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Commentary: Practical Considerations in Original Action Litigation: Virginia v. Maryland and New Jersey v. Delaware

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COMMENTARY

PRACTICAL CONSIDERATIONS IN ORIGINAL ACTION LITIGATION: *VIRGINIA V. MARYLAND* AND *NEW JERSEY V. DELAWARE*

*Stuart A. Raphael**

INTRODUCTION

In a handful of American rivers that separate one state from another, the boundary line runs along one state's shoreline, rather than down the middle of the river or through the navigable channel. Because sovereignty ordinarily goes with boundary, a state claiming ownership of the river to the other state's shoreline may assert the right to regulate the other's use of the river beyond the boundary line, or even to block it entirely. The United States Supreme Court has decided two such interstate controversies since 2003: *Virginia v. Maryland*,[1] and *New Jersey v. Delaware*.[2]

These cases reached opposite results on similar facts. They provide useful case studies to highlight three aspects of litigation practice in original action cases. First, states must give careful pre-litigation consideration to how the posture of the dispute affects the likelihood that the Court will accept jurisdiction. Second, even though the Court is not required to give any deference to the special master it appoints to make recommendations, as a practical matter, success before the special master may be critical to winning. And third, the fact-specific nature of

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[1] 540 U.S. 56 (2003).

[2] 552 U.S. 597 (2008).

original actions gives the Court flexibility to distinguish precedent that might otherwise appear controlling. All three of these considerations invite and reward effective lawyering.

BACKGROUND

The boundary line in the Potomac River that separates Maryland from Virginia runs along the Virginia shoreline at the low-water mark.[3] Similarly, the boundary line in the Delaware River that separates New Jersey from Delaware, within the so-called "Twelve-Mile Circle" from New Castle, runs along the New Jersey shoreline at the mean low-water mark.[4]

In both instances, the boundary line had been disputed for centuries and, before it was resolved, the states signed a compact governing their respective access rights. Virginia and Maryland entered into the Compact of 1785 but did not settle the boundary line until binding arbitration decided it in the Black-Jenkins Award of 1877.[5] New Jersey and Delaware entered into the Compact of 1905, and the Supreme Court settled the boundary line in 1934.[6] Article VII of both compacts addressed access-rights at a time when the signatories were uncertain where the boundary line would ultimately be drawn. A side-by-side comparison of the two compact provisions is useful:

Virginia-Maryland Compact of 1785	**New Jersey-Delaware Compact of 1905**
VII. The citizens of each state respectively shall have full property in the shores of [the Potomac] river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river.[7]	VII. 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.[8]

[3] *Virginia*, 540 U.S. at 62.

[4] *New Jersey*, 552 U.S. at 602.The boundary line in the lower Delaware River and Bay is in the middle of the main shipping channel. *See* New Jersey v. Delaware, 291 U.S. 361, 385 (1934).

[5] *Virginia*, 540 U.S. at 62.

[6] *New Jersey*, 291 U.S. at 385.

[7] *Virginia*, 540 U.S. at 62.

[8] *New Jersey*, 552 U.S. at 602.

On its face, the language in the 1905 Compact more clearly granted each state sovereign jurisdiction over activities along its own shoreline than the earlier compact. New Jersey and Delaware recognized that each state would "continue to exercise riparian jurisdiction of every kind and nature," and that each had the power to grant riparian lands. The 1785 Compact, by contrast, addressed the rights of citizens along the Potomac River without even mentioning what jurisdiction Virginia and Maryland could exercise.

Nonetheless, the Court ruled seven to two in *Virginia* that the 1785 Compact gave Virginia the power to withdraw water from the River and to extend improvements beyond the boundary line, "free of regulation by Maryland."[9] This freed Virginia's Fairfax County Water Authority to construct a water intake extending 725 feet beyond the boundary line into the channel of the Potomac River in Maryland. The pipeline was ten feet in diameter and capable of withdrawing up to 300 million gallons a day. The Court explained that the Compact gave both states equal rights of access and that those rights were not lost by the fact that the boundary was later established on Virginia's side of the river; Article VII "simply guaranteed that the citizens of each State would retain the right to build wharves and improvements *regardless of which State ultimately was determined to be sovereign over the River*."[10]

By contrast, although the 1905 Compact appeared to give New Jersey and Delaware clearer rights of jurisdiction over their own shores, the Court ruled six to two in *New Jersey* that Delaware had powers to regulate New Jersey's side of the River that Maryland did not have on Virginia's side. New Jersey could grant and regulate "ordinary and usual riparian rights" on its own side of the River, but Delaware could regulate—and prohibit—any improvements on the New Jersey side "to the extent that they exceed ordinary and usual riparian uses."[11] This allowed Delaware to block the construction of a liquefied natural gas (LNG) plant that would have been constructed in Logan Township, New Jersey, but which depended on a 2000 foot pier extending into the channel of the mile-wide Delaware River.[12]

In both cases, the Supreme Court appointed the same special master, Ralph I. Lancaster, Jr., of Maine.[13] Lancaster's report favored Virginia and the Supreme Court confirmed his recommendations in full.[14] He reached the opposite

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[9] 540 U.S. at 79.

[10] *Id.* at 69 (emphasis added).

[11] 552 U.S. at 624.

[12] *Id.*

[13] New Jersey v. Delaware, 546 U.S. 1147 (2006); Virginia v. Maryland, 531 U.S. 922 (2000).

[14] *Virginia*, 540 U.S. at 79.

conclusion in *New Jersey* and would have given Delaware "overlapping" authority with New Jersey to regulate the construction of riparian improvements on New Jersey's side of the River.[15] As just noted, the Supreme Court confirmed his recommendation to the extent it permitted Delaware to regulate uses that "exceed ordinary and usual riparian uses," but denied Delaware the authority to regulate "ordinary and usual riparian uses."[16] This distinction was not mentioned in the Special Master's report, the parties' briefs, or at oral argument.

PRE-LITIGATION MANEUVERING IN VIEW OF THE GATEKEEPING REQUIREMENTS

The United States Constitution gives the Supreme Court original jurisdiction over suits between states,[17] and Congress has made that jurisdiction "exclusive."[18] But the fact that the Supreme Court alone may exercise original jurisdiction does not mean that it must. The exercise of original jurisdiction is "obligatory only in appropriate cases."[19] The Court has said that original actions "tax the limited resources of this Court by requiring us 'awkwardly to play the role of factfinder' and diverting our attention from our 'primary responsibility as an appellate tribunal.'"[20] So the Court exercises its original jurisdiction "sparingly" and "retain[s] 'substantial discretion' to decide whether a particular claim requires 'an original forum in this Court.'"[21]

A state seeking to invoke the Court's original jurisdiction, in addition to satisfying Article III's justiciability requirements, must satisfy two "gatekeeping" requirements.[22] First, the state's interest must be of such "seriousness and dignity" to warrant the Court's intervention.[23] Jurisdiction is reserved for "weighty controversies,"[24] with the "model case" being a dispute "of such seriousness that it would amount to *casus belli* if the States were fully sovereign."[25] Former Maine Chief Justice McKusick, a special master in three original actions,[26] wrote

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[15] *New Jersey*, 552 U.S. at 608.

[16] *Id.* at 624.

[17] U.S. CONST. art. III, § 2.

[18] 28 U.S.C. § 1251(a) (2011).

[19] Mississippi v. Louisiana, 506 U.S. 73, 76 (1992) (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972)).

[20] South Carolina v. North Carolina, 130 S. Ct. 854, 863 (2010) (quoting Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 498 (1971)).

[21] *Id.* (quoting *Mississippi*, 506 U.S. at 76).

[22] Nebraska v. Wyoming, 515 U.S. 1, 8 (1995).

[23] *Mississippi*, 506 U.S. at 77 (quoting *Illinois*, 406 U.S. at 93).

[24] *South Carolina,* 130 S. Ct. at 869 (Roberts, C.J., concurring in part and dissenting in part).

[25] Texas v. New Mexico, 462 U.S. 554, 571 n.18 (1983).

[26] Kansas v. Nebraska, 528 U.S. 1001 (1999); Louisiana v. Mississippi, 516 U.S. 22 (1995); Connecticut v. New Hampshire, 503 U.S. 1002 (1992).

a highly regarded law review article in 1993 in which he identified *California v. West Virginia*[27]—a breach of contract dispute over college football—as a case that was declined because it "was probably thought too insubstantial to be worthy of attention by the highest federal tribunal."[28]

Second, the state must show there is no "alternative forum in which the issue tendered can be resolved."[29] The alternative forum may be adequate even though the complaining state is not a party. In *Arizona v. New Mexico*,[30] for instance, the Court declined to exercise its original jurisdiction in a suit by Arizona challenging a New Mexico tax as a violation of the Commerce Clause. The Court found an adequate alternative forum in a pending suit in which the same issues were being raised, not by Arizona, but by one of Arizona's political subdivisions.[31] "Arizona's interests were thus actually being represented by one of the named parties to the suit."[32] The "issue of appropriateness," however, "must be determined on a case-by-case basis."[33]

The Supreme Court typically does not issue an opinion explaining why it chooses to exercise its original jurisdiction, and it did not do so when it granted leave to file in *Virginia* or *New Jersey*. The seriousness-and-dignity factor was probably satisfied with ease in both cases. In *Virginia*, Maryland was blocking a Virginia municipality from constructing an offshore drinking water intake that would supply cleaner water to more than a million people in Northern Virginia and greatly improve operational efficiencies.[34] Moreover, the political controversy

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[27] 454 U.S. 1027 (1981).

[28] Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisprudence Docket Since 1961*, 45 ME. L. REV. 185, 198 (1993). The lack of seriousness was probably a factor in the Court's decision declining jurisdiction last year in *Mississippi v. City of Memphis*. 130 S. Ct. 1317 (2010). Mississippi claimed that groundwater pumping in Memphis was depleting the Memphis Sands aquifer that underlay various states, including Mississippi. Mississippi asserted exclusive ownership of the groundwater underneath its soil and sought money damages for the value of water extracted. Mississippi asked, alternatively, for an equitable apportionment. Tennessee responded that Mississippi's groundwater-ownership theory was invalid and that, in any case, Mississippi could not demonstrate any actual injury from groundwater pumping. The Court denied Mississippi's motion for leave to file the complaint without prejudice. *Mississippi*, 130 S. Ct. at 1317 (citing Colorado v. New Mexico, 459 U.S. 176, 187 n.13 (1982)). The Court in *Colorado* said: "Our cases establish that a State seeking to prevent or enjoin a diversion by another State bears the burden of proving that the diversion will cause it 'real or substantial injury or damage.'" 459 U.S. at 187 n.13 (citations omitted).

[29] *Mississippi*, 506 U.S. at 77.

[30] 425 U.S. 794 (1976) (per curiam).

[31] *Id.* at 794–97.

[32] Maryland v. Louisiana, 451 U.S. 725, 743 (1981).

[33] *Id.* at 739–44 (finding alternative forum inadequate despite involvement of state officials in pending FERC action raising same question).

[34] Brief in Support of Motion for Leave to File Bill of Complaint at 1–2, 10–12, 21–23, Virginia v. Maryland, 540 U.S. 56 (2003) (Orig. No. 129), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/22o129/22o129.cmp.pdf.

surrounding Maryland's efforts to block the project appeared parochial. Various Maryland officials said that Maryland needed to control Virginia's water supply in order to limit growth in Northern Virginia. Another Maryland official said that if "Virginia and Maryland were independent states, we would be at war over this,"[35] tying nicely into the "*casus belli*" dictum about the "model" original action case.[36]

New Jersey involved similar stakes. New Jersey argued that Delaware was using its coastal zone laws to effectively prohibit industrial development on the New Jersey side of the River within the Twelve-Mile Circle.[37] As Justice Scalia would later note in dissent, the project that Delaware blocked would have "created more than 1,300 new jobs, added $277 million to New Jersey's gross state product, produced $13 million in state and local tax revenues," and increased by 15% the region's natural gas supply.[38]

An arguably-adequate alternative forum posed an obstacle in both cases, however. In *Virginia*, Fairfax Water, a political subdivision of Virginia, was embroiled in administrative litigation in Maryland seeking a permit to construct the offshore intake. Although Fairfax Water pressed for the issuance of the permit, it also argued that the Compact barred Maryland from requiring a permit. By the time Virginia filed its papers in the Supreme Court, Fairfax Water had prevailed before the administrative law judge only to have the Maryland Department of Environment reject the decision, claiming that Virginia did not "need" a new water intake. The Maryland administrative law judge declined to address Fairfax Water's Compact arguments. Moreover, Maryland's highest court had already determined that the Compact of 1785 did not apply in the non-tidal portion of the Potomac River,[39] where the intake was to be constructed. Accordingly, Virginia was able to make an effective case that the alternative forum was inadequate because the compact claim was doomed in a Maryland tribunal.

The potential alternative forum in *New Jersey* was also a state permit proceeding. BP America's affiliate was seeking a Delaware coastal zone permit to construct the pier for the LNG facility. The Delaware agency denied the permit a few months before New Jersey initiated litigation in the Supreme Court. BP could have appealed the permit-denial to a state court in Delaware but chose not

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[35] Virginia's Reply Brief at 3, *Virginia*, 540 U.S. 56 (Orig. No. 129) (on file with author).

[36] *Texas*, 462 U.S. at 571 n.18.

[37] New Jersey's Brief in Support of Motion to Reopen at 19, New Jersey v. Delaware, Orig. No. 134, 2005 WL 5949401 (Aug. 1, 2005).

[38] New Jersey v. Delaware, 552 U.S. 597, 644 (2008) (Scalia, J., dissenting).

[39] Middlekauff v. LeCompte, 132 A. 48 (Md. 1926).

to, concluding that an appeal would be futile under Delaware law. By the time New Jersey filed its moving papers, there was simply no alternative forum pending in which the compact issue could have been resolved.[40]

Practitioners must give careful consideration to the posture of the dispute before seeking leave to file the complaint. In *Virginia*, the Commonwealth effectively positioned the case to maximize the likelihood of the Court taking it while Maryland repeatedly blundered by exacerbating the controversy. The Attorneys General exchanged correspondence in the months leading up to the filing in which Maryland hardened its position that it could regulate Virginia's access to the Potomac River and that the Compact of 1785 did not apply. A similar exchange of correspondence between high-level officials in *New Jersey* helped crystallize the dispute there. And while Virginia's motion for leave to file was pending, the Maryland General Assembly took up and enacted legislation that further regulated Virginia's rights by requiring any water intakes to have permanent flow-restrictors. One of the law's proponents was quoted as saying that the legislation would help Maryland retain control over Virginia's water withdrawals despite Virginia's pending lawsuit.[41] Virginia was able to bring those statements to the Court's attention during the briefing process.

Timing was also important. When Virginia filed suit, it appeared likely that Fairfax Water would lose its permit-fight. Ironically, the Maryland legal process ultimately shook loose the permit, but that was after the Supreme Court had already taken the case and appointed a special master. Maryland's argument for stopping the original action would have been stronger had Maryland issued the permit before Virginia filed suit, and if Maryland had not insisted on new restrictions, while the gate-keeping motion was pending, that further demonstrated Maryland's interference with Virginia's river-access.[42]

IMPORTANCE OF SUCCESS BEFORE THE SPECIAL MASTER

The Court typically appoints a special master in original action cases to take evidence and make recommendations. The parties may file exceptions to the special master's report. As a practical matter, this converts what is formally a trial court proceeding into something more closely resembling an appeal.

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[40] *Accord* Wyoming v. Oklahoma, 502 U.S. 437, 452 (1992) ("[N]o pending action exists to which we could defer adjudication on this issue.").

[41] Virginia's Reply Brief, *supra* note 35, at 2–3.

[42] Maryland asked the Special Master to dismiss the case as moot after Maryland issued the permit. But Virginia countered that the permit changed nothing; Virginians should not have had to apply to Maryland for permits in the first place, and Maryland's permit required a flow-restrictor that interfered with Virginia's compact rights. The Special Master rejected Maryland's mootness argument, and the final decree enjoined Maryland from enforcing the permit. Virginia v. Maryland, 540 U.S. 56, 79–80 (2003).

Is the special master's recommendation entitled to any deference? The formal answer is no. Just as with a district court appointment, a special master's findings of fact and conclusions of law are both subject to *de novo* review.[43] Chief Justice Roberts remarked that he regards a special master "as more akin to a law clerk than a district judge. We don't defer to somebody who's an aide that we have assigned to help us gather things here."[44] Justice Scalia put it more colorfully, and derogatorily, when he pressed Kansas's Attorney General: "Why do you keep talking about the Special Master? He's just—he's just our *amanuensis*. Ultimately it's our discretion, isn't it?"[45]

But these comments understate the practical importance of a special master's recommendations. The record in an original action proceeding is typically huge and the proceedings often span many years. A special master in such a case develops an expertise in the merits that no Justice has the time to replicate. Lengthy and complex proceedings can also give a special master the opportunity to make numerous, effectively unreviewable, decisions. Then-Justice Rehnquist came close to recognizing the practical deference given to a special master when he referred to the "appellate-type review which this Court *necessarily* gives to his findings and recommendations."[46]

In other words, original action proceedings create two opportunities for *de facto* deference to the special master. First, a state that loses an argument before the special master may be forced to abandon it when choosing the best issues to raise on exceptions. The 15,000-word limit (about fifty pages) that applies to formal exceptions,[47] together with appellate strategy that requires litigants to pick their best arguments, necessarily force litigants to drop their weaker claims by the time they file exceptions to the special master's report.

That happened in *Virginia*. The parties spent the first year litigating whether the Compact of 1785 applied to the *entire* Potomac River or only the tidal portion. The Special Master ruled in Virginia's favor on this "Entire River"

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[43] FED. R. CIV. P. 53(f)(3)–(4) (providing for "de novo" review of special master's findings of fact and conclusions of law); EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 643 (9th ed. 2007) ("[T]he Master's reports and recommendations are advisory only . . . .").

[44] Transcript of Oral Argument at 27, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (Orig. No. 138), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/138-orig.pdf.

[45] Transcript of Oral Argument at 13, Kansas v. Colorado, 556 U.S. 98 (2009) (Orig. No. 105) (emphasis added), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/105%20Orig.pdf. An amanuensis is "a literary or artistic assistant, in particular one who takes dictation or copies manuscripts." THE OXFORD AMERICAN COLLEGE DICTIONARY 36 (2002).

[46] Maryland v. Louisiana, 451 U.S. 725, 765 (1981) (Rehnquist, J., dissenting) (emphasis added).

[47] SUP. CT. R. 33.1(g).

issue.[48] Although the Special Master could have submitted an interim report to the Court, he did not. If he had, Maryland certainly would have filed exceptions and would have had a chance to win the argument there. Instead, the parties spent the next eighteen months of the litigation addressing Maryland's argument that the Compact preserved its inherent police power over Virginia's shoreline, and that Virginia's Compact rights were abandoned through prescription and acquiescence. Special Master Lancaster ultimately resolved those issues in Virginia's favor, too. While Maryland filed exceptions to those recommendations, it chose not to contest his earlier ruling on the Entire River issue.[49] That ruling was then embodied in the final decree,[50] which effectively overruled a decision of Maryland's highest court in 1926[51]—all without any formal analysis of the issue by the Supreme Court.[52]

Second, the Court may implicitly defer to the recommendations of special masters because of the greater time they spend with the massive record and their expertise in the subject matter. Justice Ginsburg suggested such deference in her opinion for the majority in *New Jersey,* noting that Lancaster had "carefully considered nearly 6,500 pages of materials presented by the parties in support of cross-motions for summary judgment."[53]

Moreover, Lancaster may have received greater deference by the majority in *New Jersey* because he was also the Special Master in *Virginia*, and Lancaster himself distinguished the two cases. Justice Ginsburg intimated some deference to him when she wrote that "*both* original actions were referred to Ralph I. Lancaster, Jr., as Special Master. We find persuasive the Special Master's reconciliation of his recommendations in the two actions."[54] Indeed, although Justice Scalia

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[48] Report of the Special Master at 15–44, 54, 58-65, Virginia v. Maryland, 540 U.S. 56 (2003) (Orig. No. 129), *available at* http://www.supremecourt.gov/SpecMastRpt/Orig129_120602.pdf.

[49] Justice Stevens remarked at oral argument that he "made the mistake of reading the Master's report before I read the briefs," asking Maryland to confirm that it was "no longer" arguing the Entire River issue. Transcript of Oral Argument at 3, *Virginia*, 540 U.S. 56 (Orig. No. 129), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/129orig.pdf.

[50] *Virginia*, 540 U.S. at 79.

[51] Middlekauff v. LeCompte, 132 A. 48, 48 (Md. 1926).

[52] There is no guarantee that the Court will adopt a special master's recommendation simply because the losing party chooses not to challenge it. Indeed, the Court declined to approve the parties' consent decree in *Vermont v. New York*. 417 U.S. 270 (1974). The decree would have required the Court to appoint a special "lake master" who could make arbitral decisions that would then be reviewable by the Court. *Id.* at 277. The Court refused to approve the decree, suggesting instead that the parties resolve the dispute through an interstate compact or binding settlement agreement. *Id.* at 278. But arguments that the parties choose not to pursue are typically considered abandoned. *Alabama v. North Carolina*, 130 S. Ct. 2295, 2307 (2010) (treating as abandoned an exception that was not briefed).

[53] New Jersey v. Delaware, 552 U.S. 597, 608 (2008).

[54] *Id.* at 617 (emphasis added).

maintained that *Virginia* "effectively decided" *New Jersey*,[55] Delaware's position was strengthened considerably because the Special Master thought the cases were distinguishable.

In short, although a case is not necessarily over when a state loses the special master's recommendation, the state filing exceptions will have a more challenging hurdle to overcome than might be suggested by the *de novo* standard of review.

ORIGINAL ACTIONS ARE *SUI GENERIS*

As noted above, the language in the New Jersey and Delaware Compact of 1905 appeared to give New Jersey a stronger claim to exclusive jurisdiction over its side of the Delaware River than Virginia had on its side of the Potomac River under the Virginia and Maryland Compact of 1785. Yet the Special Master and the majority in *New Jersey* concluded that the language of New Jersey's compact was weaker. Lancaster addressed *Virginia's* precedential effect in a footnote in his report in *New Jersey;* he said the result in *Virginia* "[s]uperficially . . . would appear to support New Jersey's argument here," but he distinguished *Virginia* based on "the unique language of the compact and arbitration award involved in that case."[56] Justice Scalia, in a dissent joined by Justice Alito, strongly criticized the "unique language" argument as one that undermines the value of precedent:

> Our opinion in *Virginia v. Maryland*, 540 U.S. 56 (2003), effectively decided this case. It rejected the very same assertion of a riverbed-owning State's supervening police-power authority over constructions into the river from a State that had been conceded riparian rights.
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> . . .
>
> Today's opinion, quoting the Special Master, claims that the result in *Virginia v. Maryland* turned on "'the unique language of the compact and arbitration award involved in that case.'" But the case did not say that. And of course virtually every written agreement or award has "unique language," so if we could only extend to other cases legal principles pertaining to identical language our interpretive jurisprudence would be limited indeed.[57]

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[55] *Id.* at 638 (Scalia, J., dissenting).

[56] *Id.* at 617 (quoting Report of the Special Master at 64 n.118, New Jersey v. Delaware, 552 U.S. 597 (2008), *available at* http://www.supremecourt.gov/SpecMastRpt/Orig134_041697.pdf).

[57] *Id.* at 638–39 (Scalia, J., dissenting) (citations omitted).

Justice Scalia also criticized the majority in *New Jersey* for inventing the distinction between "ordinary and usual riparian rights" and wharves of "extraordinary character"[58]—a distinction none of the parties or the Special Master ever suggested. He accused the majority of making up that distinction because the case involved a pier for offloading potentially hazardous substances, rather than a less-menacing use, like offloading vegetables (or like the water intake structure at issue in *Virginia*):

> The Court inexplicably concludes, however, that the liquefied natural gas (LNG) unloading wharf at stake in this litigation "goes well beyond the ordinary or usual." Why? Because it possesses "extraordinary character."
>
> To our knowledge (and apparently to the Court's, judging by its failure to cite any authority) the phrase has never been mentioned before in any case involving limitations on wharfing out. What in the world does it mean? Would a pink wharf, or a zig-zagged wharf qualify? Today's opinion itself gives the phrase no content . . . . This rationale is bizarre.[59]
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> . . .
>
> Could the determinative fact be that the wharf will be used to transport liquefied natural gas, which is dangerous? No again. The Court cites no support, and I am aware of none, for the proposition that the common law forbade a wharf owner to load or unload hazardous goods. . . .
>
> . . . I am not so rash as to suggest, however, that these factors had nothing to do with the Court's decision. After all, our environmentally sensitive Court concedes that if New Jersey had approved a wharf of equivalent dimensions, to accommodate tankers of equivalent size, carrying tofu and bean sprouts, Delaware could not have interfered.[60]

Whether Justice Scalia was right to criticize the majority in *New Jersey* for deciding the case based on concerns over the LNG facility, rather than applying the reasoning of *Virginia*, this episode offers an important lesson to advocates in original action cases: never underestimate the potential to distinguish unfavorable

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[58] *Id.* at 628.

[59] *Id.* at 640.

[60] *Id.* at 643–44 (citations omitted).

precedent based on the "unique" facts of the earlier case. The Court may be receptive to arguments that original actions are *sui generis*, and decisions from one case may not control the outcome in another.

CONCLUSION

Suits between states on the Supreme Court's original docket provide a wonderful opportunity for creative lawyering at all stages of the process. States seeking to persuade the Court to exercise jurisdiction can improve their chances by taking careful steps before filing their papers to show that the case is a serious one, warranting the Court's intervention, and to demonstrate that no alternative forum exists in which the issue can be resolved. Conversely, the state that sees one of these actions coming can take defensive steps to improve its chances of persuading the Court to decline jurisdiction, such as by offering its adversary avenues to avoid litigation through negotiation, and by avoiding being locked into a legal position prematurely that may come back to haunt it. If the Court accepts jurisdiction, success before the special master is extremely important, if not critical. And original actions, perhaps more so than cases on the Court's appellate docket, permit effective advocates to distinguish precedent that might otherwise appear controlling.