands, despite the proximity of the islands to South Carolina. *See id.*

treaty, pursuant to the doctrine of prescription and acquiescence.[109] Justice Blackmun, writing for the Court, agreed with the Special Master's assessment of the evidence establishing South Carolina's sovereignty over the islands by way of its prescriptive acts, including South Carolina's persistent taxation of the islands, South Carolina's police and prosecution activities on the islands, and South Carolina's wildlife officer patrols.[110] The Court overruled Georgia's exceptions to the prescriptive evidence and its argument that Georgia did not acquiesce to South Carolina's prescriptive acts because it lacked proper notice of such actions.[111] The Court held that inaction alone, ongoing for long periods of time when a response was clearly warranted, could be considered sufficient acquiescence under this doctrine.[112] The Court reasoned that Georgia had sufficient notice of certain activities on the islands, such as South Carolina's rice cultivation on the islands, which was both recorded on maps as early as 1855 and known by Savannah residents.[113] Thus, the Court concluded that Georgia

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[109] *See id.* at 388-93. A claim of sovereignty under the doctrine of prescription requires longstanding possession and dominion by one sovereign and acquiescence to those acts by the other sovereign. *See id.* at 389 (citing Virginia v. Tennessee, 148 U.S. 503, 524 (1893)). Prescription usually applies to "incorporeal hereditaments," whereas the doctrine of "adverse possession" is applied to lands. *See* BLACK'S LAW DICTIONARY 1183 (6th ed. 1990). *Black's Law Dictionary* defines "corporeal hereditaments" as "substantial permanent objects which may be inherited," including land. *Id.* at 726. "Incorporeal hereditaments" includes intangibles such as a right emanating from a corporeal thing, but not the thing itself. *See id.* Adverse possession is a means to obtain *title* to real property and "consists of actual possession with intent to hold solely for possessor to exclusion of others and is denoted by exercise of acts of dominion over land including making of ordinary use and taking of ordinary profits of which land is susceptible in its present state." *Id.* at 53. The Restatement (Third) of Property indicates that both doctrines allow the acquisition of property over the course of time under certain conditions. *See* RESTATEMENT (THIRD) OF THE LAW OF PROPERTY § 2.16 cmt. a (1993 Draft). While prescription applies to servitudes, adverse possession is applied to possessory estates. *See id.*

[110] *See Georgia v. South Carolina*, 497 U.S. at 392-93.

[111] *See id.* at 393.

[112] *See id.* (citing Vermont v. New Hampshire, 289 U.S. 593, 616 (1933); Rhode Island v. Massachusetts, 40 U.S. (15 Pet.) 233, 274 (1841)).

[113] *See id.* Although the Court's analysis rested on the doctrine of prescription and acquiescence, the Court referenced the doctrine of adverse possession. *See id.* In analyzing this issue, the Court quoted from the well-established precedent in *Landes v. Brant*: "It is conclusively settled in England, that open and notorious adverse possession is evidence of notice; not of the adverse holding only, but of the title under which the possession is held . . . . And in the United States we deem it to be equally settled." *Id.* (quoting Landes v. Brant, 51 U.S. (10 How.) 348, 375 (1851)).

acquiesced to South Carolina's actions.[114]

Despite the Court's holding in *Georgia v. South Carolina*, which granted sovereignty of the Barnwell Islands to South Carolina, the Court held that some of the emerging lands formed in the river[115] remained under Georgia's sovereignty pursuant to the doctrine of avulsion.[116] Construction efforts by the Army Corps of Engineers in the 1880's to improve navigation through a portion of the Savannah River altered sedimentation patterns, which resulted in the formation of land that ultimately became connected to South Carolina.[117] Nonetheless, the Court awarded these lands to Georgia, reasoning that the rapidity of the Army Corps' work which resulted in land creation was more analogous to avulsion than to the natural processes of erosion and accretion; therefore, no change in boundary was effected, leaving Georgia with sovereignty over the land.[118]

In *Illinois v. Kentucky* the Court granted leave for the State of Illinois to file a complaint against the State of Kentucky regarding the proper location of their common boundary line along the Ohio River.[119] Illinois claimed that the proper boundary line should be the low-water mark on the northern shore of the Ohio River, as it existed in 1792.[120] While Kentucky did not dispute that the northern low-water mark was the proper elevation to choose, Kentucky claimed that the boundary was not the 1792 line but was "as it exists from time

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[114] *See id.*

[115] *See id.* at 394. These lands include Southeastern Denwill, which was created as marsh adjacent to the Army Corps' training wall that ultimately connected with the southern shore of South Carolina. *See id.* at 394-402. Similarly, Horseshoe Shoal was created and connects Jones Island and Oyster Bed Island. *See id.* at 402.

[116] *See id.* at 403-04. Avulsion is defined as "a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream." BLACK'S LAW DICTIONARY 137 (6th ed. 1990).

[117] *See Georgia v. South Carolina*, 497 U.S. at 404.

[118] *See id.* The Court compared the doctrines of avulsion and accretion. *See id.* (citing Arkansas v. Tennessee, 246 U.S. 158, 173 (1918)). If the riverbed is the boundary, then natural changes to the river meanders caused by the natural processes of erosion and accretion result in a changed boundary following the natural course of the river. *See id.* If the river leaves its bed in favor of a new one through the process of avulsion, however, then there is no change in the boundary. *See id.*

[119] *See* 500 U.S. 380, 382 (1991).

[120] *See id.*

to time" along the river.[121] Essentially, Kentucky believed that the boundary line should follow the natural course of the river, whereas Illinois maintained that the boundary had remained unchanged since it was originally set in 1792, regardless of the naturally occurring changes in the riverbed.[122]

Writing for a unanimous Court, Justice Souter generally agreed with the conclusions of the Special Master and relied on prior decisions to hold that the current boundary should be as it existed in 1792.[123] The Court also overruled an exception to the Special Master's report filed by Kentucky, which concluded that the preponderance of the evidence failed to support Kentucky's sovereignty claim based on the doctrines of prescription and acquiescence.[124] The Court observed that not only did Kentucky fail "to engage in consistent and unequivocal acts of occupation," but that documents from the Kentucky Legislative Research Commission admitted that the boundary line was actually the line as it existed in 1792.[125] Thus, Kentucky's limited acts of dominion over the land, combined with its own statements, were fatal to its sovereignty claims.[126]

The Court also found Kentucky's other affirmative defenses unpersuasive, primarily because of the failure of its prescription argument.[127] First, the Court affirmed the Special Master's conclusion that the defense of laches[128] was

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[121] *Id.* (quoting Report of the Special Master at 2, Illinois v. Kentucky, 500 U.S. 380 (1991)).

[122] *See id.*

[123] *See id.* at 382-84. The Court noted that this issue had been decided in *Ohio v. Kentucky*, in which the Court held that the Ohio-Kentucky boundary was as it existed in 1792, the northern low-water mark along the Ohio River. *See id.* at 383 (citing Ohio v. Kentucky, 444 U.S. 335 (1980)). The *Ohio* Court had relied on an earlier case, *Indiana v. Kentucky*, which also held that the Indiana-Kentucky boundary followed the northern low-water mark of the Ohio River, as it was "when Kentucky became a State." *See id.* (quoting Indiana v. Kentucky, 136 U.S. 479, 518-19 (1890)).

[124] *See id.* at 384-85.

[125] *Id.* at 386.

[126] *See id.* at 387.

[127] *See id.* at 387-88.

[128] *See id.* at 388. "The 'Doctrine of Laches' is based upon maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to a party, operates as bar in court of equity." BLACK'S LAW DICTIONARY 875 (6th ed. 1990); *see also infra* note 186.

not generally applicable against a state, and, second, that Kentucky could have only prevailed on "principles of riparian boundaries, including accretion, erosion and avulsion"[129] if it had prevailed on the issue of prescription.[130]

B. PRIOR CASES RELATED TO THE 1998 *NEW JERSEY V. NEW YORK* CASE

Although the seeds of the dispute in the present case were sown during the Colonial period,[131] the Supreme Court did not consider a boundary dispute between New Jersey and New York until the early Nineteenth Century.[132] The invention of the steamboat led to a dramatic increase in commerce in the Hudson River, resulting in both New Jersey and New York examining their respective rights to control and regulate activities in these waters.[133] During this period, New York held a monopoly on steamboat traffic on the Hudson River, as described in one of the Court's more famous decisions, *Gibbons v. Ogden*.[134]

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[129] *Illinois v. Kentucky*, 500 U.S. at 389 (quoting Exceptions Brief of Commonwealth of Kentucky at 48-49, Illinois v. Kentucky, 500 U.S. 380 (1991)).

[130] *See id.*

[131] *See Report of the Special Master*, *supra* note 4, at 35. In 1664, King Charles II of England's grant to the Duke of York established New York as a royal colony. *See id.* Later that year, the Duke of York transferred his grant to Lord Berkeley and Sir George Carteret, who owned the land now known as New Jersey. *See id.* The grant "transferred the lands west of Long Island and Manhattan Island 'bounded on the east part by the main sea, and part by Hudson's river.'" *Id.* As a result, New York claimed that New Jersey's eastern boundary was its Hudson River shoreline, while New Jersey claimed the boundary was in the middle of the river. *See id.*

[132] *See* New Jersey v. New York, 31 U.S. 323 (1832) (State of New York demurring, with the Court granting the State of New Jersey's motion to argue the demurrer); New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1831) (ordering the State of New York to answer New Jersey's complaint and to appear before the Supreme Court); New Jersey v. New York, 28 U.S. (3 Pet.) 461 (1830) (filing of the bill of complaint on Feb. 20, 1829).

[133] *See Report of the Special Master*, *supra* note 4, at 35-36.

[134] 22 U.S. (9 Wheat.) 1 (1824). Aaron Ogden operated a ferry between New York City and Elizabethtown Port in New Jersey under his license granted by Robert Livingston and Robert Fulton, inventor of the steamboat, who themselves had been granted a monopoly by the New York legislature. *See id.* at 1-2. Thomas Gibbons began operating a competing ferry using a license granted by a 1793 federal law, and in the New York state courts, Ogden sought and obtained an injunction prohibiting Gibbons' operation. *See id.* at 2-3. The Supreme Court reversed the New York courts, holding that New York's monopoly was preempted by federal law and that the monopoly was an impermissible restriction of interstate commerce. *See id.* at 186-240. Although *Gibbons* is best known for representing the

By 1829, New Jersey filed an original suit with the Supreme Court to resolve the interstate boundary issue.[135] New York claimed that New Jersey's eastern boundary was the Hudson River shoreline, while New Jersey claimed that its boundary was actually the middle of the river.[136] New York refused to respond to the complaint, however, questioning the Supreme Court's authority to hear cases involving a state.[137] In response, the Court ordered New York to appear, and Chief Justice Marshall emphatically proclaimed the Court's original jurisdiction to hear the case.[138] Nonetheless, the states resumed settlement negotiations and the case was never tried.[139] The negotiations ultimately resulted in the States' execution of the Compact of 1834.[140]

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genesis of the Court's Commerce Clause jurisprudence, the Special Master included the case in his Final Report to provide the commercial context at the time leading up to New Jersey's suit in 1829. *See Report of the Special Master*, *supra* note 4, at 35-40.

[135] *See* New Jersey v. New York, 28 U.S. (3 Pet.) 461 (1830).

[136] *See* New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1831); *Report of the Special Master*, *supra* note 4, at 42. While New Jersey advocated its sovereignty over one-half of the Hudson River, New Jersey conceded at the time that it had lost Ellis Island to New York by adverse possession. *See id.*

[137] *See* New Jersey v. New York, 28 U.S. (3 Pet.) 461 (1830). New York's attorney general and governor both believed the Supreme Court's Constitutional grant of original jurisdiction to hear cases between two states was not valid until activated by Congress. *See id.* at 465.

[138] *See New Jersey v. New York*, 30 U.S. (5 Pet.) at 290. Chief Justice Marshall opined that "[i]t has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the [C]onstitution and existing acts of [C]ongress." *Id.*

[139] *See* New Jersey v. New York, 31 U.S. (6 Pet.) 323, 327 (1832); *see also* New Jersey v. New York, 118 S. Ct. 1726, 1732 (1998).

[140] *See Report of the Special Master*, *supra* note 4, at 42. The Compact is comprised of eight articles, but in *New Jersey v. New York*, the States focused primarily on the first three articles. *See id.* at 44. The first three articles of the Compact of 1834 are as follows:

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

ARTICLE SECOND. 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.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

(1) The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

(2) The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.

(3) The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, *Provided*, That the navigation be not obstructed or hindered.

Act of June 28, 1834, 4 Stat. 708 (1834), *reprinted in Report of the Special Master*, *supra* note 4, at 4a-5a.

The Special Master summarized the terms of the first three articles. *See Report of the Special Master*, *supra* note 4, at 45-46. Article First stated that the boundary line between New York and New Jersey is the midpoint of the Hudson River and the Bay of New York. *See id.* at 45. Although Ellis Island is located on the New Jersey side of the boundary, Article Second reserved New York's "present jurisdiction" over Ellis Island and Bedlow's Island. *See id.* at 45-46. Article Third granted "exclusive jurisdiction" of the waters of the Hudson River and the Bay of New York to New York. *See id.* at 46. Article Third also gave New Jersey "exclusive right of property" to the submerged lands on its side of the river and granted "exclusive jurisdiction" over its wharves and docks. *See id.* Bedlow's Island, also known as Bedloe's Island, is commonly known today as Liberty Island. *See* New Jersey v. New York, 118 S. Ct. 1726, 1732 n.1 (1998). For an illustration of the locations of Ellis Island and Liberty Island, see *infra* Appendix A1.

The Court subsequently interpreted the Compact of 1834 in *Central Railroad Company of New Jersey v. Jersey City*,[141] where the Court affirmed New Jersey's ability to levy taxes on submerged lands lying between the midpoint of New York Bay and the low-water line of the New Jersey shore.[142] Writing for a unanimous Court, Justice Holmes observed that the waters in the area being taxed were on the New Jersey side of the state's boundary line but were under the exclusive jurisdiction of New York, pursuant to the Compact.[143] Although the Compact ceded some jurisdiction within the sovereign territory of New Jersey to New York, the Court noted that the Compact's purpose was to promote navigation and commerce interests, not to impinge on New Jersey's sovereignty.[144] Accordingly, the Court held that New Jersey was vested with the power to tax based on its sovereignty of the submerged lands on its side of the states' common boundary.[145]

In *Central Railroad Company*, Justice Holmes summarized the remaining five articles. *See* Central R.R. Co. of New Jersey v. Jersey City, 209 U.S. 473, 478 (1908). Article Fourth grants "exclusive jurisdiction" over the waters of the Kill van Kull to New York. *See id.* Article Fifth grants "exclusive jurisdiction over certain other waters" to New Jersey. *Id.* Articles Sixth and Seventh allow for service of process of each state within the exclusive jurisdiction of the other. *See id.* The final article, Article Eighth, provides for Congressional approval of the agreement. *See id.*

[141] 209 U.S. 473 (1908). The Court's discussion of the Compact of 1834 in *Central Railroad* is important to the present case, despite the fact that neither state was a party to it nor was Ellis Island specifically an issue in it. *See Report of the Special Master*, *supra* note 4, at 74.

[142] *See Central R.R. Co.*, 209 U.S. at 480.

[143] *See id.* at 478. "Sovereignty" is defined as "[t]he supreme, absolute, and uncontrollable power by which any independent state is governed." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990). "Jurisdiction" is defined as "[a]reas of authority; the geographic area in which a court has power . . . ." *Id.* at 853. The Special Master highlighted Justice Holmes' conclusion that the Compact terms "boundary," "territory," and "sovereignty" were closely connected, whereas the term "jurisdiction" indicated "something less." *See Report of the Special Master*, *supra* note 4, at 74-76. The Special Master interpreted Justice Holmes' analysis as meaning that the submerged lands in question were within New Jersey's sovereign territory in which New Jersey had granted some jurisdiction to another sovereign, New York. *See id.* Justice Holmes interpreted Article Second's reservation to New York of its "present jurisdiction" of Ellis Island as meaning that New York retained the jurisdictional status it had prior to the consummation of the Compact. *See Central R.R. Co.*, 209 U.S. at 479.

[144] *See Central R.R. Co.*, 209 U.S. at 478.

[145] *See id.* at 480.

The Compact of 1834 was revisited by the United States Court of Appeals for the Second Circuit more than eighty years later in *Collins v. Promark Products, Inc.*[146] *Collins* involved a tort claim brought by a government employee for personal injuries sustained while using a machine during the course of his employment on the filled portion of Ellis Island.[147] In Collins' suit against the manufacturer of the machine, the defendant impleaded the United States under negligence theories, including the failure to provide a safe workplace.[148] The United States moved for summary judgment, arguing that New Jersey Workers Compensation Law prohibited such third-party complaints; however, the district court denied the United States' motion, finding that because the accident occurred on Ellis Island, New York law was applicable.[149] The Second Circuit subsequently affirmed the district court's findings, and analyzed the issue in the context of the Compact of 1834.[150]

The Second Circuit distinguished *Collins* from *Central Railroad*, as the latter involved submerged land, while the former involved Ellis Island itself.[151] Since the Compact of 1834 granted jurisdiction over the Island to New York, and because the Compact did not address the issue of landfilling, the court concluded that New York had jurisdiction and that New York law should apply.[152] The Second Circuit also cited a panoply of acts evidencing New York's jurisdiction over the Island.[153] Finally, the court observed that, although neither New York nor New Jersey was a party to the case, New Jersey only filed an *amicus curiae* brief[154] in the matter and had not invoked the Supreme Court's

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[146] 956 F.2d 383 (2d Cir. 1992).

[147] *See id.* at 384.

[148] *See id.* at 385.

[149] *See id.* at 386.

[150] *See id.* at 386-89.

[151] *See id.* at 387.

[152] *See id.* at 388-89.

[153] *See id.* at 387-88.

[154] *Amicus curiae* literally means "friend of the court." BLACK'S LAW DICTIONARY 82 (6th ed. 1990).

> A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on

original jurisdiction to settle its territorial claim.[155]

The Second Circuit's decision in *Collins* apparently incited officials in Trenton, as New Jersey's complaint in *New Jersey v. New York* cited *Collins* as evidence that New York was "expand[ing her] governmental authority over the filled portion of Ellis Island."[156] Indeed, New Jersey's complaint in *New Jersey v. New York* was filed in 1993, one year after the *Collins* decision.[157]

IV. COMMON LAW DOCTRINES INSUFFICIENT TO OVERCOME THE EXPRESS TERMS OF THE COMPACT OF 1834: *NEW JERSEY V. NEW YORK*

A. MAJORITY OPINION BY JUSTICE SOUTER

Writing for the Court, Justice Souter analyzed each of the exceptions to the Special Master's Report filed by New York and New Jersey.[158] In summary, the Court overruled all of New York's exceptions: 1) the Special Master's Interpretation of the 1834 Compact; 2) a rejection of New York's claim of sovereignty through prescriptive acts and New Jersey's acquiescence to those acts; and 3) a rejection of New York's allegation that New Jersey's sovereignty claim was barred through the doctrine of laches.[159] The Court further overruled New Jersey's exception regarding the Special Master's choice of water level to determine the interstate boundary line, but the majority sustained New Jersey's exception that the Court lacked authority to alter the original boundary

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behalf of a party but actually to suggest a rationale consistent with its own views. Such amicus curiae briefs are commonly filed in appeals concerning matters of broad common interest.

Id.

[155] *See Collins*, 956 F.2d at 388.

[156] *See Report of the Special Master*, *supra* note 4, at 14 (quoting N.J. Br. in supp. of Mot. for Leave at 19).

[157] *See id.*

[158] *See* New Jersey v. New York, 118 S. Ct. 1726, 1735 (1998) (No. 120 Orig.). Justice Souter was joined in the majority by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Ginsburg, and Breyer. *See id.* at 1730.

[159] *See id.* at 1735-48.

line as a matter of convenience.[160]

1. THE COURT'S OVERRULING OF NEW YORK'S EXCEPTION REGARDING THE SPECIAL MASTER'S INTERPRETATION OF THE COMPACT OF 1834

The Court accepted the Special Master's interpretation of the Compact of 1834 (hereinafter "the Compact" or "the Compact of 1834"), particularly Mr. Verkuil's conclusions regarding the first three articles of the Compact.[161] Neither party disputed Article First of the Compact, which established that Ellis Island is located on the New Jersey side of the interstate boundary.[162] Article Second, however, offers the exception to the Article First boundary line by including all of the islands, including Ellis Island, under New York's jurisdiction.[163] In this case, New York raised an exception to the Special Master's report by claiming jurisdiction, not only to the original dimensions of Ellis Island as it existed at the time of the Compact, but also to the portions subsequently filled as the Island was expanded.[164]

The majority rejected both of New York's arguments regarding Article Second.[165] Although New York conceded that at the time of the Compact New Jersey retained jurisdiction of the waters and submerged lands surrounding Ellis Island, New York claimed that it automatically obtained jurisdiction over any newly formed or added land that was contiguous to the original Island.[166]

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[160] *See id.* at 1748-51.

[161] *See id.* at 1735-38.

[162] *See id.* at 1735. The Court held in *Central Railroad* that Article First established that the "boundary line" between the states is the line of sovereignty. *See id.* (citing Central R.R. Co. of Jersey City v. Jersey City, 209 U.S. 473 (1908)).

[163] *See id.* Both parties agreed that New Jersey had no claim over the original portion (three acres) of Ellis Island pursuant to Article Second's granting of "present jurisdiction" to New York. *See id.* The Special Master presumed that the Compact of 1834 drew the interstate boundary as it existed in 1834. *See Report of the Special Master*, *supra* note 4, at 53. Moreover, he concluded that the Compact did not address "*an expanded Ellis Island.*" *See id.* at 62 (emphasis in original). The Special Master also concluded that if the Island had not been expanded in size, there would be no issue to litigate, as New York retained "present jurisdiction" over the original three acres in 1834 to the present. *See id.* at 90.

[164] *See New Jersey v. New York*, 118 S. Ct. at 1736.

[165] *See id.*

[166] *See id.* at 1735-36.

New York also argued that, because landfilling was such a common practice in New York Harbor even at the time of the Compact, it was unnecessary for the express terms of the Compact to explicitly mention New York's jurisdiction to include any subsequent landfilling.[167] The Court refused, however, to confer jurisdiction to New York when the terms of the Compact were silent with respect to newly created and developed land through landfilling practices.[168] Instead, the Court followed a long history of common law prohibiting the expansion of one's property by landfilling and the common law of avulsion, which dictates that a sudden shoreline change does not affect boundaries.[169]

Second, the Court rejected New York's argument that it was entitled to jurisdiction on the grounds that to do otherwise would frustrate the Compact's main intent.[170] New York saw the primary aim of the Compact as submitting the New Jersey-side islands to New York jurisdiction in order to ensure New York's regulatory authority of commerce and navigation in New York Harbor.[171] Although Article Third addresses New York's regulatory power over shipping in the Harbor, Justice Souter reasoned that awarding New Jersey jurisdiction over the filled portion of the Island would have no affect on New York's authority to regulate the Harbor's navigation and commerce.[172]

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[167] *See id.* at 1736.

[168] *See id.* The Court observed that the absence of a metes and bounds description in the 1834 Compact cannot support a sovereignty based solely on the Island's name. *See id.* Justice Souter opined "[t]he drafters' silence, then, can hardly be taken to convert the Island's name into a definitional Proteus for validating sovereignty claims." *Id.*

[169] *See id.* at 1737. As in *Georgia v. South Carolina*, neither state in the present case caused the expansion of the island; rather, the filling was done by the United States Army Corps of Engineers. *See id.* at 1736-37 (citing Georgia v. South Carolina, 497 U.S. 376, 404 (1990)). Common law prohibits a littoral owner from extending its own property via purposeful landfilling. *See id.* at 1737 (citing *Georgia v. South Carolina*, 497 U.S. at 404). Sudden shoreline changes, as opposed to gradual changes, are known as avulsion, which have no effect on the boundary. *See id.* at 1737 (citing Nebraska v. Iowa, 143 U.S. 359, 361 (1892)). The majority thus applied the common law of avulsion to fill in the Compact's silence. *See id.* at 1736-37 n.6.

[170] *See New Jersey v. New York*, 118 S. Ct. at 1736.

[171] *See id.*

[172] *See id.* at 1737-38. Justice Souter noted that "[w]hile Article Third does speak to commerce and navigation, New York's 'exclusive jurisdiction' over the water and submerged lands lying between the two States is unaffected in any literal sense by the presence of fill . . . ." *Id.*

2. THE COURT'S OVERRULING OF NEW YORK'S EXCEPTION ASSERTING ITS SOVEREIGNTY THROUGH PRESCRIPTIVE ACTS AND NEW JERSEY'S ACQUIESCENCE TO THOSE ACTS

While maintaining its argument that the terms of the Compact granted sovereignty of the Island to New York, New York alternatively argued that the Court should grant sovereignty through the doctrine of prescription and acquiescence.[173] Both parties agreed that the alleged period of prescription would have been between 1890 and 1954, because 1890 was the year the federal government began filling the Island, and after 1954, New Jersey strongly asserted its own sovereignty over the filled portion of the island.[174] The majority noted two key points that served to discount much of New York's evidence in support of its prescription and acquiescence claim.[175] First, neither party disputed New York's sovereign acts over the original portion of the Island, but the Court noted that it was not clear whether New York's claimed prescription included activity on both the filled land and the original land.[176] Second, the federal government arguably occupied the Island during the entire period of New York's alleged prescription.[177]

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[173] *See id.* at 1738-47. One sovereign may obtain jurisdiction through prescriptive acts over another sovereign's land coupled with that sovereign's acquiescence to those acts. *See id.* at 1738 (citing Illinois v. Kentucky, 500 U.S. 380, 384-385 (1991); Georgia v. South Carolina, 497 U.S. 376, 389 (1990)). The sovereign claiming jurisdiction under this doctrine must show, by a preponderance of the evidence, a long and continuous possession of the land in question. *See id.* (citing *Illinois v. Kentucky*, 500 U.S. at 384). Although the Court does not discuss the reason that the relevant rule of law is prescription as opposed to adverse possession, presumably adverse possession is not applicable because the Island is *owned* by the United States. *See supra* note 109. The issue in the case is sovereignty, not ownership. *See New Jersey v. New York*, 118 S. Ct. at 1730.

[174] *See id.* at 1739-40. Although no general rule exists stating the minimum number of years required for a claim of prescription, in *Michigan v. Wisconsin*, the Court found that sixty years was a sufficient prescriptive period; therefore, the sixty-four year period in the present case was deemed sufficient for New York to at least make its case. *See id.* at 1740 (citing Michigan v. Wisconsin, 270 U.S. 295 (1926)).

[175] *See id.*

[176] *See id.* There were no physical descriptions of the boundaries of Ellis Island on New York tax maps or statutes defining voting districts for the island. *See id.* Thus, New Jersey could not have been charged with notice of New York's alleged prescriptive acts, as New Jersey presumably would have thought such acts were on the original portion of the Island. *See id.*

[177] *See id.* As a result of the federal government's occupation of the Island, the United States Army Corps of Engineers and the Procurement Division of the Treasury Department directed all construction on the Island. *See id.* Thus, New York was precluded from en-

The majority analyzed New York's evidence of prescriptive activity by reviewing four main categories of evidence: i) New York's recorded vital statistics of people on the Island; ii) New York's maintenance of voting districts; iii) the personal impressions of the inhabitants; and iv) the understanding of the federal government.[178] First, the majority found that thirty-two entries of vital statistics over a period of sixty-four years could not sustain the allegation that New York was acting under a claim of right over the filled portion of the Island or that New Jersey officials could have been on notice of such a claim.[179] Second, the majority rejected New York's allegation that the New York legislature included the Island in its voting districts, because New York failed to clearly indicate an intent to include the filled portion of the Island on its voting district maps.[180] Third, the majority found that New York's evidence regarding the personal impressions of the Island inhabitants was too meager to support an inference of prescription.[181] Finally, the majority found fatal inconsis-

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gaging in prescriptive acts such as constructing towns, roads, or public buildings. *See id.* The present case is accordingly distinguishable from *Georgia v. South Carolina*, where Georgia was charged with knowledge that South Carolina was cultivating the disputed territory. *See* Georgia v. South Carolina, 497 U.S. 376, 391-93 (1990). In *New Jersey v. New York*, the United States also maintained its own fire fighting equipment and security force, and despite the evidence discussed by Justice Stevens in dissent, New York rendered assistance only on three occasions, in 1897, 1903 and 1916. *See New Jersey v. New York*, 118 S. Ct. at 1741-42. In addition to New York's limited ability to conduct prescriptive acts, the federal government's involvement on the Island also limited the notice that New Jersey could reasonably have paid to any of New York's activities. *See id.*

[178] *See New Jersey v. New York*, 118 S.Ct. at 1742-47.

[179] *See id.* at 1742-43. For example, the majority noted that no evidence was presented showing that any marriages were conducted on the filled areas of the Island; more likely, the marriages were performed in the Main Building, which was located on the original portion of the Island. *See id.* at 1743.

[180] *See id.* at 1743. For example, the depiction of Ellis Island on New York voting district maps remained constant over time despite the changing shoreline as fill was added to the original island. *See id.* Therefore, the Court reasoned that New Jersey could not have been on notice that New York was including the filled portions of Ellis Island in its voting districts, despite the maintenance of some voting lists. *See id.* at 1743-44.

[181] *See id.* at 1744. The majority acknowledged that the belief of the inhabitants in a disputed territory is "of no inconsiderable importance." *Id.* (quoting Handley's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374, 384 (1820)). New York's strongest evidence of this sort was the maintenance of voting districts in which some of the Island's inhabitants listed their residence as "Ellis Island, New York." *See id.* Nonetheless, the majority dismissed this evidence as not being persuasive, relying on its discussion of the tax maps. *See id.* The majority also responded to Justice Stevens' reliance on immigration documents referring to "Ellis Island, New York" by noting that throughout the Island's use as an immigration sta-

tencies regarding whether United States officials perceived that the filled portion of the Island was part of New York.[182] Although New York did present some evidence to show that federal officials believed the Island to be a part of New York, other evidence illustrated that federal officials believed that New Jersey had sovereignty over the island.[183]

In summary, the majority held that New York's evidence on this issue was insufficient to sustain a claim of sovereignty through New York's prescriptive acts as well as New Jersey's acquiescence to those acts.[184] In addition, the views of the Island's inhabitants, and those of federal officials, were inconsistent in showing that a majority perceived the Island to be included within New York territory.[185]

3. THE COURT'S OVERRULING OF NEW YORK'S EXCEPTION THAT NEW JERSEY'S CLAIM WAS BARRED THROUGH THE DOCTRINE OF LACHES

New York's answer to New Jersey's complaint presented the affirmative defense of laches,[186] which New York alleged barred New Jersey from asserting

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tion, from 1891 to 1956, northern New Jersey was included in the New York Immigration District. *See id.* at 1744 n.19.

[182] *See id.* at 1747.

[183] *See id.* at 1745-47. The majority acknowledged that during the 1900, 1910, 1920, and 1940 censuses, the federal government considered Ellis Island to be part of New York. *See id.* at 1745. The majority also pointed out, however, that from 1890 to 1911, surveys prepared by the federal Harbor Line Board were entitled "Pierhead & Bulkhead Lines for Ellis' Island, *New Jersey* [emphasis added], New York Harbor, as recommended by the New York Harbor Line Board." *Id.* at 1746. In 1933, the federal Immigration and Naturalization Service ("INS") sought and received permission from New Jersey to construct a sea wall on the filled portion of the Island. *See id.* After 1933, the federal government also took positions suggesting that neither state had jurisdiction over the Island. *See id.* at 1746-47. In response to a request by New Jersey Representative Mary T. Norton that federal contractors hire more New Jersey labor, the federal government's Procurement Division of the Public Works Branch of the Treasury responded that "[s]ince Ellis Island is not clearly within the boundary lines of either state and is clearly outside of the jurisdiction of either, workers should be drawn in roughly equal proportions from the two states." *Id.* at 1747 (quoting N.J. Exhs. 24, 33-35).

[184] *See id.* at 1747.

[185] *See id*; *Report of the Special Master*, *supra* note 4, at 100.

[186] *See New Jersey v. New York*, 118 S. Ct. at 1748. In asserting the affirmative defense of laches, the defendant must prove two elements. *See id.* First, the defendant must show "lack of diligence by the party against whom the defense is asserted," and, second,

its claim because New Jersey's delay in filing its complaint resulted in prejudice to New York's case.[187] New York further argued that its claims had been prejudiced because if New Jersey had filed a complaint years ago New York would have been able to meet its burden of proof regarding acts of sovereignty.[188] Although the Special Master assumed that the doctrine of laches could apply in this case, he nonetheless analyzed the equitable doctrine of laches as being a subset of the doctrine of prescription and acquiescence.[189] The Special Master reasoned that both doctrines present similar equitable concerns: lack of diligence and acquiescence.[190] Finding that New York's claim was not substantially prejudiced, the Special Master concluded his laches analysis and instead focused on an analysis of New York's claim of prescription and acquiescence.[191]

The Court overruled New York's exception to the Special Master's finding regarding laches, as the Court was not persuaded that New York's claims had been prejudiced.[192] The Court reasoned that, in actuality, New York was not truly asserting laches as an affirmative defense because New York was essentially a plaintiff with respect to prescription.[193] First, the Court dismissed New York's claim of prejudice regarding the interpretation of the Compact of 1834

"prejudice to the party asserting the defense." *Id.* (citing Kansas v. Colorado, 514 U.S. 673, 687 (1995)). For many years, the Court has been reluctant to apply the doctrine of laches to the states, because historically states, as sovereigns, have not been limited by traditional bars to suit such as the statute of limitations. *See Report of the Special Master*, *supra* note 4, at 105 (citing Block v. North Dakota, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting)). According to the majority, New York hoped to benefit from the Court's decision in *Kansas v. Colorado*, which discussed the possibility of allowing a laches defense in cases involving interstate compacts, but the issue was not resolved in that case because the element of lack of diligence was not proven. *See New Jersey v. New York*, 118 S. Ct. at 1748 (citing *Kansas v. Colorado*, 514 U.S. at 687-88); *see also Report of the Special Master*, *supra* note 4, at 103.

[187] *See New Jersey v. New York*, 118 S. Ct. at 1748.

[188] *See id.*

[189] *See Report of the Special Master*, *supra* note 4, at 103-04 (citing Illinois v. Kentucky, 500 U.S. 380, 388 (1991)).

[190] *See id.*

[191] *See id.* at 105.

[192] *See New Jersey v. New York*, 118 S. Ct. at 1748.

[193] *See id.*

or the doctrine of avulsion.[194] Second, although New York was claiming prescription as a defense, the majority reasoned that New York still had the burden to prove prescription because New York was effectively a plaintiff on that issue.[195] Thus, New York was required to show that it took steps to seize sovereignty independent of the terms of the Compact accompanied by New Jersey's failure to protest.[196] The Court concluded that the laches defense did not assist New York's failure to carry its burden in proving sovereignty through New Jersey's acquiescence to New York's prescriptive acts.[197]

4. THE COURT'S OVERRULING OF NEW JERSEY'S FIRST TWO EXCEPTIONS REGARDING THE SPECIAL MASTER'S DETERMINATION OF THE 1834 BOUNDARY LINE

New Jersey's first exception concerned the Special Master's choice of using the low-water mark of the original Island as the interstate boundary instead of the high-water mark shoreline as suggested by New Jersey.[198] Although the Special Master relied on the 1827 negotiations between the two states to reach such a conclusion,[199] Justice Souter instead relied on common law, which customarily places interstate boundaries at the low-water mark.[200] Given the in-

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[194] *See id.* The Court observed that New York did not argue that New Jersey's delay in filing its claim resulted in a loss of evidence regarding the interpretation of the terms of the Compact of 1834. *See id.* Similarly, New York proffered historical evidence regarding the filling practices common during the expansion of the Island that presumably was not hindered by New Jersey's decision to file its claim years after the filling occurred. *See id.*

[195] *See id.*

[196] *See id.* Although the majority appeared to sympathize with New York, it did not find that New York met its burden on this issue. *See id.*

[197] *See id.*

[198] *See id.* The use of a high-water mark would have effectively given more territory to New Jersey. *See id.*

[199] *See id.* at 1748-49. During the 1827 negotiations, New Jersey offered to give New York "the islands called Bedlow's Island, Ellis' Island, Oyster Island and Robbins Reef, to [the] low water mark of the same." *Id.*

[200] *See id. See, e.g.,* Illinois v. Kentucky, 500 U.S. 380 (1991) (affirming the Special Master's conclusion that the interstate boundary between the two states is the low-water mark of the Ohio River as it existed in 1792); Vermont v. New Hampshire, 289 U.S. 593 (1933) (affirming the Special Master's conclusion that the true boundary between the two states is the low-water mark of the Connecticut River). In reviewing precedent on this issue, the majority also quoted Chief Justice Marshall, who stated that "[w]herever the river is a

structive common law precedent, the Court reasoned that the Compact would have explicitly provided for a high-water mark boundary had the parties so intended.[201] The Court also rejected New Jersey's inference that because Article Third specifies New York jurisdiction extending to the low-water mark in only certain areas, the parties must have intended to use an alternative high-water mark as the boundary of Ellis Island and elsewhere.[202]

The second exception filed by New Jersey challenged the Special Master's conclusion that the Island's pier that existed in 1834 was built upon landfill and therefore fell within New York's jurisdiction pursuant to Article Second of the Compact.[203] Instead, New Jersey claimed that the pier was built upon pilings driven into the submerged land, thereby placing the pier within New Jersey's jurisdiction because the pier was not part of the Island as it existed in 1834.[204] Based on expert testimony, however, the Court concluded that the pier was likely built upon landfill rather than on pilings,[205] and the Court overruled New Jersey's second exception.[206]

5. THE COURT'S SUSTAINING OF NEW JERSEY'S THIRD EXCEPTION THAT THE COURT SHOULD NOT ALTER THE 1834 BOUNDARY LINE AS A MATTER OF PRACTICALITY OR CONVENIENCE

Justice Souter agreed with New Jersey that the Court lacked authority to adjust the boundary line under the Compact and accordingly sustained New Jersey's exception in this matter.[207] The majority reasoned that since the origi-

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boundary between States, it is the main, the permanent river, which constitutes the boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark." *New Jersey v. New York*, 118 S. Ct. at 1749 (quoting Handley's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374, 380-81 (1820)).

[201] *See New Jersey v. New York*, 118 S.Ct. at 1749.

[202] *See id.*

[203] *See id.*

[204] *See id.* at 1750.

[205] *See id.* at 1749-50. New York's expert testified that the use of pilings to create piers was not common during the middle of the Nineteenth Century and that it would have been simpler at that time to fill the shallow waters around the Island for pier construction. *See id.* at 1750.

[206] *See id.* at 1750.

[207] *See id.*

nal boundary line was part of the 1834 Compact between New Jersey and New York, which was approved by Congress pursuant to the Compact Clause, the boundary line effectively became federal law.[208] Justice Souter further concluded that the Court could not substitute its judgment on this issue for that of Congress, unless the Compact itself was found to be unconstitutional.[209] Although Justice Souter acknowledged that the Special Master redrew the line for a variety of practical reasons,[210] the majority nonetheless emphasized that the Court had to respect the express terms of the Compact.[211]

B. JUSTICE BREYER'S CONCURRENCE

Justice Breyer, joined by Justice Ginsburg, concurred with Justice Souter's majority opinion but wrote separately to express disagreement with the positions taken in the dissents authored by both Justice Stevens and Justice Scalia.[212] First, although Justice Breyer agreed that the terms of the Compact were ambiguous, the concurrence disagreed with the argument that custom and history should resolve this ambiguity, as advocated by Justice Scalia. [213] Unlike Justice Scalia, who analyzed the parties' conduct to infer the meaning of the Compacts' ambiguous text, the concurrence highlighted the majority's point

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[208] *See id.*; *see also supra* notes 68-71 and accompanying text.

[209] *See id.*

[210] The Special Master was concerned that using the boundary line as it existed in 1834 would pass through the Main Building, the Baggage and Dormitory Building, and the Boathouse Building. *See Report of the Special Master*, *supra* note 4, at 162. In addition, New York's jurisdictional area on the Island would not be accessible to the ferry slip in front of the Main Building, which the Special Master saw as a potential problem for New York City's Circle Line boats, which transport millions of tourists to the Island annually. *See id.* at 163.

[211] *See New Jersey v. New York*, 118 S. Ct. at 1750. Justice Souter appreciated "the difficulties of a boundary line that divides not just an island but some of the buildings on it, but these drawbacks are the price of New Jersey's success in litigating under a compact whose fair construction calls for a line so definite." *Id.*

[212] *See id.* at 1751 (Breyer, J., concurring).

[213] *See id.* Justice Breyer focused on the ambiguities in the terms of Article First and Article Second, which were the main parts of the Compact on which New York based its case. *See id.* The concurrence did not find any "relevant ambiguity;" instead, Justice Breyer noted that the Compact is silent with respect to landfilling and its effects to jurisdiction over the Island. *See id.*

that silence does not equal ambiguity.[214] Instead, Justice Breyer advanced the proposition that ordinary background law should apply where the Compact was silent, and through the application of the common law doctrine of avulsion, the Island's sovereignty belongs to the state in whose waters the avulsion is found.[215] Justice Breyer then concluded that the avulsion occurred in New Jersey's waters.[216]

Second, Justice Breyer disagreed with Justice Stevens' view that New Jersey lost sovereignty over the island to New York through the doctrine of prescription.[217] The concurrence emphasized that during the alleged prescriptive period, the federal government, not the State of New York, controlled the Island.[218] Therefore, it would have been unreasonable, Justice Breyer argued, to expect New Jersey to protest New York's activities at a time when the actual control of the Island was under the dominion of the national government.[219] Justice Breyer concluded that granting sovereignty to New York based on the doctrine of prescription would set an undesirable precedent for future cases, given the high burden of proof required to make a showing of prescription.[220]

C. JUSTICE STEVENS' DISSENT

Justice Stevens authored a dissenting opinion, which agreed with the majority's legal analysis, but reached a contrary conclusion.[221] Justice Stevens' opinion focused primarily on the doctrine of prescription, finding that the relevant parties, New Jersey, New York, and the United States, shared a belief during the alleged prescriptive period that the original portion of the Island, as well as its filled portions, were part of New York.[222] In Justice Stevens' view,

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[214] *See id.*

[215] *See id.*

[216] *See id.*

[217] *See id.*

[218] *See id.*

[219] *See id.*

[220] *See id.*

[221] *See id.* at 1752 (Stevens, J., dissenting).

[222] *See id.* The prescriptive period covers the time from the initiation of the landfilling in 1890 until the cessation of use of the Island as an immigrant receiving station in 1954.

the evidence demonstrated that New York acquired sovereignty over the entire Island through both New York's acts of prescription and New Jersey's acquiescence.[223] The Justice described the showing as not simply by a preponderance of the evidence, but by "clear, convincing, and uncontradicted evidence."[224]

Justice Stevens' appraisal of the evidence began with a review of New York's prescriptive acts.[225] First, the dissent disagreed with the majority's dismissal of much of New York's prescriptive evidence.[226] Justice Stevens assumed that the majority dismissed the evidence primarily because New Jersey conceded that the original portion of the Island was in New York and because the United States occupied the Island during the prescriptive period.[227] The dissent pointed out, however, that during the prescriptive period, none of these three parties thought that the Island was in two states; moreover, New Jersey's claim that the Island was split did not arise until well after the end of the prescriptive period.[228] Second, Justice Stevens pointed to federal and New York census data showing that the Island residents considered themselves as New York residents[229] and to evidence that those residents voted in New York elections.[230] Third, Justice Stevens indicated that New York issued the certificates

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See id.

[223] *See id.* at 1759 (Stevens, J., dissenting).

[224] *Id.*

[225] *See id.* at 1752-57 (Stevens, J., dissenting).

[226] *See id.* at 1752 (Stevens, J., dissenting).

[227] *See id.* Justice Stevens would instead have focused on the expectations of New Jersey, New York, and the United States, which were the three parties who agreed to fill the Island for its use as an immigration station. *See id.*

[228] *See id.* at 1753 (Stevens, J., dissenting). New Jersey did not claim that the boundary split the Island until 1963. *See id.*

[229] *See id.* Justice Stevens discussed the nonimmigrant population as increasing from 93 people in 1915, to 124 in 1920, and to 182 in 1925. *See id.* These people were employed as "cooks, maids, nurses, and hospital attendants." *Id.*

[230] *See id.* The dissent described New York City Board of Elections maps showing Ellis Island as part of a New York State Assembly District in 1918, 1926, 1927, 1930, and 1945-46 and records showing that Island residents (non-immigrants) actually voted in 1918, 1919, 1925, 1930, and 1953. *See id.* Ellis Island was also part of a New York State Senate District according to the 1894 and 1938 New York State Constitutions and was included in a federal congressional district since 1911. *See id.*

of births and deaths that occurred on the Island during the prescriptive period,[231] and that the hundreds of marriages performed on the Island were conducted pursuant to New York law.[232] Fourth, Justice Stevens highlighted that the millions of immigrants passing through the Island, as well as the Island's residents, believed that they were in New York.[233] Finally, the dissent's view of the evidence showed that New York employees provided police or fire protection services on the Island as needed[234] and that lower courts shared a belief that the Island was part of New York.[235]

Next, Justice Stevens concluded that New Jersey acquiesced to New York's prescriptive acts.[236] Due to the close proximity of the Island to New Jersey, Justice Stevens opined that notice of New York's official acts should have been

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[231] *See id.* at 1754 (Stevens, J., dissenting). Justice Stevens noted that although the hospital in which these births and many of the deaths occurred was located on the filled portion of the Island, New York, not New Jersey, issued the vital statistics certificates. *See id.*

[232] *See id.* Justice Stevens reviewed evidence of marriages between 1892 and 1907 "solemnized under New York law," with no evidence of any marriages conducted according to New Jersey law. *Id.* Justice Stevens also showed that after 1907, marriage licenses were obtained by Ellis Island residents in New York City. *See id.*

[233] *See id.* at 1754-55 (Stevens, J., dissenting). Justice Stevens discussed the immigrants' steamship tickets listing their destination as "New York," with each "certificate of arrival" as being marked "Ellis Island, New York." *See id.* The dissent also quoted the Landing Cards issued by federal officials to the immigrants that stated in eight languages: "[w]hen landing at New York this card is to be pinned to the coat or dress of the passenger in a prominent position." *Id.* Justice Stevens also described the Island's residents as listing their mailing addresses as "Ellis Island, New York," and the U.S. Postal Service included Ellis Island in New York postal zone. *See id.* at 1755 (Stevens, J., dissenting).

[234] Justice Stevens referenced police and firefighting activity in 1897, 1916, 1934, and 1942, which the dissent viewed as being consistent with New York maintaining jurisdiction over the Island, in spite of the federal control of the Island. *See id.* at 1756 (Stevens, J., dissenting). Moreover, Justice Stevens disagreed with the Special Master's finding that New Jersey maintained police activity on the Island, as the dissent found only one instance of New Jersey police activity in the record—in 1966, well after the prescriptive period. *See id.* at 1756 n.10 (Stevens, J., dissenting).

[235] *See id.* at 1756 (Stevens, J., dissenting). Justice Stevens referenced several instances in the record supporting this proposition, including a 1931 Third Circuit decision holding that the District Court for the District of New Jersey did not have jurisdiction to hear a petition for habeas corpus filed by a detainee on the Island. *See id.* at 1756 n.12 (Stevens, J., dissenting) (citing United States *ex rel.* Belardi v. Day, 50 F.2d 816, 817 (3d Cir. 1931)).

[236] *See id.* at 1757-59 (Stevens, J., dissenting).

presumed.[237] Although New Jersey presented evidence that it did not acquiesce to New York's sovereignty by showing that one of its representatives tried to persuade federal officials to use New Jersey labor for projects being constructed on the Island, the dissent was not persuaded.[238] Justice Stevens discounted this solicitation by New Jersey labor in finding that the request simply illustrated New Jersey's knowledge of New York's acts on the Island.[239]

Moreover, Justice Stevens also noted that Justice Breyer's concurrence referenced a statement made by the Solicitor of Labor, who remarked that Ellis Island was United States territory and, as such, was neither part of New York nor New Jersey.[240] Justice Stevens dismissed this statement with two points.[241] First, the Solicitor of Labor's statement was incorrect because many federal enclaves throughout the country are subject to the jurisdiction of the state in which it is located, and, second, there was no evidence that anyone else shared that view.[242] Finally, because the matter was dropped for twenty years after New Jersey's labor request was denied, Justice Stevens viewed this as a further illustration of New Jersey's acquiescence.[243]

In conclusion, Justice Stevens disagreed with the majority's evaluation of the evidence and lamented that the majority's endorsed interstate boundary line actually intersects three buildings.[244] Justice Stevens viewed the line as bla-

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[237] *See id.* at 1757 (Stevens, J., dissenting).

[238] *See id.* at 1757-58 (Stevens, J., dissenting). In 1934 and 1935, New Jersey Representative Norton negotiated with federal officials in an attempt to secure construction work on Ellis and Bedloes Islands for New Jersey labor. *See id.* In her correspondence, she claimed that Ellis Island was in New Jersey, but the Department of the Treasury rejected her request. *See id.*

[239] *See id.* at 1758 (Stevens, J., dissenting).

[240] *See id.* Charles Wyzanski was the Solicitor of Labor at the time of Representative Norton's request, which was ultimately rejected. *See id.*

[241] *See id.* at 1759 (Stevens, J., dissenting).

[242] *See id.*

[243] *See id.* at 1757 (Stevens, J., dissenting).

[244] *See id.* at 1759 (Stevens, J., dissenting). Justice Stevens observed that "[t]he new boundary line intersects the Main Building, the Baggage and Dormitory Building, and the Boathouse Building." *Id.* Expressing a similar concern, the Second Circuit in *Collins* quoted the District Court for the Southern District of New York, which stated that it would "mak[e] it necessary for every person injured on Ellis Island to engage in litigation to establish the exact spot on the island where the injury was sustained" in order to determine whether New York or New Jersey law applied. Collins v. Promark Prods., Inc., 956 F.2d

tantly unfair to New York, because no party could have foreseen the creation of such an odd boundary line during the prescriptive period.[245]

D. JUSTICE SCALIA'S DISSENT

Justice Scalia, joined by Justice Thomas, prepared a separate dissent, echoing the opinion of Justice Stevens that New Jersey's claims of sovereignty should have been foreclosed because the evidence showed that all interested parties believed that the filled portions of the Island, as well as the original area, were part of New York.[246] Unlike Justice Stevens, however, Justice Scalia was not inclined to rely on the doctrine of prescription because of the high burden of proof required to establish the existence of prescriptive acts and acquiescence to those acts.[247] Rather, Justice Scalia sought to rely on basic contract law to interpret the Compact of 1834.[248] Justice Scalia likewise viewed the language of the Compact as ambiguous and relied on the parties' later conduct to interpret its meaning.[249] Justice Scalia's assessment of the evi-

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383, 388 (2d Cir. 1992).

[245] *See New Jersey v. New York*, 118 S. Ct. at 1759 (Stevens, J., dissenting). Justice Stevens concluded: "During that entire period both States most certainly treated Ellis Island as part of a single State. Unquestionably, that State was New York." *Id.*

[246] *See id.* at 1759 (Scalia, J., dissenting).

[247] *See id.*; *see also supra* Part IV.A.2.

[248] *See New Jersey v. New York*, 118 S. Ct. at 1760 (Scalia, J., dissenting). In addition to the Uniform Commercial Code §2-208(1), Justice Scalia referenced two sections from the Restatement of Contracts. *See id.* (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 202-03 (1979)).

[249] *See id.* The Court generally does not apply the parol evidence rule and allows the introduction of extrinsic evidence when interpreting an interstate compact because of its two-fold character: contract and statute. *See Report of the Special Master*, *supra* note 4, at 46-47.

> [I]t is appropriate to look at extrinsic evidence of the negotiation history of the Compact . . . [because] a congressionally approved Compact is both a contract and a statute and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous . . . . Thus, resort to extrinsic evidence of the Compact negotiations . . . is entirely appropriate.

Id. at 47-48 (quoting Oklahoma v. New Mexico, 501 U.S. 221, 234 n.5 (1991)). Justice Scalia argued that the Court has applied this principle to interstate boundary cases, as in

dence indicated that New York, New Jersey, and the United States all acted as though New York had sovereignty over Ellis Island; therefore, the State of New York should have been granted sovereignty over the entire Island.[250]

V. CONCLUSION

The Supreme Court's original jurisdiction jurisprudence is apparently well established, particularly regarding interstate boundary disputes. In *New Jersey v. New York*, the Court granted New Jersey's request to file its complaint, without preparing an opinion documenting any "gatekeeping" analysis.[251] The Court simply acquiesced to New Jersey's invocation of the Court's original jurisdiction, presumably because the matter involved an interstate boundary dispute, which the Court accepts almost without question.[252] Furthermore, it is likely that the Court will continue to accept future interstate boundary disputes onto its original jurisdiction docket.

The justices have also maintained that the Supreme Court, rather than a lower federal court, is the only tribunal with the authority to adjudicate an interstate boundary dispute. For example, in deciding the boundary issue in *New Jersey v. New York*, the Supreme Court declined to follow the Second Circuit's interpretation of the Compact of 1834 in *Collins*.[253] Similarly, in *Georgia v. South Carolina*, the Supreme Court declined to follow a Fifth Circuit case, which held that certain islands were part of the State of Georgia.[254] Notwithstanding the Fifth Circuit's decision, the Supreme Court later awarded jurisdiction of those islands to the State of South Carolina.[255] Justice Blackmun's

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Vermont v. New Hampshire, in which the court stated "the practical construction of the boundary by the acts of the two states and of their inhabitants tends to support our interpretation of the Order-in-Council of 1764." *New Jersey v. New York*, 118 S. Ct. at 1760 (Scalia, J., dissenting) (quoting Vermont v. New Hampshire, 289 U.S. 593, 619 (1933)). Justice Scalia would have applied this principle to the present case as it was in *Vermont*. *See id.*

[250] *See id.*

[251] *See* New Jersey v. New York, 511 U.S. 1080 (1994) (mem.).

[252] *See supra* note 41 and accompanying text.

[253] *See New Jersey v. New York*, 118 S. Ct. at 1735-38; *see also supra* Part III.B.

[254] *See* Georgia v. South Carolina, 497 U.S. 376, 384 (1990) (citing United States v. 450 Acres of Land, More or Less in Chatham County, 220 F.2d 353 (5th Cir.), *cert. denied*, 350 U.S. 826 (1955)).

[255] *See id.*

opinion in *Georgia v. South Carolina* restated the proposition that the Supreme Court, rather than a court of appeals, is the proper forum in which to adjudicate an interstate boundary dispute.[256]

The use of special masters to assist the Court's factfinding mission when sitting in original jurisdiction, however, has generated some controversy. For example, Justice Harlan[257] and Justice Rehnquist[258] both expressed concern that the convenience of employing a special master might interfere with the policy that the Court's original jurisdiction be "invoked sparingly."[259] While these considerations have merit, the gate-keeping rules that the Court employs, however, sufficiently circumscribe the Court's original jurisdiction docket only to "appropriate cases."[260] The Court's implementation of the appropriateness test has apparently managed to minimize the number of original jurisdiction cases on its docket.[261] Moreover, the special master device is an excellent compromise that enables the Court to devote most of its attention and energy to its appellate duties while simultaneously allowing "dignified" state parties the ability to litigate in the only equally dignified forum: the Supreme Court.[262] Precedent for the delegation of judicial duties by high-ranking officials can be traced to Biblical times, when Moses' father-in-law advised him to entrust some of his judicial duties to others.[263] Likewise, the modern-era Court appropriately dele-

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[256] *See id.* at 392 (citing Durfee v. Duke, 375 U.S. 106, 115-16 (1963)).

[257] *See supra* notes 52-54 and accompanying text.

[258] *See supra* notes 47-49 and accompanying text.

[259] *See* Maryland v. Louisiana, 451 U.S. 725, 761 (1981) (No. 83 Orig.) (Rehnquist, J., dissenting) (quoting Utah v. United States, 394 U.S. 89, 95 (1969)).

[260] *See supra* notes 37-39 and accompanying text.

[261] *See supra* note 30.

[262] *See* A. Leo Levin & Michael E. Kunz, *Thinking About Judgeships*, 44 AM. U. L. REV. 1627, 1647 (1995). *But see* DeGraw, *supra* note 44 (criticizing the use of special masters in institutional reform litigation, particularly during the remedial phase).

[263] *See Exodus* 18:13-27 (New Revised Standard Version). Jethro cautioned Moses that "[w]hat you are doing is not good. You will surely wear yourself out . . . . [f]or the task is too heavy for you; you cannot do it alone." *Id.* at 18:17-19. Following Jethro's advice, Moses "chose able men from all Israel and appointed them as heads over the people . . . . And they judged the people at all times; hard cases they brought to Moses, but any minor case they decided themselves." *Id.* at 18:25-26.

gates its factfinding mission to special masters in original jurisdiction cases.[264] Further, utilization of a special master in original jurisdiction has the added benefit of eliminating local prejudices if the Court were to delegate a state-party case to a federal district court.[265]

In *New Jersey v. New York*, the justices apparently made a careful evaluation of the evidence, especially considering that there were two dissenting opinions and one concurring opinion. Justice Stevens surely devoted considerable effort to his analysis of the evidence, as Justice Stevens' lengthy dissenting opinion carefully reviewed most of the factual evidence, particularly that dealing with prescription. Unfortunately, there is no way to determine whether the justices' examination of the evidence interfered with their appellate functions. It is likely, however, that the justices' efforts could not have been terribly intrusive to their other duties, because Special Master Paul Verkuil's report was outstanding, as it cogently summarized both the voluminous number of facts and the law of the pertinent issues.

Although the Court is not bound to give the special master the same level of deference on findings of fact as the Court normally would in reviewing a trial court's determinations,[266] in the context of interstate boundary dispute cases, the Court has nonetheless given a great deal of deference.[267] In *New Jersey v. New York*, the parties raised a total of six exceptions to the Special Master's report, but the Court overruled five of them, while sustaining only one.[268] The Court's decision in *New Jersey v. New York* is illustrative of the pattern of def-

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[264] *See* Levin & Kunz, *supra* note 262, at 1647-48. In discussing special masters, the authors of *Thinking About Judgeships* stated that "[b]ecause judges have an interest in the effectiveness of any special masters whom they appoint, they are interested in quality. Selection does not appear to be a matter of immediate concern." *Id.* at 1648.

[265] In arguing that the Supreme Court would be vital to adjudicate interstate boundary disputes, Alexander Hamilton stated that "it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded." THE FEDERALIST NO. 80, at 447 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

[266] *See supra* note 46 and accompanying text.

[267] *See infra* note 269. At oral argument in *New Jersey v. New York*, one of the justices stated that "[w]e rarely second-guess a master on a factual issue." Transcript of Oral Argument at 44, New Jersey v. New York, 118 S. Ct. 1726 (1998) (No. 120 Orig.), *available in* 1998 WL 15118.

[268] *See* New Jersey v. New York, 118 S. Ct. 1726, 1750-1751 (1998) (No. 120 Orig.).

erence to the special master's findings in interstate boundary cases,[269] and it is likely that this pattern will continue.[270]

Applying these principles to the present case, the Court properly concluded that New Jersey has sovereignty over the filled portion of Ellis Island, given the Compact's silence regarding the landfilling issue and the common law doctrine of avulsion. Yet, the resulting boundary line is problematic, as Justice Stevens deplored in his dissent.[271] Although the Special Master reached an imperfect solution, Mr. Verkuil's recommended boundary line is more practical than the oddly-shaped line of the 1834 boundary.[272] Nonetheless, the majority

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[269] *See, e.g.*, Illinois v. Kentucky, 500 U.S. 380 (1991) (No. 106 Orig.) (overruling all but one of Kentucky's exceptions to the Special Master's report); Georgia v. South Carolina, 497 U.S. 376 (1990) (No. 74 Orig.) (overruling all of South Carolina's exceptions and overruling all but one of Georgia's exceptions); Kentucky v. Indiana, 474 U.S. 1 (1985) (No. 81 Orig.) (adopting the Special Master's report; no exceptions filed); Arkansas v. Mississippi, 471 U.S. 377 (1985) (No. 92 Orig.) (adopting the Special Master's report and entering decree); Oklahoma v. Arkansas, 473 U.S. 610 (1985) (No. 79 Orig.) (adopting the Special Master's report and entering decree accordingly); Louisiana v. Mississippi, 466 U.S. 96 (1984) (No. 86 Orig.) (overruling all exceptions); Texas v. Oklahoma, 457 U.S. 172 (1982) (No. 85 Orig.) (filing of the Special Master's report and entering decree with minor adjustments); South Dakota v. Nebraska, 458 U.S. 276 (1982) (No. 72 Orig.) (filing of the Special Master's report and entering decree); California v. Arizona, 452 U.S. 431 (1981) (No. 72 Orig.) (approving the Special Master's report and granting decree); Tennessee v. Arkansas, 454 U.S. 809 (1981) (No. 77 Orig.) (adopting the Special Master's report and recommendations); California v. Nevada, 447 U.S. 125 (1980) (No. 73 Orig.) (overruling Nevada's exceptions and approving the Special Master's report and recommendations in part); New Hampshire v. Maine, 426 U.S. 363 (1976) (No. 64 Orig.) (accepting the Special Master's report and entering decree); Mississippi v. Arkansas, 415 U.S. 289 (1974) (No. 48 Orig.) (accepting the Special Master's report and recommended decree and overruling Arkansas' exceptions); Michigan v. Ohio, 410 U.S. 420 (1973) (No. 30 Orig.) (overruling Michigan's exceptions); Arkansas v. Tennessee, 397 U.S. 88 (1970) (No. 33 Orig.) (overruling Arkansas' exceptions and adopting the Special Master's report); Illinois v. Missouri, 399 U.S. 146 (1970) (No. 18 Orig.) (adopting the Special Master's report and entering decree); Louisiana v. Mississippi, 384 U.S. 24 (1966) (No. 14 Orig.) (overruling all exceptions and confirming the Special Master's report).

[270] *See* Louisiana v. Mississippi, 516 U.S. 22 (1995) (No. 121 Orig.). This case was the next original jurisdiction case filed after *New Jersey v. New York*, although the Court reached its decision prior to the conclusion of the present case. *See id.* Like *New Jersey v. New York*, the Court's decision in *Louisiana v. Mississippi* is illustrative of the continuing deference granted to special masters, as the Court praised the report prepared by Special Master Vincent L. McKusick and overruled Louisiana's exceptions. *See id.* at 24.

[271] *See supra* Part IV.C.

[272] For an illustration of the 1834 boundary line accepted by the Court and the Special Master's recommended boundary line, which was rejected by the Court, see *infra* Appendix A2.

in *New Jersey v. New York* held that redrawing the boundary would overstep the Court's authority, given that the justices were interpreting a congressionally-approved Compact.[273] For this reason, the majority rejected the Special Master's notion that the Court should use its equitable powers to create a reasonable solution to the practicalities involved in establishing the interstate boundary, as the Court has done in the past.[274]

In lieu of litigation, perhaps the best solution for both parties would have been to negotiate an agreement to share jurisdiction over the Island. First, there is a precedent for settlement in this very matter, as the two states ceased their Nineteenth Century litigation and subsequently settled the dispute by forming the Compact of 1834.[275] Second, New Jersey and New York are in close proximity with each other and have formed joint ventures in the past, with the most notable being the Port Authority of New York and New Jersey.[276] Finally, and most significantly, the Court acknowledged that litigating interstate boundary disputes "is obviously a poor alternative to negotiation between the interested States."[277] Further, the majority seemed to agree with both the Special Master's conclusions and Justice Stevens' dissenting opinion that the Court's choice of boundary line creates difficulties and hinted that it

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[273] *See supra* notes 68-71 and accompanying text.

[274] *See Report of the Special Master*, *supra* note 4, at 146-50. The Special Master invoked the words of Chief Justice Marshall in justifying the use of the Court's equitable powers to adjust the boundary line: "in great questions which concern the boundaries of States, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals." *Id.* at 147 (quoting Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374, 383-84 (1820)).

[275] *See supra* Part III.B.

[276] The Port Authority ("PA") was founded in 1921 as the Port of New York Authority but was later renamed in 1972 to the Port Authority of New York and New Jersey to recognize New Jersey's part in the two-state agency. *See* The Port of Authority of New York and New Jersey, *Historical Overview* (visited Apr. 15, 1999) <http://www.panynj.gov/-hismain.html>. The Governors of New Jersey and New York each appoint six members to the PA Board of Commissioners, and each governor retains the right to veto actions from his or her appointed board members. *See* The Port of Authority of New York and New Jersey, *Finance & Governance* (visited Apr. 15, 1999) <http://www.panynj.gov/govmain.html>. Each state must approve a project before it can be initiated by the PA. *See id.*

[277] New Jersey v. New York, 118 S. Ct. 1726, 1750 (1998) (quoting Texas v. New Mexico, 462 U.S. 554, 567 (1983).

would have been better for the two states to settle the matter together.[278]

As a result of the litigation, New York's jurisdictional portion of the Island is effectively an enclave within New Jersey territory, having limited access to the ferry slip.[279] This situation raises difficulties for New York City because it operates Circle Line ferries, which ship millions of tourists to the Island each year.[280] New Jersey is now in the forbidding situation of having jurisdiction over the "handyman's special"[281] portion of the Island, where twenty-nine buildings are located that will require an estimated two hundred million dollars to restore.[282] Both states presently have some jurisdiction over portions of the Island, but the entire Island is owned by the federal government and operated by the National Park Service. This predicament could lend itself to a tripartite organization having total control. Such an association would be comprised of representatives from both states and the federal government, with all three being jointly responsible for restoring and operating the Island, in conjunction with the Statue of Liberty-Ellis Island Foundation.[283] A partnership arrangement such as this, could have been the most equitable solution for all parties.

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[278] *See id.* Justice Souter recalled earlier precedent, which observed that "[a] more convenient boundary line must therefore be 'a matter for arrangement and settlement between the States themselves, with the consent of Congress.'" *Id.* (quoting Indiana v. Kentucky, 136 U. S. 479, 508 (1890)).

[279] *See Report of the Special Master*, *supra* note 4, at 163.

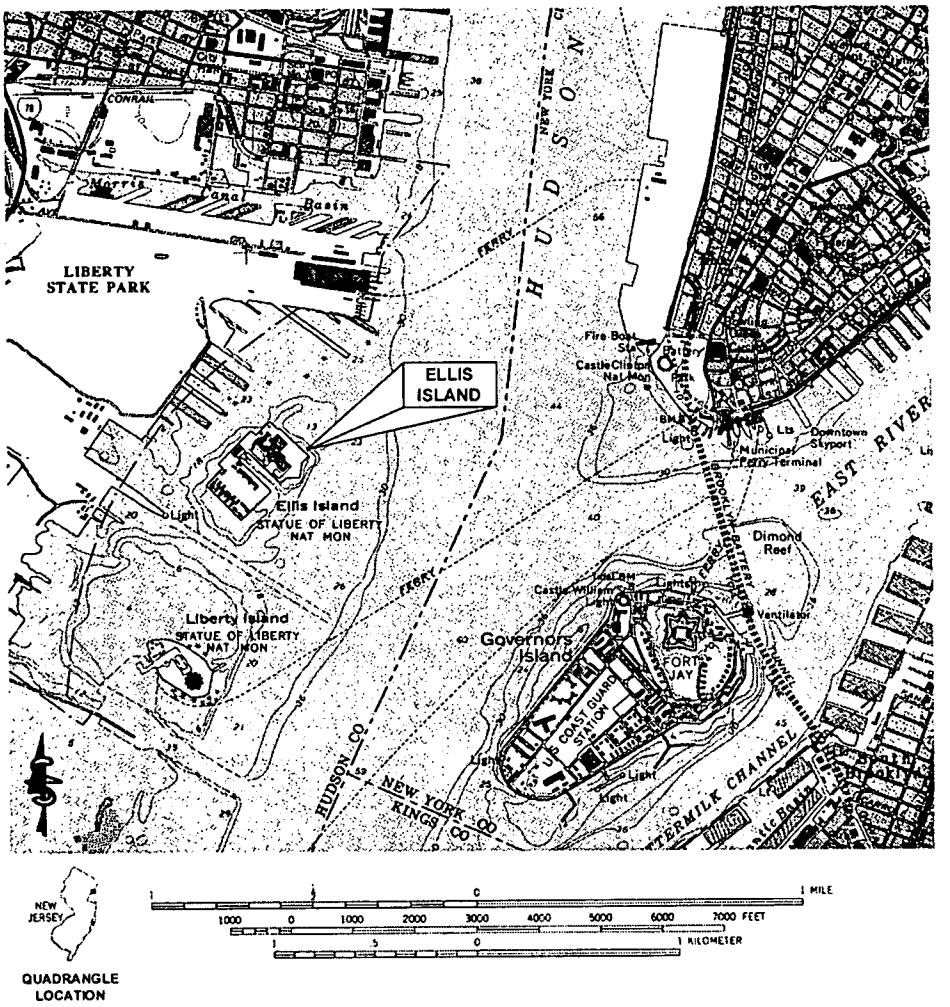
[280] *See id.*

[281] McLaughlin, *supra* note 74.

[282] *See id.*

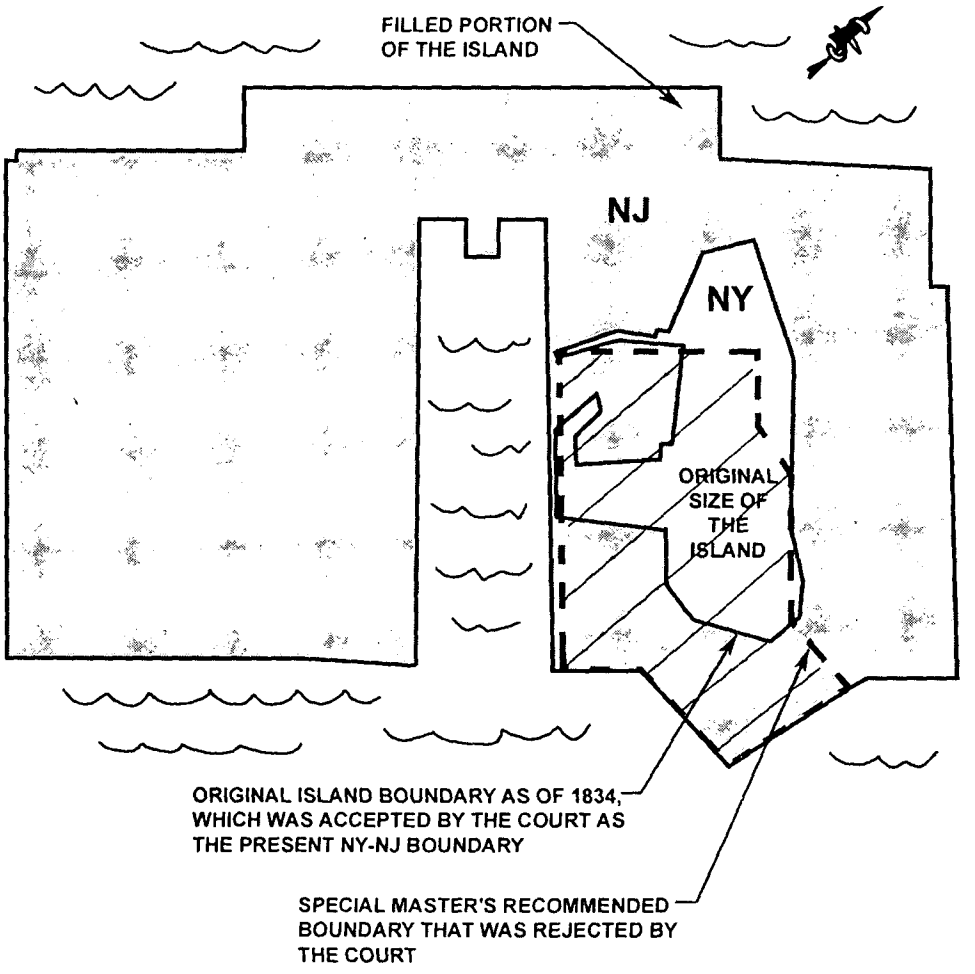
[283] *See supra* note 5.

APPENDIX A



SOURCE:
JERSEY CITY QUADRANGLE, NEW JERSEY-NEW YORK, USGS 7.5 MINUTE SERIES (TOPOGRAPHIC), DATED 1967, PHOTOREVISED 1981.

Appendix A1
Site Location Map



SOURCE:
FINAL REPORT OF THE SPECIAL MASTER, NO. 120, ORIGINAL, APPENDIX F AND APPENDIX K (1997).

Appendix A2

Boundary Line on Ellis Island

APPENDIX B

Chronology of Major Events on Ellis Island

PERIOD Pre- 18th Century

- Mohegan Indians refer to Ellis Island as "Kioshk," meaning Gull Island.
- The Island was purchased by the Dutch of New Amsterdam, who name the island as one of the Oyster Islands.
- In 1664, England seized land from the Dutch. King Charles II included the Island in a grant to his brother the Duke of York, who in turn granted it to Lord Berkeley and Sir George Carteret, the proprietors of New Jersey.

PERIOD 18th Century

- In 1785, the eponymous Samuel Ellis owned the Island. His heirs were the Island's last private owners.
- After the conclusion of the American Revolutionary War, New York and New Jersey began their long dispute about their interstate boundary.

PERIOD 19th Century

- In 1800, New York cedes jurisdiction of the Island to the United States but reserved the right to serve judicial process.
- Prior to the War of 1812, the US Army took over the Island and constructed a barracks and magazine. The Army continued using the Island as a fortress until 1861 and maintained it as a munitions magazine until the 1880's.
- In 1807, New Jersey and New York appointed commissioners to prepare a compromise regarding their common boundary; no agreement was reached.
- In 1829, New Jersey filed suit in *New Jersey v. New York*, but the case was never tried to judgment. Instead, the states negotiated an agreement, resulting in the Compact of 1834. New York held to have "present jurisdiction" over the Island, which was approximately three acres.
- Until the 1880's, the states were controlling immigration, but the vast numbers of immigrants overwhelmed the state systems, prompting the federal government to initiate national immigration regulation. Congress decided that an island immigration receiving station would be ideal, and Ellis Island was chosen.
- In 1892, the new Ellis Island Immigration Station opened. By this point, the federal government had almost doubled the Island's size to six acres.
- By 1897, the Island was 14 acres, but the immigration station

burned.

- In 1899, the Island's hospital was built on filled land (area known as "Island No. 2," which was connected to the main Island by a gangway).

PERIOD 20th Century

- In 1900, a new depot was built.
- Between 1906 and 1911, the Island's contagious disease hospital was built on 4.75 acres of fill (area known as "Island No. 3," also connected via gangway). Prior to construction, New Jersey challenged the federal government's authority to appropriate submerged lands for filling purposes. In 1904, New Jersey conveyed 48 acres of territory surrounding the Island to the United States, as recorded in a Hudson County deed dated Dec. 23, 1904.
- In 1907, immigration reaches its highest point on the Island, with about 5,000 arrivals daily. *Central R.R. Co. v. Jersey City* was decided, with the Court holding that the Compact of 1834 allowed New Jersey to levy taxes on submerged lands.
- During the 1920's, two additional acres were added, and by 1934 the Island had grown in size from 3 acres to 27.5 acres.
- By 1954, the number of new arrivals had dropped to about 200 per day, and the Immigration and Naturalization Service (INS) closed the station.
- After the station was closed, both New Jersey and New York announced that it intended to collect taxes from the Island if it were taken over by a private owner.
- In 1960, the Council of State Governments unsuccessfully attempted to mediate the jurisdictional dispute.
- The federal General Services Administration (GSA) had offered the Island for sale, but in 1964 the Secretary of the Interior decided that the Island should be developed as a national historic site. The National Park Service was given legal title to the Island. Restoration of the Island began in 1976 and continues presently.
- In 1986, New York failed to enact an agreement between New Jersey and New York to forward tax revenue from the Island into a fund to help the homeless.
- In 1992, the Second Circuit held that New York law applied on the filled portion of the Island in *Collins v. Promark Prods., Inc.* In 1993, the present case was filed, and in 1998 the Supreme Court held in *New Jersey v. New York* that New Jersey had sovereign authority over the filled portion of the Island.