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## **The Role of Historical Context in *New Jersey v. Delaware III* (2008)**

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# THE ROLE OF HISTORICAL CONTEXT IN NEW JERSEY v. DELAWARE III (2008)

**“The past is a foreign country: they do things differently there.”**

--L. P. Hartley, from *“The Go Between”*

The 2008 decision of the United States Supreme Court in *New Jersey v. Delaware*<sup>1</sup> (“*NJ v. DE III*”) was hailed as a victory for Delaware, and so it was. The Court upheld Delaware’s authority to block the construction of a liquefied natural gas (“LNG”) unloading terminal that would have extended from New Jersey’s side of the Delaware River well into Delaware territory. But while the case involved modern concerns over the environment, clean energy, and even the threat of terrorist attack, the States’ underlying dispute was, like the River itself, of ancient origin, with a folklore of its own, and powerful, sometimes twisting currents. This was New Jersey’s third Supreme Court original jurisdiction action against Delaware since the Civil War, all challenging Delaware’s claim to sovereignty within a twelve-mile circle from the town of New Castle, which reaches across the River to within a few feet of the New Jersey side. In *NJ v. DE III*, the Court was called on to (i) construe a 1905 interstate compact (the “Compact” or “1905 Compact”)<sup>2</sup> by which the States settled the first suit in 1907 (“*NJ v. DE I*”)<sup>3</sup>; (ii) apply the Compact in light of the Court’s 1934 decision resolving the States’ boundary dispute in the second suit (“*NJ v. DE II*”)<sup>4</sup>; and then (iii) determine the effect of the Compact and the boundary decision on Delaware’s authority to enforce its 1971 Coastal Zone Protection Act.<sup>5</sup> This would prove no simple task.

At the heart of the dispute lay Article VII of the 1905 Compact, which allowed that each State “may, on its own side of the river, continue to exercise riparian jurisdiction” and make grants

“of riparian lands and rights” under its own laws.<sup>6</sup> These few words spawned five different readings in *NJ v. DE III*: one by the Special Master in his 2007 report to the Court,<sup>7</sup> one by a five-member majority of the Court, one by Justice Stevens concurring in the judgment, one by Justice Scalia in dissent, and another proposed extemporaneously by Justice Ginsburg at oral argument. At one end of \*102 this interpretive spectrum, Article VII ceded to New Jersey complete riparian jurisdiction over projects extending from its side of the River, including the proposed LNG terminal; at the other, Article VII conceded no jurisdictional rights at all, but merely permitted unobjectionable prior activities to continue.

In an early decision confirming its original jurisdiction over boundary disputes, the Court found it appropriate to “look to the history of the times, and examine the state of things existing when [the Constitution] was framed and adopted, to ascertain the old law, the mischief and the remedy.”<sup>8</sup> So too, in *NJ v. DE III*, the Court did well to examine the 1905 Compact in its historical context. To the extent that an interpretation overlooked or misread that context, or was driven by events occurring several decades thereafter, it invariably veered off course. Conversely, to the extent that a reading harmonized the words of the Compact with “the state of things existing” when it was framed and adopted, that reading drew closer to the drafters’ intent. In the end, the reading that best fit the historical context may well have been that of Justice Ginsburg, not in her opinion for the Court, but in her suggestion at oral argument that Article VII permitted the States to continue unobjectionable exercises of riparian jurisdiction in the shadow of their unresolved boundary dispute, without “do[ing] anything dispositive.”<sup>9</sup>

## I. THE HISTORICAL BACKGROUND

On the western side of the River near New Castle in 1682, by the ancient ritual of livery of seisin, William Penn received “turf and twig and water and Soyle of the River of Delaware,” supposedly leaving him “in quiet and peaceable possession thereof.”<sup>10</sup> But Penn’s grant first led to a decades-long dispute with Lord Baltimore and then to an even longer feud between Delaware and New Jersey, marked by arrests at gunpoint, threats of military action, and three Supreme Court cases. The attorneys who represented Delaware before the Supreme Court included figures of historical significance, such as Thomas F. Bayard (1828-1898), George Gray (1840-1925), and Clarence A. Southerland (1889-1973). And while Delawareans would point with pride to Southerland’s triumphant advocacy in the 1930’s boundary case, which confirmed Delaware’s sovereignty throughout the twelve-mile circle, New Jersey would insist, seven decades later, that Southerland had made key concessions that all but guaranteed victory for New Jersey in *NJ v. DE III*. The story bears some telling.

### A. The River, Penn’s Deed, and Early Jurisdictional Disputes

Prior to the arrival of the European settlers, the Lenni Lenape lived on both sides of the

Delaware River, paddling their dugout canoes to harvest its fish with woven nets, spears, and sometimes even their bare hands.<sup>11</sup> While fur trading and whaling brought the first Europeans to the River in the 17th century, explorers could not help but notice its uncommon abundance of fish. Thomas Yong, sailing for England in 1634, compared the climate to that of Italy, and of the fish he noted, “heere is plenty, but especially sturgeon all the sommer time ....”<sup>12</sup> Peter Lindeström, who came over in about 1650 as part of the New Sweden Colony, described shad for his masters in Stockholm as “a kind of large fish like the salmon, runs against the stream like a salmon ... a very fine flavored and excellent tasting fish ....”<sup>13</sup> And within a year of his arrival on the Delaware, William Penn wrote to friends back in England that “the sorts of fish in these parts are excellent and numerous. Sturgeon leap day and night that we can hear them ... in our beds.”<sup>14</sup>

By 1664, the Duke of York (later, King James II) had seized New Castle and the surrounding land from the Dutch. The Duke wanted to protect the town, so in 1680 his secretary proposed a circle boundary from its courthouse as a territorial buffer. In 1682, the Duke conveyed the territory, including the twelve-mile circle, to Penn, by livery of seisin.<sup>15</sup> Over time, Penn’s Three Lower Counties on the Delaware were recognized as a separate colony, and in 1776, when the United States declared independence from Great Britain, Delaware inherited the twelve-mile circle as its northeastern border.

By the end of the Revolutionary War, the cause of the first dispute over territory within the circle had arisen, literally, from the waters within it. In about 1783, there appeared at low tide in the River, about five miles below New Castle, a small muddy exposure of soil “about the size of a man’s hat.”<sup>16</sup> The exposure grew until it formed an island of about 87 acres. Based on a tradition that a vessel laden with peas had once sunk on the spot where the island arose, it was named “Pea Patch.” In 1784, New Jersey officials granted the island to private parties, and during the War of 1812, Delaware conveyed it to the federal government for the construction of a fort. By the 1840’s, these inconsistent conveyances led to a dispute between James Humphrey, who claimed title from New Jersey, and the United States, which claimed from Delaware.<sup>17</sup>

Pursuant to an act of Congress, in 1847 President Polk appointed the Honorable John Sergeant, an attorney and congressman from Pennsylvania, to arbitrate the dispute. After a lengthy evidentiary hearing, Sergeant found in the *Case of Pea Patch Island*<sup>18</sup> that Delaware had good title to convey throughout the twelve-mile circle. According to one legal journal, “Mr. Sergeant’s opinion ... having been formed after full and grave publick argument before him for many days ..., is far more authoritative than any opinion merely professional, and has all the intrinsic weight of the highest judicial opinion.”<sup>19</sup>\***104** The journal went on to predict that Sergeant’s opinion “can scarcely be reversed in any case which may again involve the question of this boundary.”<sup>20</sup> But as Justice Cardozo noted in his 1934 opinion in *NJ v DE II*, although Sergeant’s opinion was “a careful and able statement of the conflicting claims of right,” still “the controversy would not down.”<sup>21</sup>

## B. *New Jersey v. Delaware I* (1877 - 1907) and the 1905 Compact

On the morning of May 2, 1872, a tugboat named the *Falcon* steamed out from the Port of Wilmington with officers on board to intercept New Jersey fishermen on the eastern half of the River. The *Falcon*'s mission was to enforce Delaware's 1871 "Act to Protect Fishermen," which sought to save an industry already plagued by overfishing and pollution by requiring non-Delawareans to purchase a \$20 annual license to fish in the River.<sup>22</sup> The *Falcon* stopped twenty-two New Jersey fishermen without licenses, arrested them, and impounded their boats. When one resisted, a Delaware officer "drew a pistol and pointed it at the person so refusing, and said if he ... did not come on board of the 'Falcon,' he would make him ...."<sup>23</sup>

The arrests sparked outrage in New Jersey and ignited oratorical salvos from both sides of the River. New Jersey Governor Joel Parker put "all persons" (read: Delaware) on notice of New Jersey's jurisdiction "easterly of the middle line of said river." His Delaware counterpart, James Ponder, responded that Delaware did not regard the matter "as an open question," it being clear that Delaware's jurisdiction is "exclusive over the waters of said river to low water mark, on the eastern side of said river, within the twelve mile circle from New Castle."<sup>24</sup> Eventually, the States appointed commissioners to negotiate an interstate compact, but their efforts failed. In 1876, Delaware gave notice that it intended to resume enforcement of its 1871 fishing law.

On March 13, 1877, the Court granted New Jersey leave to file a Complaint challenging Delaware's territorial claim over the twelve-mile circle, launching *NJ v. DE I*.<sup>25</sup> The Complaint set forth a two-pronged attack. First, Delaware's chain of title from Penn was flawed, so that New Jersey had title to the middle of the River under the Treaty of Paris in 1783. Second, even if Delaware's claim was originally valid, New Jersey nevertheless had gained title to the middle of the River under the doctrine of "prescription and acquiescence" (akin to adverse possession) by virtue of its "long, peaceable and undisputed possession, use and enjoyment" of the River.<sup>26</sup> In support of its prescription claim, New Jersey alleged that it had taken numerous actions within the twelve-mile circle without objection by Delaware, including regulating fishing, exercising criminal jurisdiction over "wrongs committed," and authorizing residents to build piers.<sup>27</sup> This last allegation sowed the seeds of the jurisdictional conflict that would ultimately result in *NJ v. DE III*.

**\*105** Along with its Complaint, New Jersey filed a motion for a preliminary injunction to stop Delaware from enforcing its 1871 fishing law. In support of its motion, New Jersey submitted affidavits from fishermen who recalled the *Falcon* incident and warned that "if such arrests are attempted again they will be resisted and ... violence, bloodshed, and loss of life will be the ... almost certain result."<sup>28</sup> Within less than two weeks, on March 26, 1877, the Court issued an order granting New Jersey's motion, noting the threat of violence on the River.<sup>29</sup> But thereafter, the case went into a slumber of Van Winklean proportions, for over twenty years, as neither side was sufficiently bothered by the status quo to embark upon the tedious process of litigating the underlying chain of title and prescription claims.

Finally, in 1901, the clerk of the Court prodded counsel to resolve the matter. On or about February 14, 1901, Delaware Governor John Hunn, a respected Quaker businessman and son of a noted abolitionist,<sup>30</sup> issued a message to the General Assembly calling upon it to fund the defense of the State's birthright. In words that convey a depth of conviction that may sound quaint to modern ears, Hunn stated:

The unanimity with which the people of this State, through various General Assemblies and Executives, have always defended the integrity of the jurisdiction, territory, and sovereignty of this State in this controversy, constitutes a just guide for present action. I cannot bring myself to believe that the present generation of Delawareans will, when properly advised on the subject, find themselves less sensitive and earnest in maintaining the rights of the State than the generations which have preceded us ....

I therefore recommend that the General Assembly renew its dedication of purpose, not to abandon the vindication of its sovereign right and title to the territory which immemorially has been conceded to be a part of its domain, and that it shall make such provision for the further defense thereof against what must be considered the unfounded pretensions of the State of New Jersey, as will comport with the honor, dignity and best interests of the State.<sup>31</sup>

Needless to say, such provision was made.

In October 1901, Delaware filed a 67-page, type-set, single spaced Answer setting forth in meticulous detail its chain of title from William Penn and rebutting New Jersey's prescription claim.<sup>32</sup> As to the latter, Delaware stated that it did not know whether or not New Jersey residents had built wharves or other improvements on the easterly side of the River within the twelve-mile circle. But even if they had, the building of such structures could not "affect in any way" Delaware's title to any part of the soil or bed of the River within the twelve-mile circle not "actually and physically occupied" by the structures. And even then:

[New Jersey] cannot, whether by such actual or physical occupation, if any such occupation there be, of any part of the original territory ... of [Delaware] ... acquire any part or portion of such territory, \*106 jurisdictions, rights, privileges, franchises, powers or estates, or any of them, of any and every nature and description ... of [Delaware], unless and until [Congress and Delaware and New Jersey] have expressly and formally consented thereto.<sup>33</sup>

In other words, while a resident of New Jersey (or Delaware) might gain ownership of the

subaqueous soil underneath a particular wharf by adverse possession, New Jersey could not, by such occupation, acquire any jurisdiction from Delaware, let alone full sovereignty to the middle of the River. In *NJ v. DE II*, a unanimous Court would agree: “From acquiescence in these improvements of the river front, there can be no legitimate inference that Delaware made over to New Jersey the title to the stream up to the middle of the channel or even the soil under the piers.”<sup>34</sup> But Delaware’s 1901 Answer also signaled a willingness to grant New Jersey some authority to regulate wharves entering the circle -- within the broad spectrum of powers identified in its Answer -- in a mutually-agreeable interstate compact.

On January 31, 1903, Delaware’s Attorney General, Herbert H. Ward, reported to Governor Hunn that, in light of a mutual concern over the “very considerable expense” of trying the case, counsel on both sides had agreed to attempt to “adjust all differences” out of court.<sup>35</sup> Ward advised that the “very laborious and critical examination of ancient documents” which preceded the preparation of Delaware’s Answer had “greatly strengthened the belief and reliance of counsel for this state upon the justice of her claim.”<sup>36</sup> Nevertheless:

Notwithstanding this well grounded hope that the State of Delaware would be ultimately successful in the suit now depending [sic] in the Supreme Court of the United States, ... if the entire controversy between the two states can be settled out of court in a manner creditable and satisfactory to both states, it would seem the part of good reason to attempt to make such a settlement.<sup>37</sup>

Governor Hunn agreed, and after legislative approval, commissioners from both States met in Philadelphia on March 12-14, 1903, to draft what would become the 1905 Compact.<sup>38</sup>

Delaware’s commissioners, Hunn, Ward, and outside counsel George H. Bates, brought to the negotiating table a remarkable breadth of experience. Bates’s mentor had been Thomas F. Bayard, Delaware’s first counsel in *NJ v. DE I*. Bayard had served in the United States Senate from 1869 until 1885, as Secretary of State under President Grover Cleveland from 1885 to 1889 and, after a brief return to private practice, as ambassador to Great Britain from 1893-1897. Bates had gained diplomatic experience, first under Bayard, and then under Bayard’s successor as Secretary of State, James G. Blaine. In particular, Bates had represented the United States in negotiating agreements with Germany and Great Britain to preserve the United States’ interests in the Samoan Islands.<sup>39</sup> Similarly, Ward, before becoming Attorney General, was \*107 a partner of George Gray. In addition to representing Delaware in *NJ v. DE I* in the 1890s, Gray served in the United States Senate from 1885 to 1899, on an 1898 United States commission that negotiated with Canada over fishing rights in the Great Lakes, on the commission that arranged terms to end the Spanish-American War, and as a judge on the newly-constituted international court at the Hague.<sup>40</sup> As such, Delaware’s commissioners were not only determined to defend the “integrity of the jurisdiction” of Delaware against New Jersey’s “unfounded pretensions,” but also familiar with diplomatic approaches to disputes between sovereigns, such as *modus vivendi* agreements that found “a way of living together”

despite conflicting claims.<sup>41</sup>

For their part, New Jersey's commissioners (Attorney General Thomas N. McCarter, Governor Franklin Murphy, and future Governor Edward C. Stokes) brought their State's history of interstate compacts with Pennsylvania and New York over the rivers between them. Particularly relevant was the 1834 New Jersey-New York Compact ("1834 Compact"),<sup>42</sup> which drew an interstate boundary at the middle of the Hudson River, gave New York jurisdiction over the waters of the River to the low water-mark on the westerly or New Jersey side, and provided that 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 ...."<sup>43</sup>

By March 14, 1903, the commissioners had produced a Compact. As Bates would later describe it to the Court, the Compact was "not a settlement of the disputed boundary, but a truce or a *modus vivendi*," the "main purpose" of which was to "provide for enacting and enforcing a joint code of fishing laws regulating the business of fishing in the Delaware River and Bay."<sup>44</sup> Of immediate effect, the Compact permitted each State to serve criminal and civil process on the River concurrently (Articles I and II) and declared that the citizens of each State "shall have and enjoy a common right of fishery" (Article III).<sup>45</sup> To further define this shared authority, the Compact called for the creation of an interstate commission to draft uniform fishing laws within two years (Article IV). Upon the adoption of these uniform fishing laws, the Compact declared that each State "shall have and exercise exclusive jurisdiction" to arrest its own citizens (Article IV).<sup>46</sup> Until then, all laws not contrary to the common right of fishery would remain in force (Article V).<sup>47</sup>

The final two substantive provisions of the Compact, Articles VI and VII, addressed the shellfish industry and regulation of riparian rights. In Article VI, the drafters clarified that "nothing herein shall affect the planting, catching, or taking of oysters, clams, or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the \*108 laws of either State."<sup>48</sup> And in Article VII, the drafters agreed that "[e]ach State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States."<sup>49</sup>

Article VII addressed a legal rather than a practical dispute. As noted above, New Jersey had claimed sovereignty to the middle of the River based on its regulation of those wharves, and Delaware had denied that New Jersey's actions had given it any jurisdictional rights whatsoever. But the piers on the New Jersey side of the River that entered the disputed twelve-mile circle were few and non-controversial. They included docks for ferries that provided transportation between the States, and a pier serving an industrial facility owned by the Wilmington-based Du Pont company.<sup>50</sup> In the absence of a practical dispute, the States agreed only that New Jersey "may ... continue" regulating riparian rights as it had been.

Article VIII of the Compact, a reservation of rights provision, stated: "Nothing herein contained

shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.”<sup>51</sup> Finally, Article IX stated that, after approval by the legislatures of the States and ratification by Congress, the Compact would be “binding in perpetuity upon both of said States” and the suit would be “discontinued without costs to either party and without prejudice.”<sup>52</sup>

On March 16, 1903, with the ink on the Compact barely dry, the commissioners submitted it to their respective legislatures for approval. New Jersey’s commissioners explained that:

... while it was not found practicable to settle the exact geographical boundary line between the two States, nevertheless every interest of the State of New Jersey has been protected, all its riparian, fishery and other rights and jurisdiction thoroughly safeguarded, and every question of practical difficulty between the two States settled for all time. At the same time, the interests of our sister State of Delaware have been amply protected in a manner acceptable to the Commissioners from that State.<sup>53</sup>

New Jersey’s legislature approved the Compact. However, Delaware’s House of Representatives objected that the submission of the Compact only a few days prior to the close of the legislative session required it to be “rushed through ... with undue haste.”<sup>54</sup> The House did not act on the Compact before the legislative session expired.

At its next session, in 1905, Delaware’s General Assembly approved the Compact, but only after stiff debate. As the evidence started to come in, and Delaware’s case looked strong, Bates, for one, had second thoughts about a settlement. He argued that “no agreement should be made until the Supreme Court has judicially decided the underlying and basic question of territorial jurisdiction.”<sup>55</sup> Former State Senator Alexander B. Cooper agreed, prophesying that “Jerseymen \*109 are fighters, and if the matter is not settled by the court, they will continue their contentions whenever the opportunity arises.”<sup>56</sup> But Ward and Delaware’s new Attorney General, Robert H. Richards, who took office in January of 1905 along with the new Governor, Preston Lea, persuaded the General Assembly to approve the Compact in order to avoid further expense. In their view, the Compact would not “yield[] one foot of property or title,” but if it were rejected, they warned, the General Assembly would be asked to provide another \$10,000 to fund the suit.<sup>57</sup>

After Delaware and New Jersey approved the Compact, the States appointed commissioners under Article IV to a joint commission charged with developing uniform fishing laws. When their work was nearing completion, the States sought congressional approval of the Compact as required by the Constitution.<sup>58</sup> Congress ratified the Compact on January 24, 1907, and on April 15, 1907, the Court dismissed *NJ v. DE I* without prejudice.<sup>59</sup>

Ironically, the Compact achieved neither of its goals of establishing uniform fishing laws or of avoiding costly litigation. While the joint commission proposed uniform laws, Delaware’s

General Assembly made “certain modifications” so that the Delaware version did not match the bill as passed by New Jersey.<sup>60</sup> From time to time efforts were made to conform the bills, without success. Then, in the mid 1920’s another dispute forced the States back into the expensive boundary litigation that they had hoped to avoid. By application of Murphy’s Law, the Compact’s only enduring contribution would be to spark yet a third Supreme Court litigation a century later, in 2005, this time over the meaning of the Compact itself.

### ***C. New Jersey v. Delaware II (1929 - 1938)***

In 1925 the controversy resurfaced when New Jersey officials arrested Delaware oystermen working in water claimed by both States in the Delaware Bay south of the River.<sup>61</sup> Again, the States appointed commissioners to seek a compromise, and again their efforts failed. In 1929, New Jersey filed *NJ v. DE II*, seeking a ruling on the boundary between the States both within the twelve-mile circle and south of the River into the Delaware Bay. In its Complaint, New Jersey revived the same two claims that it had dismissed without prejudice in *NJ v. DE I*: (i) that Delaware’s chain of title from Penn was flawed and therefore of no effect, and (ii) that New Jersey had gained jurisdiction to the middle of the River by prescription.

This time the laborious task of producing evidence was completed, involving over two years of discovery and numerous days of live testimony.<sup>62</sup> But after discovery had ended, New Jersey injected a new issue into the case, based \*110 on Article VII of the Compact. Like Pea Patch Island, the argument appeared inconspicuously at first, on page 126 of New Jersey’s mammoth 749-page opening “brief” before the Special Master, filed on August 15, 1932. There, New Jersey argued that Article VII “clearly acknowledges and confirms the jurisdiction which [New Jersey] had previously, and has since, exercised in the ownership and disposition of lands under water in the disputed area” to the middle of the River in the twelve-mile circle. New Jersey contended that the Compact “alone, is sufficient to sustain the title of [New Jersey] and its grantees in the bed of the river east of the ship channel, independent of all other considerations.”<sup>63</sup>

The task of responding to New Jersey’s brief was assigned to Delaware’s outside counsel, the formidable Clarence A. Southerland, who had been Delaware’s Attorney General (1925-1929) and would go on to serve a twelve-year term as the first Chief Justice of Delaware’s separately-constituted Supreme Court (1951-1963).<sup>64</sup> In Delaware’s reply brief, submitted on September 12, 1932, Southerland pointed out that the Compact had never been at issue in the case. While New Jersey’s Complaint set forth with “great particularity the sources of [its] claim to title” on the eastern half of the River [*i.e.*, Delaware’s allegedly flawed chain of title and New Jersey’s exercises of jurisdiction], the Complaint “nowhere mentions the Compact as the source of that claim.”<sup>65</sup> The construction previously placed on the Compact “has been the reverse to that now contended for” by New Jersey.<sup>66</sup> Indeed, Southerland pointed out, this was “the first time the idea has ever been advanced that the Compact of 1905 settled the boundary dispute within

the twelve-mile circle.”<sup>67</sup>

Because no discovery had been taken on the meaning of the Compact, and the Delaware commissioners involved in drafting it, Bates, Hunn, and Ward, had passed away,<sup>68</sup> Southerland was left to make what arguments he could based on the text. He was sure that Article VII did not acknowledge any jurisdiction to the middle of the River, but less sure exactly what it did do. In Delaware’s reply brief, he argued that Article VII was “merely a recognition of the rights of the riparian owners of New Jersey and *a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights.*”<sup>69</sup> At oral argument, also on September 12, 1932, Southerland told the Special Master that “*in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do.*”<sup>70</sup> Therefore, New Jersey had no case “for the application of any doctrine of prescription.”<sup>71</sup>

**\*111** On October 9, 1933, the Special Master issued a report recommending that Delaware’s claim to sovereignty throughout the twelve-mile circle be upheld as its chain of title was good and such title was not lost due to prescription or the Compact.<sup>72</sup> South of the circle and into the Delaware Bay, the Special Master agreed with New Jersey that the States’ boundary should follow the thalweg (the mid-point of the shipping channel), rather than the geographic middle of the River as Delaware had argued.<sup>73</sup> In a unanimous opinion authored by Justice Cardozo, issued on February 5, 1934, the Court affirmed the report in all respects.<sup>74</sup> Along the way the Court quickly dispatched New Jersey’s Compact argument, stating:

We are told that by this compact the controversy was set at rest and the claim of Delaware abandoned. It is an argument wholly without force. The compact of 1905 provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go.<sup>75</sup>

In rejecting New Jersey’s boundary claim, the Court was not required to parse Article VII or other provisions of the Compact. But the Court left ample room for dispute by stating that “[w]ithin the twelve-mile circle, the river and the subaqueous soil thereof up to low water mark on the easterly or New Jersey side will be adjudged to belong to the state of Delaware, *subject to the Compact of 1905.*”<sup>76</sup>

In a report to Delaware Attorney General Percy Warren Green dated July 3, 1935, shortly after the Court had issued its final decree, Southerland admitted that, “[t]he meaning of [Article VII] of the compact is far from clear.”<sup>77</sup> But he was certain of one thing: “there will obviously be a difference of opinion between the States on the proper construction of this compact.”<sup>78</sup> As late as 1938, New Jersey filed motions petitioning the Court to reconsider its ruling on the twelve-mile circle.<sup>79</sup> Although the Court denied them, the motions were, like Southerland’s report, intimations that the controversy still “would not down.”

#### D. *New Jersey v. Delaware III* (2005 - 2008)

In the decades after the Court resolved the boundary dispute, the Compact gathered dust as the fishing industry on the River died out and the States adopted a cooperative approach to boundary-straddling riparian projects. Delaware did **\*112** not begin regulating riparian rights until the 1960's, when it first passed laws regulating the use of its subaqueous lands.<sup>80</sup> In 1971, Delaware adopted the Delaware Coastal Zone Act ("DCZA") to preserve its fragile coastal zone for tourism and recreation.<sup>81</sup> New Jersey's public officials did not object when, in 1972, Delaware denied an application by El Paso Eastern under the DCZA to construct an LNG terminal from the New Jersey side of the River into the twelve-mile circle just north of Wilmington.<sup>82</sup> In 1980, New Jersey stated in a document filed under the Federal Coastal Management Act<sup>83</sup> that "any New Jersey project extending beyond mean low water must obtain coastal permits from both states."<sup>84</sup> Apart from the El Paso Eastern proposal, from 1969 through 2004, only three riparian structures were built from the New Jersey side of the River into the circle, and Delaware regulated all three.<sup>85</sup>

The era of cooperation ended in 2005, soon after British Petroleum ("BP") sought permission from Delaware to construct an LNG terminal on the River on almost the same spot as the proposed El Paso Eastern terminal in 1972. BP's project called for a 2,000 foot long, 50 foot wide pier extending from the New Jersey bank of the River into Delaware territory. To build the pier and accommodate the supertankers that would berth there, the project would require dredging 1.24 million cubic yards of riverbed, affecting approximately 29 acres of Delaware soil. The supertankers would transport 200,000 cubic meters of LNG up the River and under the Delaware Memorial Bridge, past densely-populated areas to an offloading point just north of Wilmington.<sup>86</sup>

On February 2, 2005, Delaware's Department of Natural Resources and Environmental Control determined that the proposed LNG terminal would constitute a prohibited bulk product transfer facility under the DCZA. After BP lost an administrative appeal, it looked to New Jersey for help. BP's outside counsel had represented Virginia successfully in another original jurisdiction case, *Virginia v. Maryland* (2003), involving a dispute over riparian rights in the Potomac River.<sup>87</sup> With some coaching from BP, New Jersey advised Delaware that, under Article VII of the Compact and *Virginia v. Maryland*, Delaware had no authority to interfere with BP's project. Delaware disagreed, and the ensuing rhetoric recalled the days of the tugboat *Falcon*. New Jersey legislators introduced a bill threatening to withdraw State **\*113** pension funds from Delaware banks if Delaware did not relent. Two Delaware legislators responded by introducing a bill to authorize the National Guard to protect Delaware's borders from encroachment. Not to be outdone, a New Jersey legislator explored the seaworthiness of the decommissioned battleship *New Jersey* in the event the State was forced to repel an "armed invasion" by Delaware.<sup>88</sup>

On July 28, 2005, New Jersey filed in the Supreme Court a motion to reopen *NJ v. DE II* seeking a declaration that Delaware could not interfere with New Jersey's regulation of riparian projects appurtenant to its shore. The Court instead authorized New Jersey to commence a third original jurisdiction action and on January 23, 2006, appointed Ralph I. Lancaster, Jr., the Special Master in *Virginia v. Maryland*, to serve in the same capacity in *NJ v. DE III*.<sup>89</sup> The States then undertook extensive discovery into the history surrounding the Compact, followed by briefing and oral argument in Philadelphia, just blocks from where the Compact was drafted.

Both before the Court and the Special Master, New Jersey highlighted Southerland's statements in *NJ v. DE II* that Article VII was a "cession" of jurisdiction.<sup>90</sup> As the case progressed through discovery, Delaware brought to light documents relating to the Compact that Southerland had not been given an opportunity to consider, such as the 1834 New Jersey -- New York Compact and Bates's explanation of the Compact to the Court in 1906 as a "truce or *modus vivendi*."<sup>91</sup> Delaware also pointed out that New Jersey officials had made their own inconvenient statements contrary to New Jersey's claim of exclusive jurisdiction over boundary-straddling riparian projects.<sup>92</sup>

On April 2, 2007, the Special Master issued a 100-page report recommending that the Court conclude that Article VII created overlapping jurisdiction over the River. New Jersey could exercise riparian jurisdiction over wharves extending from its shore into the twelve-mile circle. However, New Jersey could not grant lands in Delaware territory. And Delaware was entitled to exercise police power jurisdiction over improvements extending onto its territory, including by enforcing its environmental laws to block the proposed BP project.<sup>93</sup>

In addressing New Jersey's exceptions to the Special Master's Report, the eight Justices who participated in the case<sup>94</sup> proposed four additional readings of Article VII. In Justice Ginsburg's opinion for a majority of five, the Court held that "New Jersey and Delaware have overlapping authority to regulate riparian structures and operations of extraordinary character extending outshore of New Jersey's domain into territory over which Delaware is sovereign."<sup>95</sup> Because BP's LNG terminal was of extraordinary character, Delaware had authority to block it. Justice Stevens concurred with the Court's conclusion that Delaware retained authority to block the terminal, but read Article VII to permit New Jersey to \*114 make grants and authorize the building of wharves within Delaware territory only "to the extent that such activities are not inconsistent with Delaware's exercise of its police power."<sup>96</sup> Justice Scalia, joined by Justice Alito, dissented, stating that Article VII conceded to New Jersey full and exclusive control over riparian projects on the New Jersey side, including the proposed terminal.<sup>97</sup> And at oral argument, Justice Ginsburg proposed that Article VII might have permitted certain conduct to continue without conceding jurisdiction.

## II. THE READINGS OF THE COMPACT AND THE "HISTORY OF THE TIMES ...."

As the Court acknowledged in *NJ v. DE III*, interstate compacts are presumed to be “drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.”<sup>98</sup> Thus, the Compact drafters presumably expressed their intent clearly and precisely in Article VII by stating:

Each State may, on its own side of the river, continue to exercise riparian jurisdiction, of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.<sup>99</sup>

Unfortunately, a century later, these words yielded five different understandings over a 180-degree spectrum, only one of which (at most) could be correct. In light of “the history of the times,”<sup>100</sup> the reading that was most likely correct was not that of the Court, or of Justice Scalia in dissent, but of Justice Ginsburg at oral argument, proposing that Article VII simply allowed New Jersey to continue unobjectionable conduct in the shadow of an unresolved boundary dispute, without doing anything dispositive.

### A. The Court’s “Overlapping Authority” Reading

Based on the text of the Compact and its historical context, the Court properly rejected New Jersey’s claim that Article VII conceded to it exclusive jurisdiction over all riparian projects extending from New Jersey into the twelve-mile circle.<sup>101</sup> But as to what Article VII did mean, the Court stumbled in relying on two post-Compact considerations: Southerland’s statements in the 1930’s and the statements of public officials from New Jersey in the 1970’s and 1980’s. The Court held that Article VII ceded to New Jersey some, but not all, jurisdiction, such that the Court’s boundary decision resulted in a regime of overlapping jurisdiction. As to how such a regime would operate, the Court fashioned a test unmoored from \*115 the text of the Compact, whereby Delaware would retain jurisdiction over projects of “extraordinary character,” while New Jersey would have jurisdiction over the exercise of “ordinary and usual riparian rights.”<sup>102</sup>

Beginning with the text of Article VII, the Court focused on the term “riparian jurisdiction,” in which “riparian” stood as a “limiting modifier.”<sup>103</sup> New Jersey was permitted to exercise, not “exclusive jurisdiction” or “jurisdiction unmodified,” but only “*riparian* jurisdiction.”<sup>104</sup> Thus, New Jersey was not entitled to exercise complete jurisdiction over all issues relating to wharves, but only jurisdiction over riparian rights, which were subject to the general police power of the sovereign under the background law of the time.<sup>105</sup> Particularly in light of Article VIII’s requirement that any cession of territorial jurisdiction over the River be “express,” the Court “resist[ed]” reading “riparian jurisdiction” as “tantamount to an express cession by Delaware of its entire territorial ... jurisdiction ... over the Delaware River.”<sup>106</sup>

Two historical considerations confirmed the Court’s reading of the text.<sup>107</sup> First, the drafters had incorporated into the 1905 Compact, with minor variations, three provisions from the 1834 New

Jersey-New York Compact.<sup>108</sup> But in Article VII the drafters had not adopted the provision in the 1834 Compact declaring that 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 ....”<sup>109</sup> Noting this conspicuous disparity, the Court observed that “New Jersey could hardly claim ignorance that Article VII could have been drafted to grant New Jersey ‘exclusive jurisdiction’ (not merely ‘riparian jurisdiction’).”<sup>110</sup>

**\*116** Second, the Court referenced contemporaneous evidence suggesting that “Delaware would not have willingly ceded all jurisdiction over matters taking place on land that [Delaware adamantly] contended it owned exclusively and outright.”<sup>111</sup> In particular, the Court noted Ward’s statement to Governor Hunn in 1903 that the process of preparing Delaware’s Answer had “greatly strengthened the belief and reliance of counsel ... upon the justice of her claim,”<sup>112</sup> and Bates’s 1906 description of the Compact as “a truce or *modus vivendi*.”<sup>113</sup> In light of such evidence, the Court agreed with the Special Master that New Jersey’s claim that Delaware had surrendered complete jurisdiction over projects entering the twelve-mile circle, through Article VII, was “implausible.”<sup>114</sup> As the Court noted, such a broad concession would have rendered the Court’s 1934 settlement of the boundary “an academic exercise with slim practical significance.”<sup>115</sup>

Based on those historical considerations, the Court might have questioned whether Article VII conceded to New Jersey any jurisdiction. After all, Article VII stated only that New Jersey “may ... continue to exercise” jurisdiction. But Southerland had read Article VII as a “cession” of jurisdiction to New Jersey, and his statements exerted a powerful influence on both the Special Master and the Court seven decades later. With no discussion, and based only on a reference to Southerland’s statements, the Court in *NJ v. DE III* held that New Jersey “did indeed preserve the right to exercise its own jurisdiction over riparian improvements appurtenant to its shore.”<sup>116</sup> And while the Court would say only that New Jersey had “preserved” jurisdiction, rather than that Delaware had ceded it, the Court’s holding was the same.

In fact, the historical evidence weighs heavily against such a concession. As the drafters sat down to negotiate the Compact on March 12-14, 1903, the States had staked out contrary positions on the effect of New Jersey’s regulation of wharves entering the twelve-mile circle. New Jersey had alleged in its Complaint that its acts had established full jurisdiction to the middle of the River. Delaware had responded, in its Answer, that New Jersey’s actions could not manufacture any jurisdiction. In other words, as far as Delaware was concerned, New Jersey had no jurisdiction to preserve. If, from that locked-horns position, Delaware’s commissioners had emerged from the negotiations in March of 1903 with a document that “preserves for New Jersey” riparian jurisdiction, as the Court stated,<sup>117</sup> then Delaware would have abandoned its position without receiving anything in return, as New Jersey retained its larger claim to complete jurisdiction to the middle of the River. Such a concession would have been especially odd because it would have enabled New Jersey effectively to annex portions of Delaware, pier by pier, by conveying them away, at the same time that Delaware was insisting that it had

preserved in full its sovereignty over the subaqueous lands within the twelve-mile circle.

Moreover, Southerland had been blind-sided by New Jersey's introduction of the Compact into the case via its post-discovery brief on August 15, 1932. He was required to construe Article VII, along with 748 pages of other arguments in New Jersey's brief, in time to file his reply brief and participate in oral argument before the Special Master on September 12, 1932. The voluminous record that the parties had compiled over the previous three years dealt with the \*117 chain of title and prescription issues, and did not include evidence relating to the drafting of the Compact.<sup>118</sup> Indeed, neither the 1834 New Jersey - New York Compact nor the contemporaneous statements of Ward and Bates that the *NJ v. DE III* Court found so informative were part of that record. Given that Southerland was forced to construe a nearly 30-year-old document in short order and in a virtual evidentiary vacuum, his reading should not have been treated as effectively binding on Delaware.<sup>119</sup>

In concluding that Article VII ceded some but not all riparian jurisdiction to New Jersey, the Court also relied on tenuous "course of conduct" evidence from the 1970s and 1980's.<sup>120</sup> In particular, the Court pointed to New Jersey's 1980 submission in connection with the federal Coastal Zone Management Act, in which New Jersey stated that "any New Jersey project extending beyond mean low water mark must obtain coastal permits from both states."<sup>121</sup> This document, written over seventy years after the framing of the Compact, with no proof that the authors were even aware that it existed, casts no real light on the original meaning of the Compact.<sup>122</sup> Instead, the gaping absence of any relevant course of conduct over the decades between 1905 and the 1970s demonstrates how deeply the Compact had fallen into desuetude.

In any event, the Court's conclusion that Article VII conceded some, but not all, riparian jurisdiction led it into an analytical thicket. In a regime of dual jurisdiction over riparian projects, whose jurisdiction controls? Article VII did not say, so the Court was required to fashion a solution out of whole cloth. The Court declared that Delaware could not "impede ordinary and usual exercises of the right of riparian owners to wharf out from New Jersey's shore" but could exert governing authority over wharves of "extraordinary character."<sup>123</sup> Tellingly, the Court's Decree setting forth this result did not even refer to Article VII.

Thus, while the Court began well by using historical context to reject New Jersey's claim that Article VII gave it exclusive jurisdiction over riparian projects, unfortunately, the Court relied too heavily on ahistorical considerations in \*118 concluding that Article VII, together with the boundary decision, created a dual jurisdiction regime. While the Court's "extraordinary character" test solved the trumping problem inherent in such a regime, the jerry-built character of that test invited criticism, which Justice Scalia would not hesitate to provide.

## **B. Justice Scalia's "Full and Exclusive Control" Reading**

In the opening paragraph of his dissent, Justice Scalia immediately put his finger on two key weaknesses in the Court's analysis. First, the Court's concession that Article VII had "preserved" riparian jurisdiction for New Jersey -- or, as he would say more directly, "that jurisdiction and power over [riparian rights] were given to New Jersey"<sup>124</sup> -- supported New Jersey's contention that it had jurisdiction over a riparian project such as BP's LNG offloading terminal. Second, the Court's "extraordinary character" test, which it devised to sustain Delaware's authority to block the terminal, was unsatisfying on many levels: it was unclear, it had "absolutely no basis in prior law," and it was "so unheard-of ... that its first appearance in this case is in the Court's opinion."<sup>125</sup> But Justice Scalia's reading suffered from its own weaknesses, including its failure to offer any persuasive rebuttal to the textual and historical evidence suggesting that Delaware did not concede jurisdiction over riparian projects, and its misplaced reliance on Southerland's reading of Article VII.

For Justice Scalia, Article VII was nothing less than a full surrender of the "authority of a sovereign power to govern or legislate" by which Delaware "convey[ed]" to New Jersey "riparian jurisdiction of every kind and nature."<sup>126</sup> At common law, riparian rights included the right "to erect wharves for the loading and unloading of goods."<sup>127</sup> While riparian jurisdiction did not allow New Jersey to put a casino on the end of a pier, such jurisdiction covered the "core riparian right of building a wharf to be used for the ... unloading of cargo," including BP's proposed LNG terminal.<sup>128</sup>

Justice Scalia's reading of the Compact was unpersuasive because it failed to account for the nuances in the text that reflected the historical context in which it was written. For Justice Scalia, there could be no "presumption against concession of sovereignty" because, in his view, "[t]here is no way the Compact can be interpreted other than as a yielding by both States of what they claimed to be their sovereign powers."<sup>129</sup> But in fact, the drafters had hard-wired into the Compact, in Article VIII, a *textual* presumption against jurisdictional cession: "nothing herein contained" could affect "the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein *expressly* set forth."<sup>130</sup> Both sides had agreed to disagree about their larger jurisdictional dispute, and neither wanted to face, down the road, clever arguments as to alleged concessions made in ambiguous terms.

**\*119** Nor did the drafters limit themselves to a collection of binary win-lose propositions, as Justice Scalia suggested. For example, they agreed to leave certain issues unresolved (the boundary, oystering) and put in place a process for resolving others by sharing jurisdiction over service of process and fashioning uniform fishing laws. Also, the legal background suggested that Article VII accomplished something more nuanced than a jurisdictional white flag. While *NJ v. DE I* was pending, the Court had addressed an analogous situation in *Coffee v. Groover*,<sup>131</sup> involving a dispute between persons claiming land under competing grants from Georgia (which, like New Jersey, had first exercised *de facto* jurisdiction) and Florida (which, like Delaware, turned out to be the true sovereign). In reversing a judgment for the party claiming

from Georgia, the Court had held that “when the true boundary is ascertained ... grants made by [a] sovereign beyond the limits of his rightful territory, whether he had possession or not, (unless confirmed by proper stipulations) fail for want of title in the grantor.”<sup>132</sup> Thus, New Jersey needed at least a stipulation authorizing its grants and other actions in order to avoid forfeiture of its riparian interests and those of its riparian owners. Delaware, for its part, also needed at least to authorize such activities to continue to prevent New Jersey from adding evidence to its prescription claim. Neither State’s needs required that Delaware surrender jurisdiction over the very lands within the twelve-mile circle that it adamantly claimed were its own, and that were the subject of the larger boundary dispute that they had agreed they could not resolve.

Justice Scalia’s argument as to the historical plausibility of a complete surrender of riparian jurisdiction by Delaware was also unpersuasive.<sup>133</sup> For example, he suggested that Delaware might have given up such jurisdiction because the case “appeared to be going badly” for it, based solely on the Court’s “rather ominous sounding” order granting a preliminary injunction barring Delaware from enforcing its 1871 fishing law.<sup>134</sup> But that order was entered in 1877, over twenty-five years before the drafters sat down to negotiate the Compact. While the Court had stopped Delaware from attempting to enforce a facially discriminatory (and probably unconstitutional) law in the face of threats of violence, the 1877 injunction hardly signaled how the Court would resolve the complex boundary dispute on a full record.<sup>135</sup> At least, New Jersey did not seem particularly emboldened by the injunction, as it waited until 1901 to prosecute the case, and then only after the Court prodded it to do so. Any speculation about the impact of the 1877 order on the view of Delaware’s 1903 commissioners as to how their case “was going” seems strained as compared with the contemporaneous statements of those commissioners -- such as Ward’s 1903 statement to Governor Hunn that Delaware’s recently gathered evidence had only strengthened its “belief and reliance” upon “the justice of her claim”<sup>136</sup> -- which Justice Scalia did not address.

Finally, while Justice Scalia concluded that post-Compact conduct was irrelevant because he found no ambiguity in the text, his reading was at least confirmed (and possibly influenced) by Southerland’s statements in *NJ v. DE* \*120 II. Justice Scalia found Southerland’s “concessions” to be a “powerful indication that Delaware’s understanding of the Compact was the same as the one I assert.”<sup>137</sup> But as discussed above, Southerland’s reading of the Compact in *NJ v DE II* -- without any opportunity to explore its historical context -- did not warrant the weight that Justice Scalia and the other Justices gave it.

In sum, while Justice Scalia’s dissent threw a powerful light upon the lack of a textual foundation for the Court’s “extraordinary character” test, his own reading was at odds with the nuanced language of Article VII and its historical context.

### C. Justice Ginsburg’s Status Quo Reading

Neither the Court nor the dissent in *NJ v. DE III* offered a reading of Article VII that fit the historical context in an entirely satisfying way. But Justice Ginsburg's suggested reading at oral argument -- like the youngest child -- is still left to consider. In the first exchange between the Court and New Jersey's counsel, Justice Ginsburg stated:

... one of the striking things about this Compact is that to the extent that it is definite, there is a lot in here in detail about ... arrests on the river and about fishing, but then you get to these two articles at the end ... they certainly don't have that same definite detailed quality. As I read the Article VII ..., it says -- let's see -- "may continue to exercise." So it seems to me that "may continue to" was just whatever was the status quo, that will continue; not to do anything dispositive, just whatever will continue.<sup>138</sup>

Both as a matter of textual analysis and historical context, this simple "status quo" reading is remarkably compelling.

Only this reading gives weight to the verbal nuance in the central predicate clause in Article VII, "may ... continue to exercise." Just as "riparian jurisdiction" did not mean "exclusive jurisdiction," so also "may continue to exercise" did not mean "shall have and exercise," or even, "may continue forever to exercise." "Continue" means "to remain in a given place or condition."<sup>139</sup> When the attorneys who drafted the Compact intended to declare a right in a dispositive way, they did so in the express terms required by Article VII, through traditional *habendum* clauses denoting the formal conveyance of both the right (to "have") and the use (to "enjoy" or "exercise").<sup>140</sup> In Article III, they declared that the citizens of both States "shall have and enjoy" a common right of fishery. In Article IV, they agreed that, once uniform \*121 laws were adopted, each State "shall have and exercise exclusive jurisdiction" to arrest its own inhabitants for violation of those laws. The drafters did not employ such a clause in Article VII -- even though they could have borrowed one from the 1834 New Jersey -- New York Compact, from which they took other provisions. Basic rules of construction require that their choice be given weight.

The status quo reading is in harmony with the legal context in which the drafters were working, as defined by the pleadings in *NJ v. DE I* and the background legal principles that they presumably knew. With Article VII, New Jersey had for the first time authorization from Delaware to continue to exercise riparian jurisdiction, such that its grants would not be null and void under *Coffee v. Groover*<sup>141</sup> in the event the Court later determined that New Jersey had conveyed disputed land outside its territory. And for its part, Delaware, by granting New Jersey permission to continue to regulate riparian jurisdiction, prevented any accumulation of evidence of prescription. By granting such permission, both sides safeguarded their interests.

The status quo reading is consistent with the contemporaneous statements by the drafters from both sides. Bates's description of the Compact as a "truce or *modus vivendi*" well characterizes a

provision in which sovereigns agree to disagree as to legal rights so that a practical peace can be achieved. And New Jersey's commissioners advised their legislature that while the "questions of practical difficulty between the two States" -- service of civil and criminal process and rights of fishery -- had been "settled for all time," each State's riparian interests had only been "safeguarded."<sup>142</sup> By gaining permission from Delaware to "continue" acting as it had, New Jersey had indeed obtained a "safeguard" against forfeiture but had not "settled" the underlying jurisdictional issue.

Finally, the status quo reading has an attractive simplicity about it, as something the drafters might actually have agreed upon on March 12-14, 1903, after addressing the practical issues of fishing rights and arrests on the water. The States had not been at loggerheads over New Jersey's few exercises of riparian jurisdiction within the twelve-mile circle.<sup>143</sup> And New Jersey certainly had every right to regulate riparian uses above the low water mark on its side of the River. Why not allow New Jersey to "continue" doing what it had been doing without objection, so long as each State's rights were protected? One can well imagine Delaware agreeing to act in a spirit of interstate comity, saying in effect to its neighbor, "I think your tomato patch is crossing into my yard, but you may continue to garden there."

Neither the text of the Compact nor its historical context undermines the status quo reading. In arguing that Article VII should not be read as a temporary provision, the Special Master pointed out that, under Article IX, the Compact was "binding in perpetuity."<sup>144</sup> If that phrase were read into every individual provision of the Compact, then Article VII could be read as if the drafters had stated, "Each State may, on its own side of the River, continue to exercise riparian jurisdiction *in perpetuity*." But such intent could have been expressed far more directly by simply conveying the right at issue, as the drafters did with respect to fishing and arrests in Articles III and IV. Also, other Compact provisions were not designed to remain in effect in perpetuity (*e.g.*, the arrest provisions of Articles I and II were to be superseded, at least in **\*122** part, by the arrest provision in Article IV that was to go into effect after adoption of uniform fishing laws). The general statement that the Compact was "binding in perpetuity" more likely meant that the Compact, as a whole, was a permanent agreement, while more specific provisions stood on their own and were either permanent, temporary, or open-ended, as necessary to achieve the drafters' purpose.<sup>145</sup>

The Special Master also stated that Bates referred to the Compact as a *modus vivendi* "only in connection with the still unresolved boundary dispute ... rather than as a representation that the entire Compact was intended merely as a temporary measure."<sup>146</sup> But reading Article VII as merely permitting unobjectionable conduct to continue would not render the entire Compact temporary, as the agreements in Articles III and IV over fishing rights and arrests on the water were meant to be permanent. And even if the Compact was a *modus vivendi* only with regard to the boundary dispute, the status quo arrangement in Article VII would have fit well within that concept. After all, boundary determines ownership. Because Article VII involved the right to convey riparian lands, the language in Article VII that permitted the exercise of such jurisdiction

to continue, while stopping short of a formal cession of jurisdiction, was consistent with the drafters' decision to leave unresolved the larger issue of boundary, which would determine ownership of the lands within the twelve-mile circle.

While Justice Ginsburg's status quo reading of Article VII never found its way into her opinion for the Court, it may help explain why the Court properly resisted as "implausible" New Jersey's claim that Delaware had surrendered complete jurisdiction over riparian projects within the twelve-mile circle. The status quo reading best fits the historical context -- that is, the "state of things existing" when the Compact was framed and the "old law, the mischief, and the remedy."<sup>147</sup> The "state of things" in 1903-1905 was that there was no practical dispute over the construction of wharves on the New Jersey side of the River. The "old law" was, for Delaware, its historical claim of sovereignty over the lands and water within the twelve-mile circle, and for New Jersey, the statutes under which it had regulated the riparian rights of its citizens. The "mischief" was, for New Jersey, the prospect of forfeiture of grants made if Delaware was right about the boundary; and for Delaware, the risk of fueling New Jersey's prescription claim by ignoring its actions. The "remedy" was to permit New Jersey to continue its unobjectionable conduct while safeguarding both States' claims to sovereignty. Article VII was part of a larger *modus vivendi* that resolved the States' practical problems, safeguarded their respective jurisdictional claims, and enabled them to end their expensive litigation without prejudice.

### III. CONCLUSION

In attempting to discover the meaning of Article VII of the Compact, the Court was forced to operate without much applicable precedent or evidence of a contemporaneous course of conduct. The term "riparian jurisdiction," was \*123 not defined by legal precedent, and the "may continue" language never garnered much attention. As the River's fishing industry died out, the Compact also became a dead letter -- until exhumed by BP and New Jersey in 2005.<sup>148</sup>

Under these circumstances, historical context is more than just one consideration among many. Rather, it is the reliable narrator, the trustworthy guide to understanding the thought expressed by the words chosen by persons who were living in that context. A reading that reflects the drafters' agreement can be reached only through a sympathetic understanding of the circumstances of those who drafted the words in dispute, recognizing that the drafters may have known what they were about in a way that we might not easily appreciate from a century away, and that our assumptions may not have been theirs. Ahistorical considerations, such as Clarence Southerland's reading of Compact text thirty years later, should not be given special weight. And ordinary assumptions, such as that a compact provision resolves rather than preserves an issue, may well not hold where, as here, the Compact was also a settlement agreement that reserved for another day the parties' dispute over ownership of subaqueous lands.

Fortunately, in *NJ v. DE III*, the Special Master and the Court entered into the world of the

Compact drafters sufficiently to prevent New Jersey from gaining, through desuetude, a surrender of sovereignty over rights and lands that it did not obtain in Philadelphia in March of 1903. But time took its toll, and Delaware's sovereignty over its historic territory was compromised. Cooper and Bates were right in having second thoughts about the wisdom of entering into the Compact in order to avoid the expense of resolving the boundary dispute. An expedient compromise did cause mischief; Delaware would have been better served by pressing its boundary claim to conclusion first; and Delaware's gesture of inter-state comity would not go unpunished. Time and chance conspired to cloud the drafters' intent, and only by a jerry-built ruling did the Court preserve Delaware's historic sovereignty within the twelve-mile circle, at least enough to enable Delaware to block the construction of a massive LNG unloading terminal within its territory and contrary to its laws.

## Footnotes

<sup>a1</sup> Partner, Connolly Bove Lodge & Hutz LLP. The author was part of a team led by Collins J. Seitz, Jr. that represented the State of Delaware in *New Jersey v. Delaware III*.

<sup>1</sup> [NJ v. DE III, 552 U.S. 597 \(2008\)](#).

<sup>2</sup> The Compact was adopted by the States in 1905 (*see* 23 Del. Laws 12 (1905) and 1905 N.J. Laws 67), and ratified by Congress on January 24, 1907, Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (the "Compact"). The text of the Compact is included in the Appendices to Report of the Special Master, [NJ v. DE III, 2007 WL 4266844, at \\*3A \(Apr. 16, 2007\)](#) (Appendix B).

<sup>3</sup> *See NJ v. DE I, 205 U.S. 550 (1907)* (granting dismissal without prejudice).

<sup>4</sup> *See NJ v. DE II, 291 U.S. 361 (1934)* (decision resolving boundary dispute).

<sup>5</sup> DEL. CODE ANN. tit. 7, § 7001 *et seq.*

<sup>6</sup> Compact, Appendix B to Report of Special Master, [2007 WL 4266844, at \\*7A](#).

<sup>7</sup> *NJ v. DE III*, Report of the Special Master, dated April 12, 2007 (quoting letter from Delaware Gov. James Ponder to New Jersey Gov. Joel Parker (May 14, 1872)) (the "Report"). The Report and all filings in the proceedings before the Special Master are available at <http://www.pierceatwood.com/custompagedisplay.asp?Show=2>.

<sup>8</sup> *Rhode Island v. Massachusetts, 37 U.S. 657, 723 (1838)*; *see also* U.S. Const. art. III, § 2 (extending the judicial power of the Supreme Court to "Controversies between two or more States").

<sup>9</sup> *See* Transcript of November 27, 2007 Oral Argument at 4, [NJ v. DE III, 552 U.S. 597 \(2008\)](#) (No. 134), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts.html](http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html).

- 10 *NJ v. DE II*, 291 U.S. at 364-65 (internal quotations omitted). For an explanation of the ritual, see THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 10-11 (2d ed. 1984) (“Without a modern system of land records, it would be desirable that the transfer be effected with sufficient ceremony not only to mark itself indelibly in the memories of the participants, but also to give notice to interested persons such as the mesne lord about the transferor .... The transferor and transferee would go to the land to be transferred, and the transferor would then hand to the transferee a lump of soil or a twig from a tree -- all the while intoning the appropriate words of grant ....”).
- 11 This paragraph, including the quotations from early settlers, draws heavily from a beautifully written expert report authored by historian Carol E. Hoffecker, Ph.D., with the assistance of Barbara E. Benson, Ph.D., which Delaware submitted to the Court in *NJ v. DE III* (hereinafter, the “Hoffecker Report”). See Barbara E. Benson and Carol Hoffecker, *The Compact of 1905 and its Role in the United States Supreme Court Cases: New Jersey v. Delaware I, II, and III*, DEL. HISTORY, Spring-Summer 2008 (vol. XXXII, no. 2), at 61 (publishing the Hoffecker Report with an introduction addressing the Court’s opinion). Citations to the Hoffecker Report herein refer to the page numbers in the published version rather than the version submitted to the Court.
- 12 Hoffecker Report at 64-65.
- 13 *Id.*
- 14 *Id.* at 66-67.
- 15 *Id.* at 67.
- 16 See *Case of Pea Patch Island*, 30 F. Cas. 1123, 1123 (1848) (No. 18, 311).
- 17 *Id.* at 1123-24.
- 18 *Id.* at 1123.
- 19 *Id.* at 1124 (quoting NORTH AMERICAN AND UNITED STATES GAZETTE, Jan. 17, 1848).
- 20 *Id.*
- 21 *NJ v. DE II*, 291 U.S. at 377 (Delawareans were charged only \$5).
- 22 An Act for the Protection of Fisherman (Mar. 28, 1871); see Report, *supra* note 7, at 3. The full text of the Act is set forth in Delaware’s Appendix on Cross-Motions for Summary Judgment before the Special Master, filed December 22, 2006, volume 2, at pp. 913-916 (“Del. App.”).

- 23 *NJ v. DE I*, Affidavit of George Stanton, dated February 13, 1877 (1 Del. App. at 59).
- 24 Report, *supra* note 7, at 4.
- 25 *NJ v. DE I*, Order dated March 13, 1877 (1 Del. App. at 19).
- 26 *NJ v. DE I*, Complaint (1 Del. App. at 20-54).
- 27 *Id.* at 36-37.
- 28 *See NJ v. DE I*, Affidavit of George Stanton, dated February 13, 1877, and Affidavit of Joe Barber, dated February 13, 1877 (1 Del. App. at 59-61).
- 29 *NJ v. DE I*, Order for Preliminary Injunction, dated March 26, 1877 (1 Del. App. at 66-68).
- 30 HENRY CLAY CONRAD, HISTORY OF THE STATE OF DELAWARE 852-53 (1908).
- 31 2 Del. App. at 1056-61 (Message of the Governor to the General Assembly, accompanied by an Opinion by Attorney General Ward on the status of the case).
- 32 Defendant's Answer, *NJ v. DE I*, 205 U.S. 550 (1907) (No. 1) (1 Del. App. at 95-162).
- 33 *Id.* (1 Del. App. at 118-19).
- 34 *NJ v. DE II*, 291 U.S. at 375-76.
- 35 2 Del. App. at 1075-76.
- 36 *Id.*
- 37 *Id.*
- 38 *See* 2 Del. App. at 1104-05 (communication from Delaware's commissioners to the General Assembly, dated Mar. 16, 1903).

- 39 See Dennis J. Siebold, *Delaware and the Key to the Pacific: Thomas F. Bayard, George H. Bates, and the Acquisition of American Samoa*, 1886-1899, DEL. HISTORY, Spring-Summer 2008 (vol. XXXII, no. 2), at 105, 148.
- 40 See WILLIAM T. QUILLEN, POTTER ANDERSON & CORROON, AN AMERICAN LAW PRACTICE: THE FIRST 175 YEARS 27-46 (2001) (describing the careers of Gray and Ward in the firm of Gray, Ward and Gray).
- 41 See BLACK'S LAW DICTIONARY 1021 (7th ed. 1999) (defining *modus vivendi* as an "instrument of toleration" that sets forth "the basis of a method of living together with a problem ... pending a permanent settlement").
- 42 Compact between the State of New Jersey and the State of New York, 4 Stat. 708 (1834) (2 Del. App. at 885).
- 43 *NJ v. DE III*, 552 U.S. at 616.
- 44 See *id.* at 605 n.5. Bates delivered his "Statement of reasons submitted orally for the joint application of Counsel on both sides for suspension of proceedings until the further order of the Court" in February of 1906, in support of the counsels' request for an indefinite stay of *NJ v. DE I* while the Compact was pending in Congress and commissioners from both States were drafting joint fishing laws pursuant to Article IV thereof. 1 Del. App. at 190-91.
- 45 Compact, Appendix B to Report of Special Master, 2007 WL 4266844, at \*5A.
- 46 *Id.* at \*6A-7A.
- 47 *Id.* at \*7A.
- 48 *Id.*
- 49 *Id.*
- 50 See Hoffecker Report at 83-85.
- 51 Compact, Appendix B to Report of Special Master, 2007 WL 4266844, at \*7A.
- 52 *Id.* at \*7A-8A.
- 53 2 Del. App. at 1110.

- 54 4 Del. App. at 4749-50.
- 55 Hoffecker Report at 91 (quoting Bates).
- 56 Alexander Cooper, Editorial, *The Boundary Question*, EVERY EVENING (Wilmington, Del.), Mar. 9, 1905, at 2-3 (produced in *NJ v. DE III* as NJ00692-93) (on file with author).
- 57 Hoffecker Report at 96.
- 58 U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State ....”).
- 59 *NJ v. DE II*, 205 U.S. 550 (1907).
- 60 See Biennial Message of Delaware Governor Preston Lea to the General Assembly (Jan. 5, 1909) (identifying lack of conformity). This document is set forth in the Appendix of the State of New Jersey on Motion for Summary Judgment, vol. 3, filed Dec. 22, 2005 (“NJ App.”) at 356a-358a.
- 61 Hoffecker Report at 102.
- 62 *NJ v. DE II*, 55 S. Ct. 934, 934 (1933) (Report of the Special Master).
- 63 Plaintiff’s August 15, 1932 Brief Before the Special Master at 126, *NJ v. DE II*, 55 S. Ct. 934 (1933) (No. 13) (on file with Delaware State Archives).
- 64 See DELAWARE BAR IN THE TWENTIETH CENTURY 375-379 (H. Winslow, A. Bookout, & P. Hannigan eds. 1994).
- 65 Reply Brief of Defendant Before Special Master at 9-10, *NJ v. DE II*, 55 S. Ct. 934 (1933) (No. 13) (1 NJ App. at 123a-124a).
- 66 *Id.*
- 67 *Id.*
- 68 Bates died in 1916, Hunn in 1926, and Ward in 1927.
- 69 Reply Brief of Defendant Before Special Master at 9-10, *NJ v. DE II*, 55 S. Ct. 934 (1933) (No. 13) (emphasis added) (1 NJ App. at 123a-124a).

- 70 Transcript of September 12, 1932 Oral Argument, *NJ v. DE II*, 55 S. Ct. 934 (1933) (No. 13) (emphasis added) (1 NJ App. at 126a-1 to 127a).
- 71 *Id.* A year later, in Delaware’s brief to the Court on New Jersey’s exceptions to the Special Master’s recommendations, Southerland restated the point more tentatively: “*Even if* the Compact of 1905 be construed as ceding to the State of New Jersey the right to determine to whom riparian rights ... shall be granted, it would still not affect the boundary between the States.” Reply Brief of Defendant (on exceptions to the report of the Special Master) at 28-29, *NJ v. DE II*, 55 S. Ct. 934 (1933) (No. 13) (emphasis added) (1 NJ App. 141a-142a).
- 72 *NJ v. DE II*, 55 S. Ct. at 965-66.
- 73 *Id.* at 966.
- 74 *NJ v. DE II*, 291 U.S. 361 (1934) (opinion of the Court); *see also NJ v. DE II*, 295 U.S. 694 (1935) (decree).
- 75 *NJ v. DE II*, 291 U.S. at 377-78.
- 76 *Id.* at 385.
- 77 Report from Clarence A. Southerland to Warren Green (July 3, 1935) (2 NJ App. at 199a).
- 78 *Id.*
- 79 *See* Report, *supra* note 7, at 17.
- 80 *See id.* at 70-71. In 1986 Delaware adopted its current Subaqueous Lands Act, 65 Del. Laws ch. 508, DEL. CODE ANN. tit. 7, ch. 72.
- 81 The DCZA declares that “the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State.” DEL. CODE ANN. tit. 7, § 7001. The public policy of Delaware is to control the location, extent and type of industrial development in Delaware’s coastal areas. *Id.* “[O]ffshore bulk transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy.” *Id.* Therefore, a “prohibition against bulk transfer facilities in the coastal zone is deemed imperative.” *Id.*; *see also* DEL. CODE ANN. tit. 7, § 7003 (offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited).
- 82 *See NJ v. DE III*, 552 U.S. at 619-20.

83 16 U.S.C. § 1451 *et seq.*

84 Report, *supra* note 7, at 72-73.

85 *Id.* at 73-76.

86 *NJ v. DE III*, 552 U.S. at 606-07.

87 *Virginia v. Maryland*, 540 U.S. 56 (2003). In that case, the Court held that Maryland, the owner of the Potomac to the Virginia shore, could not interfere with Virginia's plans to construct a water intake pipe from the Virginia side of the Potomac into Maryland territory on the river, based on the terms of a 1785 compact between the states and an 1877 arbitration award.

88 *See* Report, *supra* note 7, at 21.

89 *See NJ v. DE III*, 546 U.S. 1147 (2006) (appointing Special Master).

90 New Jersey's July 28, 2005 Motion to Reopen and for a Supplemental Decree at 7.

91 *NJ v. DE III*, 552 U.S. at 605 n.5.

92 *Id.* at 620 (quoting N.J. Coastal Management Program and Final Impact Statement 20 (Aug. 1980) (emphasis added)).

93 Report, *supra* note 7, at 99-100.

94 Justice Breyer, who reportedly held BP stock, took no part in the consideration or decision of the case. *See NJ v. DE III*, 552 U.S. at 620.

95 *Id.* at 603, 623-24.

96 *Id.* at 625 (Stevens, J., concurring).

97 *Id.* at 628 (Scalia, J., dissenting).

98 *Id.* at 615-16 (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)).

- 99 Compact, Appendix B to Report of Special Master, [2007 WL 4266844](#), at \*7A.
- 100 [Rhode Island v. Massachusetts](#), *supra* note 8, 37 U.S. at 723.
- 101 [NJ v. DE III](#), 552 U.S. at 609.
- 102 See *id.* at 603 (“New Jersey and Delaware have overlapping authority to regulate riparian structures and operations of extraordinary character extending outshore of New Jersey’s domain into territory over which Delaware is sovereign”); *id.* at 623-24 (Decree) (“1.(a) The State of New Jersey may ... exercise governing authority over ordinary and usual riparian rights ...; (b) The State of Delaware may ... exercise governing authority over the construction, maintenance, and use of ... wharves and other improvements appurtenant to the eastern shore of the Delaware River within the twelve-mile circle ... to the extent that they exceed ordinary and usual riparian uses”).
- 103 *Id.* at 609.
- 104 *Id.*
- 105 As the Court noted, the term “riparian jurisdiction” was “novel,” without precedent in fact. *Id.* at 610-11. However, that general term was understandable in light of the States’ different approaches to the regulation of riparian rights. Delaware and most other states recognized riparian rights at common law and enforced them in judicial proceedings. New Jersey, however, had developed a statutory regime beginning in 1864 to govern its citizens’ riparian rights -- perhaps due to the importance of riparian rights at or near the ports of Trenton, New York, and Philadelphia. Hofferker Report at 83-85.
- 106 [NJ v. DE III](#), 552 U.S. at 611-12.
- 107 Resort to extrinsic evidence of compact negotiations is “entirely appropriate” to resolve ambiguities in interstate compacts. [Oklahoma v. New Mexico](#), 501 U.S. 221, 236 n.5 (1991) (citing cases) (noting that “a congressionally approved compact is both a contract and a statute,” that the Court repeatedly has looked to legislative history to construe ambiguous statutes, and that it had “on occasion looked to evidence regarding the negotiating history of other interstate compacts”).
- 108 See Compact between the State of New Jersey and the State of New York, 4 Stat. 708 (1834) (2 Del. App. at 885) and Appendix J to Report of Special Master, [NJ v. DE III](#), [2007 WL 4266844](#), at \*153A (Table Comparing Similar Provisions in the New-Jersey-New York Compact of 1834 and the New Jersey-Delaware Compact of 1905).
- 109 *Id.*
- 110 [NJ v. DE III](#), 552 U.S. at 616-17 (quoting Report at 67).
- 111 *Id.* at 613-14.

112 *Id.* at 614 n.15.

113 *Id.* at 605 n.5;*id.* at 614 n.15.

114 *Id.* at 613.

115 *Id.* at 622.

116 *Id.* at 614-15 (quoting Report at 89).

117 *Id.* at 622.

118 See Stipulated Record, Descriptive List of Exhibits, Volume II, and Plaintiff's Aug. 15, 1932 Brief Before Special Master at 126, *NJ v. DE II*, 55 S. Ct. 934 (1933) (No. 13) (citing only Exhibit 53, copy of the Compact) (both documents are on file at the Delaware State Archives).

119 New Jersey argued before the Special Master that Delaware was judicially estopped from opposing New Jersey's cession claim based on Southerland's reading of Article VII. The Special Master rejected this contention, at least in part, in concluding that "Delaware is not judicially estopped from challenging New Jersey's contention that New Jersey alone has jurisdiction to regulate any riparian improvements occurring on New Jersey's side." Report, *supra* note 7, at 91. In its exceptions to the Report, New Jersey did not renew its judicial estoppel claim, see *NJ v. DE III*, 552 U.S. at 608 n.12, but relied heavily on the statements as evidence of the meaning of Article VII, to great effect. In fact, application of the doctrine of judicial estoppel would have been unwarranted at least because (i) nothing in the Court's opinion in *NJ v. DE II* indicated that Delaware had "succeeded in persuading" the Court "to accept" Southerland's particular reading of Article VII; and (ii) "considerations of equity" -- in particular, New Jersey's assertion of the Compact claim only after discovery was closed in *NJ v. DE II* -- weighed heavily against binding Delaware to Southerland's reading of the text in *NJ v. DE III*. *New Hampshire v. Maine*, 532 U.S. 742, 750, 755 (2001).

120 Course of conduct evidence is considered in interpreting ambiguous contracts because the parties to an agreement "know best what they meant, and their action under it is often the strongest evidence of their meaning." *RESTATEMENT (SECOND) OF CONTRACTS* § 202 cmt. g.

121 *NJ v. DE III*, 552 U.S. at 621 (quoting N.J. Coastal Management Program and Final Impact Statement 20 (Aug. 1980)) (emphasis added).

122 While acknowledging the lack of evidence demonstrating that the government officials in question knew of the Compact, the Court relied on the general principle that "[a]ll citizens ... are presumptively charged with knowledge of the law." *Id.* at 621 n.20.

123 *Id.* at 622-23; see also *id.* at 603 (Delaware has jurisdiction over riparian uses of "extraordinary character").

124 *Id.* at 628 (emphasis added).

125 *Id.*

126 *Id.*

127 *Id.* at 633; *see also id.* at 631 (At common law, it was considered “a necessary incident of the right [to construct wharves and piers] that they shall project to a distance from the shore necessary to reach water which shall float vessels, the largest as well as the smallest, that are engaged in commerce upon the water into which they project”).

128 *Id.* at 633-34.

129 *Id.* at 629-30.

130 Compact, Appendix B to Report of Special Master, 2007 WL 4266844, at \*7A.

131 123 U.S. 1 (1887).

132 *Id.* at 10.

133 *NJ v. DE III*, 552 U.S. at 629-30.

134 *Id.*

135 March 26, 1877 Order for Preliminary Injunction, *NJ v. DE I*, 205 U.S. 550 (1907) (No. 1) (1 Del. App. at 66-68). New Jersey had filed several affidavits from its fishermen in connection with its Complaint and motion, and some of these warned of violence if Delaware continued to arrest Jerseymen attempting to earn their living on the River.

136 *NJ v. DE III*, 552 U.S. at 614 n.15. Justice Scalia also stated that Delaware “received plenty” in the Compact as a whole, including access to fisheries on the eastern half of the River and release from the suit. *Id.* In fact, the Compact avoided windfalls to either side. Both States wanted to avoid the cost of further litigation. And both agreed to a common right of fishery and reciprocal rights to make arrests on the water until the uniform laws were adopted, after which time each State would arrest its own.

137 *Id.* at 637-38.

138 Transcript of November 27, 2007 Oral Argument at 4, *NJ v. DE III*, 552 U.S. 597 (2008) (No. 134), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/06-134orig.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-134orig.pdf).

- 139 WEBSTER’S INTERNATIONAL DICTIONARY 314 (1898) (6 Del. App. at 4195).
- 140 A *habendum* clause refers to the part of a deed that defines the interest being granted, typically introduced with the words “to have and to hold” or some variation thereof. BLACK’S LAW DICTIONARY 716 (7th ed. 1999). In Roman law, the term *habere* signified “to have (the right to) something,” which was sometimes distinguished from “*tenere* (to hold),” with *habere* referring to the right, [and] *tenere* to the fact.” *Id.* The Court in *NJ v. DE I* had previously alluded to the distinction between a claim of right and the actual exercise of jurisdiction. In its March 26, 1877 order in *NJ v. DE I*, the Court held that it “appear[ed]” that New Jersey “has *claimed and exercised* jurisdiction over the easterly portion of the river.” 1 Del. App. at 67 (emphasis added). In *NJ v. DE II*, the Special Master made the same distinction in the finding that “Delaware at all times since 1783 has *claimed, asserted and exercised* exclusive dominion and jurisdiction over the lands and waters within the boundaries fixed by the said title deeds, as modified by the Compact of 1905 between the states of Delaware and New Jersey.” *NJ v. DE II*, 55 S. Ct. at 964-65 (emphasis added).
- 141 123 U.S. 1 (1887).
- 142 2 Del. App. at 1110.
- 143 *NJ v. DE II*, 291 U.S. at 377.
- 144 Report at 38. Delaware had argued that the reference to New Jersey’s “own side of the River” in Article VII meant that New Jersey’s “side” ended at the low water mark as of the 1934 boundary decision. In rejecting this contention, the Special Master relied on Southerland’s “representations to the Court” in *NJ v. DE II*. *Id.* at 39. The Court agreed with the Special Master’s analysis, dismissing the argument as “altogether fallacious.” *NJ v. DE III*, 552 U.S. at 615. But neither the Special Master nor the Court discussed the separate “may ... continue” language of Article VII.
- 145 Even if Delaware had given New Jersey a perpetual license to exercise riparian jurisdiction, New Jersey’s authority would always be subject to the paramount police power of the sovereign within its own territory. Justice Stevens essentially adopted this reading of Article VII in concurring with the result reached by the Court. See *NJ v. DE III*, 552 U.S. at 626 (“I would hold, therefore, that New Jersey may only grant, and thereafter exercise governing authority over, the rights of construction, maintenance, and use of wharves and other riparian improvements beyond the low-water mark to the extent that the grant and exercise of those rights is not inconsistent with the police power of the State of Delaware”).
- 146 Report, *supra* note 7, at 39.
- 147 *Rhode Island v. Massachusetts*, *supra* note 8, 37 U.S. at 723.
- 148 See Hoffecker Report at 67-70, 102-04. In 1907, the joint commission charged with drafting uniform fishing laws reported the “gradual disappearance of the shad ... and the almost total disappearance of the valuable sturgeon industries” due to industrial pollution and the destruction of small food fish by menhaden fishermen. *Id.* at 100. By the 1930’s, “few if any fishermen cast their nets within the twelve-mile circle because there were few fish to be caught there.” *Id.* at 104.

Government Works.