Creating Flexibility in Interstate Compacts

Emily Jeffers

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol36/iss2/2

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38726P

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
Creating Flexibility in Interstate Compacts

Emily Jeffers*

States have relied upon interstate compacts to solve issues crossing jurisdictional lines since the early years of the republic. The interpretation of one such agreement, written in 1905 to resolve a fishing dispute between Delaware and New Jersey, was presented to the Supreme Court in New Jersey v. Delaware. Deciding a case with significant energy implications for the Mid-Atlantic region, the Court held that the 1905 Compact did not give New Jersey authority to build a liquid natural gas terminal on its shore of the Delaware River without permission from Delaware. This case highlights the difficulties in relying on a static document to solve complex interstate disputes. Because litigation is often ill-suited to resolve these controversies, restructuring interstate compacts to allow for greater flexibility would allow signatory states to adapt to future developments without an expensive and time consuming original jurisdiction lawsuit before the Supreme Court.

Introduction.................................................................................................................. 210
I. The New Jersey-Delaware Boundary................................................................. 212
   A. Background to the Conflict........................................................................ 212
   B. The 1905 Compact and 1934 Supreme Court Decision........................ 213
   C. The Controversy Erupts.............................................................................. 214
   D. New Jersey v. Delaware III...................................................................... 216
II. The Interstate Compact....................................................................................... 219
   A. Historical Background................................................................................ 219
   B. Interstate Compacts Today.................................................................... 220
III. With or Without: A Case Study of Two Compacts........................................ 222
   A. The Colorado River Compact................................................................. 223
      1. An Imperfect Solution for a Dry Land................................................. 223
      2. The Plight with the Colorado River Compact................................... 224

Copyright © 2009 by the Regents of the University of California.
* J.D. Candidate, University of California, Berkeley, School of Law, 2010; B.A., Biology, Yale University, 2004. Thanks to Bob Infelise and Holly Doremus for their insightful comments and valuable feedback throughout the writing of this Note. Joe Sax provided helpful direction in the early stages of the writing process. Thanks also to Christie Henke, Sally Huang, and Brian Scaccia for their input and excellent editorial suggestions.
INTRODUCTION

On March 31, 2008, the Supreme Court blocked the construction of a $700 million liquid natural gas (LNG) terminal on the New Jersey shore of the Delaware River, and in so doing ended a boundary dispute between New Jersey and Delaware that had persisted “almost from the beginning of statehood.” Relying on an interstate compact (the “1905 Compact”), written over a hundred years ago to settle a fishing conflict, the court found that the two states held overlapping jurisdiction over structures extending beyond the low-water mark of New Jersey’s shore. Since Delaware’s environmental regulations forbade the construction of heavy industrial facilities along the coastal zone, the facility envisioned by New Jersey was precluded by Delaware law and the compact between the two states.

The controversy briefly captured the attention of the nation. How could an interstate boundary remain unsettled for over three hundred years? More notably, why was the Supreme Court deciding the fate of a hugely profitable processing facility based upon a nineteenth-century fishing agreement? The controversy evoked strong emotional reactions in both states, with New Jersey threatening to withdraw state pension funds from Delaware banks, and Delaware countering with a proposal to authorize the National Guard to protect its borders from encroachment.

While New Jersey ultimately decided against testing the seaworthiness of the decommissioned battleship New Jersey, each state spent considerable

5. Id. One New Jersey legislator explored the seaworthiness of the vessel in the event of an armed invasion by Delaware. Id.
resources over the three years it took to reach the Supreme Court’s judgment. Ultimately, the fate of the Crown Landing project, as the LNG terminal came to be known, rested in the hands of eight justices\(^6\) and their interpretation of a compact that had no mechanism for internal dispute resolution. While bringing the Supreme Court into the fray may have effectively ended the dispute, it resulted in a verdict that leaves future New Jersey construction in limbo. In addition, a project with serious environmental implications was decided in a way that took neither the energy demands nor ecological concerns of the region into account. In the early twentieth century, when the compact between New Jersey and Delaware was written and ratified by Congress,\(^7\) LNG terminals and environmental regulations were far from the minds of the drafters.

In this Note, I recount the history of the disputed New Jersey-Delaware boundary, from its inception as a means of protecting a colonial settlement to its present role in the controversy between the two states. In doing so, I discuss the Court’s decision in *New Jersey v. Delaware* and the ways in which interstate compacts can be more effectively reconstructed to take into account complex modern realities. Interstate compacts often implicate concerns that a static agreement cannot effectively solve; thus, giving these documents greater flexibility would allow states to devise new solutions to problems that remain unresolved or arise over time.

The Supreme Court retains original jurisdiction over controversies between states,\(^8\) yet litigation often does not lead to an outcome that successfully addresses the concerns of both parties.\(^9\) Looking through the lens of water allocation law, I compare two interstate compacts and examine how their successes and failures are instructive lessons for future interstate resource management conflicts. Both the Colorado River Compact and the Delaware River Basin Compact were negotiated to solve regional water conflicts and each provides insights into the tools needed to update interstate compacts such as the 1905 Compact in *New Jersey v. Delaware III*.

Ultimately, I conclude that for a compact to maintain its relevance through the decades, successfully address environmental concerns, and achieve the goals of its drafters, several key provisions must be included. The most important of these is the establishment of a regulatory commission made up of members of both signatory states. For compacts that have already been signed into law, responsibility should fall to the states to amend their agreements to provide an adequate dispute resolution process, and to Congress to set


\(^7\) Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (the “1905 Compact”).

\(^8\) “The judicial power shall extend to . . . controversies between two or more states.” U.S. CONST. art. III, § 2.

conditions that ensure a compact’s relevancy does not fade with the passing of time. In addition, the Supreme Court should encourage mutual concession by refusing to hear suits that implicate an interstate compact. New Jersey v. Delaware, while settled by the Supreme Court in a decidedly unremarkable fashion, highlights the difficulties of relying on litigation to interpret a long-standing interstate compact and the need for alternative resolutions to compact disputes.

I. THE NEW JERSEY-DELAWARE BOUNDARY

"[H]eere is plenty, but especially sturgeon all the sommer time . . . "
—Colonist Peter Lindestrom, on the abundance of the Delaware River

A. Background to the Conflict

The unusual history of the disputed New Jersey-Delaware boundary began with a royal grant to the Duke of York in the seventeenth century. Wishing to protect the major town and administrative center of his colony on the western side of the Delaware River (land that would later become the state of Delaware), he proposed a twelve-mile circular boundary from the town, New Castle, as a territorial buffer. Because extending the circle fully would encompass land previously granted to New Jersey, the circumference was terminated at the mean low-water mark of New Jersey’s shore. In 1682, King Charles II transferred this territory to William Penn, and since colonial times Delaware has claimed water rights and the subaqueous soil in the Delaware River to the low-water mark within this twelve-mile circle. Not until two hundred years later were the details of the boundary first disputed.

The abundant shad and sturgeon stocks in the river were of particular importance to the nineteenth-century fishing industry. Fisherman of both states harvested the bounty of the Delaware River, while buyers across the East Coast came to the major port towns and shipped the catch to distant markets in water-tank rail cars. Sturgeon, once a nuisance fish, became a profitable commodity when the price of caviar increased in the late-1800s. Predictably, New Jersey and Delaware took an increasing interest in their future rights to the river. In 1871, Delaware legislators prohibited non-Delaware residents from fishing

11. Id. at 7.
12. See id.
13. Id. at 3, 5–8.
15. Price, supra note 14, at 75.
within the circle without obtaining an expensive license,\textsuperscript{16} unleashing a "tidal wave of ill will and litigation that has pitted New Jersey against Delaware for over 130 years."\textsuperscript{17} In 1877, New Jersey brought its first suit in the Supreme Court to contest Delaware's boundary claim and its authority to regulate fishing within the twelve-mile circle.\textsuperscript{18}

\textbf{B. The 1905 Compact and 1934 Supreme Court Decision}

New Jersey's 1877 claim against Delaware languished for many years until a negotiated compact settled the two states' fishing disagreements. The 1905 Compact, ratified by Congress in 1907, provided for concurrent fishing rights and settled matters of civil and criminal process procedures on vessels.\textsuperscript{19} However, the compact deferred the question of ownership within the twelve-mile circle.\textsuperscript{20} Two jurisdictional provisions in particular sowed the seeds for future litigation: Article VII granted that each state may "continue to exercise riparian jurisdiction of every kind and nature," while Article VIII stated nothing "shall affect the territorial limits, rights, or jurisdiction of either State . . . except as herein expressly set forth."\textsuperscript{21}

A 1934 dispute over the ownership of an oyster bed in the river prompted a second action, \textit{New Jersey v. Delaware II}.\textsuperscript{22} As a result of this suit, the Court conclusively settled the boundary between the States, holding that within the twelve-mile circle, Delaware owned the river and sub-aqueous soil up to the "low water mark on the easterly or New Jersey side . . . subject to the Compact of 1905."\textsuperscript{23} The Court rejected New Jersey's argument that Delaware had abandoned any claim of ownership beyond the middle of the river by agreeing to the 1905 Compact. "The compact of 1905," the Court declared, "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."\textsuperscript{24}

\begin{thebibliography}{9}
\bibitem{16} An Act for the Protection of Fishermen, 14 Del. Laws 84, 84–87 (1871).
\bibitem{17} Expert Report of Carol E. Hoffecker, \textit{supra} note 10, at 14–15.
\bibitem{19} Act of Jan. 24, 1907, ch. 394, 34 Stat. 858.
\bibitem{20} \textit{Id.} Delaware's counsel represented that "[t]he compact . . . was . . . not a settlement of the disputed boundary, but a truce or \textit{modus vivendi}." \textit{New Jersey v. Delaware III}, 128 S. Ct. 1410, 1417 n.5 (2008) (citing Delaware Cross-Motion for Summary Judgment, \textit{New Jersey v. Delaware I}, 205 U.S. 550 (1907)). The "main purpose" of the compact was to authorize joint regulation of "the business of fishing in the Delaware River and Bay." \textit{Id.}
\bibitem{21} Act of Jan. 24 1907, ch. 394, 34 Stat. 858 arts. VII, VIII.
\bibitem{22} \textit{New Jersey v. Delaware II}, 291 U.S. 361 (1934).
\bibitem{23} \textit{Id.} at 385.
\bibitem{24} \textit{Id.} at 378.
\end{thebibliography}
Figure 1. The Boundary between New Jersey and Delaware, as Established by the Supreme Court in 193425

C. The Controversy Erupts

The recent controversy arose out of the planned construction of an LNG terminal on New Jersey's shore of the Delaware River. The Crown Landing project would be operated by a subsidiary of British Petroleum (BP) and its facilities would import, store, and vaporize foreign-source LNG. The decision to locate an LNG facility along the Mid-Atlantic coast stemmed from projections that this region requires additional natural gas supplies to meet its growing energy demands.26

Imports of LNG may become a critical source given that the United States can no longer rely on domestic production nor increased imports from Canada

---


and Mexico. The U.S. Energy Information Administration forecasts that over the next 20 years, total annual imports of LNG will increase 881%. Because the Mid-Atlantic region is remote from natural gas supplies in the Gulf of Mexico and positioned near the end-point of the North American natural gas pipeline grid, the area experiences high transportation costs as well as depressed gas availability. These existing problems are compounded by the fact that existing gas pipelines from Canada and the Gulf of Mexico are operating largely at capacity and expanding gas transmission infrastructure from these sources would require significant investment and time.

While valuable to the energy future of the region, the Crown Landing facility posed several concerns for the state of Delaware. In addition to structures onshore in New Jersey, the planned construction involved a pier extending some 2,000 feet into Delaware’s waters, heavy traffic by supertankers, and the dredging of 1.24 million cubic yards of subaqueous soil, affecting 29 acres of the riverbed within Delaware’s territory. A complicated transfer system would have been installed on the 6,000-square-foot unloading platform and along the pier to transport the LNG from ships to storage tanks onshore. "Even ‘[d]uring the holding mode of terminal operation (when no ship is unloading),’ LNG would [have to be circulated] through the piping along the pier to ‘keep the line cold.’"

In 2004, Delaware’s Department of Natural Resources and Environmental Control (DNREC) denied a construction permit to New Jersey on the grounds that Delaware’s Coastal Zone Act (DCZA) prohibited offshore bulk transfer facilities as well as heavy industrial use. Signed into law in 1971, the DCZA was designed "to control the location, extent and type of industrial development in Delaware’s coastal areas . . . and [to] safeguard th[e] use [of those areas] primarily for recreation and tourism." The denial of a permit to New Jersey

---

29. CROWN LANDING LNG PROJECT, supra note 26, at I-6.
30. Id. at I-6–1-7.
32. Id. at 1418. (quoting 6 App. of Delaware on Cross-Motions for Summary Judgment 3793, 3814 (Request for Coastal Zone Status Decision)).
34. Coastal Zone Act § 7001.
sparked a barrage of insults between the two states, and led shortly afterwards to litigation before the Supreme Court.

D. New Jersey v. Delaware III

New Jersey brought suit in 2005, claiming that Article VII of the 1905 Compact, in which each state can exercise "riparian jurisdiction of every kind and nature," established exclusive jurisdiction to regulate construction of improvements appurtenant to its shores, free from regulation by Delaware. In response, Delaware asserted its regulatory authority over structures within its borders. Article VIII of the 1905 Compact, stipulating that nothing in the agreement would affect the territorial rights of either state, and the subsequent 1935 boundary settlement in New Jersey v. Delaware II, affixing the state line at the low-water mark of the New Jersey shore, provided support for Delaware's argument. The Court followed the recommendation of the Special Master in denying New Jersey exclusive jurisdiction over riparian structures extending into Delaware's territory. While maintaining ordinary riparian rights, including the ability to wharf out into navigable waters, Article VII of the 1905 Compact did not grant to New Jersey exclusive authority over "activities that go beyond the exercise of ordinary and usual riparian rights in the face of contrary regulation by Delaware."

The Supreme Court in New Jersey v. Delaware III was faced with the unenviable task of interpreting an interstate compact that turned on the meaning of an obscure and technical phrase. Article VII of the 1905 Compact reads: "Each state may, on its own side of the river, continue to exercise riparian jurisdiction." Unfortunately, "'riparian jurisdiction' was not then, and is not now, a legal term of art." Riparian law, a subcategory of the law of property, deals with the incidents specific to ownership of riparian land, or land that abuts the waters edge. Riparian ownership includes the right to wharf out to access navigable water, and ordinarily, "the rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which

---

35. See infra Introduction.
37. 128 S. Ct. at 1419.
38. Id.
39. Id.
40. Id. at 1413.
43. Id.
44. See JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS, INCLUDING RIPARIAN RIGHTS, AND PUBLIC AND PRIVATE RIGHTS IN WATERS TIDAL AND INLAND § 148, at 297-300 (3d ed. 1900).
At the time of the 1905 Compact, a riparian landowner required permission from the state to use submerged land on which to build a wharf, but with an unsettled boundary, New Jersey could have feared that prior conveyances of submerged lands to riparian landowners might be subject to scrutiny if that land ended up belonging to Delaware. Including the phrase “riparian jurisdiction” in the 1905 Compact allowed both states to retain their riparian rights, regardless of the ultimate boundary designation.

According deference to the intentions of the compact drafters, the Court interpreted the phrase “riparian jurisdiction” to encompass the jurisdiction of a riparian right. However, it divorced this right from the general police power of the state. This, in effect, meant that riparian landowners could build a wharf to access navigable waters, but only subject to “such general rules and regulations as the legislature may prescribe for the protection of the public.”

The state that grants riparian rights normally has regulatory authority over those rights, but since Delaware owned the river in which the wharf would be built, the rights of wharf owners in New Jersey became subject to Delaware’s governing law.

New Jersey’s prior conduct makes its decision to pursue the Crown Landing project without the requisite permit under the DCZA puzzling. Since 1969, when New Jersey began issuing grants for wharves extending into Delaware territory, New Jersey built three structures, each after seeking and obtaining DCZA permits from Delaware. The New Jersey Coastal Management agency understood that any “project extending beyond mean low water must obtain coastal permits from both states.” In 1972 Delaware prohibited an LNG bulk transfer facility on the grounds that it violated the DCZA, the same statute it cited over thirty years later when denying the Crown Landing permit. New Jersey raised no objection to Delaware’s refusal to permit an LNG terminal in 1972, implying a position “fundamentally
inconsistent” with its position in 2008 that only New Jersey had the right to regulate projects. In light of New Jersey’s acceptance (until the present controversy) of Delaware’s jurisdiction to preserve the quality of its coastal areas, the Court upheld Delaware’s claim of regulatory authority.

However, the test proffered by the Court does little to satisfy the goal of predictability in future developments along the eastern shore of the Delaware River. By declaring only “extraordinary structures” subject to dual regulation by Delaware, the court begs the question of what falls into this category. As Justice Scalia noted, “[w]ould a pink wharf, or a zig-zagged wharf qualify?” Unfortunately, the stage is now set for further litigation over the meaning of this phrase. Both concurring and dissenting opinions took issue with the “extraordinary character” test.

Concurring in the opinion, Justice Stevens found that Delaware had police powers over all riparian improvements within its territory, not only those of extraordinary character. This position seems the most consistent with the likely meaning of the phrase “riparian jurisdiction,” and since both parties could understand its clear limits, would engender the least amount of confusion. Scalia, one of two dissenting justices, declared that New Jersey must be able to wharf out from its own side of the river, free from regulation by Delaware, since at the time of the 1905 compact, riparian rights encompassed the ability to build down to and even below low water, provided the structure did not impair navigation. Because the LNG facility would not obstruct navigation, the Crown Point facility fit within the definition of an ordinary riparian use. Scalia concluded his opinion by mocking the “environmentally sensitive” Court for setting a vague and unpredictable standard and creating “irrationality where sweet reason once prevailed.” He also hinted (and Ginsburg concurred) that the majority would have ruled differently had the pier extending into Delaware’s territory been to “accommodate tankers of . . . tofu and bean sprouts,” suggesting that while the majority did not explicitly consider the environmental consequences of their decision, they did so implicitly.

The Court ultimately settled the case in a decidedly unremarkable fashion, interpreting the 1905 Compact based upon canons of statutory interpretation, the intent of the drafters, and the state’s previous course of conduct. To understand the importance of this decision, it is instructive to turn to the basis

57. Report of the Special Master, supra note 4, at 73.
59. Id. at 1437 (Scalia, J., dissenting).
60. Id. at 1429–30.
61. Id. at 1429 (Stevens, J., concurring).
62. Both dissenting justices, Scalia and Alito, hail from New Jersey.
63. New Jersey v. Delaware III, 128 S. Ct. at 1438 (Scalia, J., dissenting).
64. Id. at 1439.
65. Id.
upon which it was decided—the interstate compact. Little attention has been
paid to this device and the ways it shapes relationships between states. Prior to
the twentieth century, interstate compacts were used almost exclusively to
settle boundary disputes, but recent decades have seen the explosion of their
use in venues as diverse as water allocation and crime control. In addition,
compacts with flexible regulatory mechanisms have begun to outnumber static
compacts as states recognize the advantages of having dynamic management
capabilities. Still, while newer compacts allow for adaptation and change,
agreements written without such innovations are stuck in the past, and struggle
when modern, unforeseen problems emerge.

II. THE INTERSTATE COMPACT

A. Historical Background

The framers of the Constitution understood there needed to be
mechanisms by which states could manage and adjust interstate relations,
especially complex allegiances, interstate boundaries, and economic affairs.
However, interstate commitments had to be cabined somewhat to ensure that
multilateral state action did not result in factions or confederacies within the
nation. Accordingly, the Compact Clause in Article I of the Constitution
provides that “[n]o state shall, without the [c]onsent of Congress . . . enter into
any Agreement or Compact.” This clause allows states to negotiate compacts
that are both contracts and federal statutory law, while reserving to Congress
the power of final ratification. Requiring Congressional consent makes certain
that agreements which affect the balance of power in the federal structure do
not stand against the will of Congress.

Interstate compacts serve a variety of functions. In the early years of the
nation, interstate compacts were enacted almost exclusively for the purposes of
defining state boundaries. For many years, these agreements were rare; only
thirty-six became effective between 1789 and 1921. This eventually changed,
as “states began to recognize in the compact clause a tool for the resolution of
other, more complex, problems.” Rapid industrialization and the states’

COMPACTS xvi (2006).
67. BROUN ET AL., supra note 66, at 1.
68. U.S. CONST. art. I., § 10, cl. 3.
69. BROUN ET AL., supra note 66, at 8–9 (citing FREDERICK L. ZIMMERMAN & MITCHELL
WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 22 (1976)).
70. Jill Elaine Hasday, Interstate Compacts in a Democratic Society: The Problem of
Permanency, 49 FLA. L. REV. 1, 2–3 (1997).
72. Marlissa S. Briggett, Note, State Supremacy in the Federal Realm: The Interstate Compact, 18
increasing interdependency led to a heightened desire for "improvisation, experimentation, and cooperation," and compacts provided what seemed to be the answer.\(^7^3\)

The Constitution vests authority in the Supreme Court to resolve disputes between states, such as those arising from the application of an interstate compact.\(^7^4\) When exercising this original jurisdiction, the Supreme Court functions as a trial court and typically delegates much of its fact-finding and legal decision-making authority to an appointed Special Master.\(^7^5\) Special Masters often have little or no judicial experience and "embark on their duties with limited guidance or oversight,"\(^7^6\) yet the Court has held that their "findings . . . deserve respect and a tacit presumption of correctness."\(^7^7\)

B. Interstate Compacts Today

Over time, compacts have come to serve three main purposes. First, compacts resolve state boundary disputes. For example, the Virginia-Tennessee Boundary Agreement of 1803 affixed the boundary between the states, which the Supreme Court later determined could not be changed absent mutual agreement and approval by Congress.\(^7^8\) Second, compacts institutionalize one-shot interstate projects, most often involving the allocation of natural resources or the building of bridges. The Colorado River Compact, discussed below, typifies this type of fixed agreement. Third, compacts create ongoing administrative agencies with jurisdiction over such varied domains as resource management, public transportation, and economic development.\(^7^9\) The Columbia River Gorge Compact, for example, established a regional regulatory agency with broad land use powers to govern the planning and development of the areas designated by the Columbia River Gorge National Scenic Act.\(^8^0\)

The third category of interstate compacts, those including administrative or regulatory agencies, affords states the opportunity to develop dynamic, self-regulatory systems over which members can maintain control through a coordinated legislative and administrative process. These compacts "enable the states to develop adaptive structures than can evolve to meet new and increased challenges that naturally arise over time."\(^8^1\) Considering that "[f]ailure to

\(^{74}\) U.S. Const. art. III, § 2. The Supreme Court holds original, as opposed to appellate, jurisdiction over interstate disputes.
\(^{76}\) Id. at 628.
\(^{77}\) Id. (quoting Colorado v. New Mexico, 467 U.S. 310, 317 (1984)).
\(^{79}\) Hasday, supra note 70, at 3–4.
\(^{81}\) BROUN ET AL., supra note 66, at 27.
provide some means for development, revision, and continuing adjustment may well mean that the compact contains the seeds of its own destruction,” does it ever make sense to develop a static compact?82

Instances do exist where fixed documents provide the stability and certainty the signatories desire. For example, inflexibility is particularly attractive when the compact concerns a boundary dispute or a single project, like the construction of a bridge across an interstate river. Indeed, in these cases, a degree of finality is necessary. Boundary compacts decide one dispute forever and do no more; so long as they are explicit, they necessitate no ongoing decision-making mechanisms.83 The 1905 Compact, however, was not designed to establish the boundary between New Jersey and Delaware. Instead, it allocated fishing rights and preserved “riparian jurisdiction,” and by failing to clearly set out the authority of both states with regards to the river, lead to further confusion. When compacts seek to settle complex conflicts of interests, and do not provide for flexible dispute resolution, their rigid nature leaves the states no choice but litigation.

Litigation, in turn, carries its own set of drawbacks. As Justice Frankfurter said in an original jurisdiction suit between Florida and Texas:

There are practical limits to the efficacy of the adjudicatory process in the adjustment of interstate controversies. The limitation of litigation—its episodic character, its necessarily restricted scope of inquiry, its confined regard for consideration of policy, its dependence on the contingencies of a particular record, and other circumscribing factors—often denature and even mutilate the actualities of a problem and thereby render the litigious process unsuited for its solution.84

The shortcomings of litigation in resolving interstate conflicts can be illustrated by the history of the division of the North Platte River. In 1945 the Court issued its first decision regarding the allocation of waters between Nebraska, Colorado, and Wyoming.85 Relying in part upon a 1926 interstate compact between Colorado and Nebraska,86 the Court apportioned the waters between Nebraska and Wyoming while woefully noting that “if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province.”87 Justice Frankfurter’s dissent similarly lamented that

precedent now made will arise to plague this court not only in the present suit but in others. The future will demonstrate . . . how wrong it is for this

82. VINCENT V. THURSBY, INTERSTATE COOPERATION: A STUDY OF THE INTERSTATE COMPACT 14 (1953).
83. Hasday, supra note 70, at 9.
84. Carstens, supra note 75, at 670 (citing Texas v. Florida, 306 U.S. 398, 428 (1939) (Frankfurter, J., dissenting)).
86. South Platte River Compact of 1926, ch. 46, 44 Stat. 195 (1926).
87. 325 U.S. at 616.
court to attempt to become a continuing umpire or a standing Master to whom the parties must go at intervals for leave to do what . . . 88

Justice Frankfurter’s misgivings proved prescient, as the court was called again in 1993, 1995, and 2001 to settle disputes over allocation of the North Platte.89

It was certainly the case in *New Jersey v. Delaware III* that the adjudicatory process did not take into account many of the factors an administrative commission could have weighed and negotiated. For example, neither party to the dispute considered the environmental impacts of the LNG terminal in their interpretation of the 1905 compact, or the economic repercussions of the construction and resulting industry.90 Instead, the court relied solely on a document that did not attempt to take into account such varying intricacies.91 Because the terms of the 1905 Compact had never been previously ascertained, and the compact provided no means to resolve disputes besides litigation before the Supreme Court, it took three years of project delays and hundreds of thousands of dollars in attorney fees to reconcile an issue that might have been more efficiently settled in an alternative venue.

In the nation’s more recent history, compacts have alternated between setting rigid guidelines and providing mechanisms for change. Examining two water allocation compacts affords insight into the benefits and drawbacks of each type of compact, and illuminates the difficulties of relying on static compacts in the resolution of interstate disputes.

### III. WITH OR WITHOUT: A CASE STUDY OF TWO COMPACTS

Both the Colorado River Compact and the Delaware Basin Compact originated to resolve pressing water allocation issues. While very different agreements (one with and one without an administrative commission), they both aimed to solve the problems emanating from the equitable division of a river. There are benefits to both compacts, but ultimately their success in the long term hinges on the inclusion of an administrative commission or a flexible dispute resolution mechanism. Administrative compacts empower the member states, acting together, to provide coordinated regulation on a broad range of activities; these governing commissions effectively create a “third tier” of government, occupying the space between federal and state authority.92

---

88. *Id.* at 657–58.
90. Since the DCZA strictly bans heavy industry, it is debatable whether or not such factors would have come into play under the deliberation of a commission. *Del. Code Ann.*, tit. 7, § 7003 (2008).
A. The Colorado River Compact

1. An Imperfect Solution for a Dry Land

The Colorado River traverses a vast expanse of the West, collecting water over a region that encompasses a quarter-million square miles and more than a half-dozen states. Its headwaters originate in the high western slopes of the Rocky Mountains, providing the drainage for about one-twelfth of the continental United States. Although the watershed is vast, the Colorado is not a heavy flowing stream; it is simply a scarce resource in a dry land. As John Wesley Powell presciently warned the Montana constitutional convention in 1889, "[t]he great values of this region [will] ultimately be measured by you in acre-feet." The management and development of the Colorado River has produced decades of acrimonious debate and interstate controversy in part due to the division of waters in the Colorado River Compact.

By the early twentieth century, water use in California eclipsed that of states at the upper end of the Colorado River. Farmers in California’s Imperial Valley irrigated their fields with water brought from the river by a canal through Mexico, and rapidly expanding Los Angeles anticipated the need for future water. Upstream states, especially Colorado, feared that if California developed the river’s water first, upper basin states would lose their legal claim to the river. Under the principle of "equitable apportionment" by which the Supreme Court allocated waters of interstate streams, a state that developed water first held a stronger legal claim than a later developing state.

The 1922 Colorado River Compact does not allocate water to states individually, but instead breaks the river into an Upper and Lower Basin, and apportions water between the two. The compact was intended to strike an accommodation between expanding demands of the Lower Basin (Arizona, California, and Nevada) and the desire to preserve an adequate supply of water for future use in the less developed Upper Basin (Colorado, Utah, New Mexico, and Wyoming). It apportioned the waters on an essentially equal basis between the Upper and Lower Basin states, allocating 7.5 million acre feet

---

94. Id. at 413.
96. Getches, supra note 93, at 415–16.
98. Colorado River Compact, art. II(e)–(g), 70 Cong. Rec. 324, 325 (1928) (approved at 42 Stat. 171 (1921)).
99. Id., art. II(e), (f), at 325. A small part of Arizona is also in the Upper Basin. Small parts of New Mexico are also in the Lower Basin.
(m.a.f.) in perpetuity to each basin. A later treaty fixed the amount of water to be apportioned to Mexico at 1.5 m.a.f annually.

2. The Plight of the Colorado River Compact

Various water supply problems are emerging or threatening to emerge despite the Colorado River Compact. First, the compact negotiators greatly overestimated the average annual flow of the Colorado River. Data available to them indicated an average annual flow of 16.4 m.a.f. between 1899 and 1920. However, recent data reveals an average annual flow of only 13.5 m.a.f. over three centuries, with annual lows varying between 4.4 and 22 m.a.f. Because the Upper Basin is obligated to deliver 7 m.a.f. to the Lower Basin over a ten year period regardless of actual annual flow, the erroneous assumption leaves far less water available for Upper Basin use than the negotiators expected. Further, in the face of climate change and receding snow pack in the Rockies, the future flow of the Colorado River is even more uncertain.

Population growth has vastly changed patterns of water consumption in the west. As the result of exploding growth in Southern California and Arizona, the Lower Basin has exceeded its 7.5 m.a.f. allocation in recent years, with consumption reaching as high as 8.2 and 8.3 m.a.f. Additionally, while claims of Indian tribes to a fair share of western water development were passed off as inconsequential by the drafters of the compact, the Supreme Court in Arizona v. California awarded nearly 1 m.a.f. to five small tribes, constituting scarcely ten thousand individuals. The Court fixed their entitlement to all “practically irrigable acreage,” leaving undecided the full

100. The Upper Basin states feared the rapid development of the Lower Basin states would preempt a disproportionate share of the river’s waters under the theory of prior appropriation.
103. Id.
104. Id.; Getches, supra note 93, at 419.
105. Id. at 419.
109. Article VII reads “Nothing in this compact shall be construed as affecting the obligations of the United State of America to Indian tribes.” The Colorado River Compact, supra note 98, at art. VII, 70 Cong. Rec. at 325 (1928).
110. Arizona v. California, 373 U.S. 546, 596 (1963). The five tribes whose claims were decided where the Chemehuevi, Cocopah, Colorado River, Fort Mojave, and Quechan tribes. Id. at 595 n.97.
extent of future Indian water allocation. As Indian use continues to expand, and more tribes exercise their reserved right to the Colorado River, these uses could very plausibly displace existing non-Indian water uses in the Lower Basin.

The result of the distribution of the Colorado is that there is no unused water; "[i]n most months the mouth of the river at the Sea of Cortez is dry, river water replaced by rancid salt flats." More than seventy years of litigation over the Colorado River has failed to produce a singular concrete system of management; allocation of the river among states and between the United States and Mexico continues to exist through a set of compacts, statutes and court decisions. While this "Law of the River" has imposed some order on the chaos, it leaves in its wake decades of conflict. Senator John McCain recently called for renegotiation of the Colorado River Compact during his presidential candidacy in order to allocate more water to the states that have greater current need (i.e., the Lower Basin states), but this idea is unlikely to progress with the appointment of former-United States Senator Ken Salazar (D-Colorado) as Secretary of the Interior. The compact will be reopened, Salazar quipped, "over my dead body."

3. A New Paradigm

In December 2007, the Secretary of the Interior issued a set of interim guidelines that decreased the Lower Basin's apportionment through 2026, while the effect of climate change on the flow of the Colorado River is further evaluated. The guidelines specify three levels of shortage conditions, depending on the level of Lake Mead; as the surface elevation of Lake Mead decreases, the Lower Basin states receive less water. This temporary solution demonstrates the need for a flexible, adaptable approach to the allocation of the Colorado. Past practices have left states struggling to fulfill the

111. Id. at 600.
112. "[U]nquantified Indian claims in the state of Arizona alone have been estimated to be as high as 3 m.a.f., which is more than the state's entire Colorado River entitlement of 2.8 m.a.f." U.S. GLOBAL CHANGE RESEARCH PROGRAM, ENVIRONMENTAL WATER SECURITY: LESSONS FROM THE SOUTHWESTERN U.S., NORTHWESTERN MEXICO, AND THE MIDDLE EAST (1998), available at http://www.usgcrp.gov/usgcrp/seminars/981113FO.html.
113. Babbitt, supra note 95, at ix.
117. Id.
119. Id.
water supply demands of their citizens, and the terms of the Colorado River Compact are unable to create the needed equitable distribution of the waters.

Proposals for future management strategies for the Colorado River include the establishment of a new entity. This entity could be formed by way of an agreement of the seven Colorado River states that integrates the interests and people who are most affected by the outcome of decisions on major Colorado River issues. While no such commission was created by the Colorado River Compact originally, such a body could provide the administrative capacity to manage competing uses of water. Indeed, several negotiators of the 1922 Compact favored the idea of a permanent river commission. This commission would be “clothed with full authority to refuse any further appropriation within any state proposing to take what may appear to be excess.” In addition, two drafters proposed time limits that would allow for unrestricted development of both basins for “twenty or perhaps thirty years, at the end of which time uses were to be recognized on a basis of parity.”

However, the establishment of a commission to manage uses of the Colorado River can ensure that society’s interests are served only if those diverse values and ideas are included in the process. The wide range of interests vying for water create conflicting demands and implicate values that are not comprehensively represented in decision-making institutions for the Colorado River. Having grown out of a preoccupation with allocating rights to consume Colorado River water, the law of the river ignores the wider range of values that people in modern society hold for the Colorado River. The consequences of their exclusion are manifest in economically wasteful, politically inequitable, and ecologically unsustainable uses of natural resources in the Colorado River basin.

Such a commission does not yet exist, and the prospects of one forming are slight. For now, any collaborative efforts in the Colorado River basin will remain on a small scale, typically in geographic areas defined by watershed. Looking back at the experience of the Colorado River Compact as a rigid allocation device, it “augurs little good as a means of settling serious conflicts of interests.” Fortunately, the inclusion of an administrative commission within a water allocation compact has become the modern trend. Turning to the Delaware Basin Compact, the benefits of an adaptive management strategy become clear.

120. HUNDLEY, supra note 102, at 181.
121. Id. (quoting Letter from W.F. McClure to W.S. Norviel (Aug. 7, 1922) (file 1-M/295, Hoover Papers)).
122. Hundley, supra note 102, at 181.
124. Id. at 579.
B. The Delaware Basin Compact

The Delaware River Basin is shared between Delaware, New Jersey, New York, and Pennsylvania. While it includes one of the largest metropolitan areas in the United States, Philadelphia, it was not until another major city, New York City, decided to make the Delaware River its major source of municipal water that tensions in the region erupted.126 New York City's 1927 decision prompted New Jersey to initiate "the most significant original litigation over water . . . in the eastern states."127 In 1931 the Supreme Court settled the dispute in New Jersey v. New York by allocating 440 million gallons per day (m.g.d.) to the state of New York.128

However, neither state believed that the Supreme Court succeeded in solving the problems that ignited the quarrel. The litigation resulted in an apportionment to each state, yet it created no "system of comprehensive integrated management of the basin, nor could a busy court revisit the allocation among the states whenever something new happened."129 The four states entered into the Delaware River Basin Commission Compact in 1949, which came into effect after approval by Congress in 1952.130 The Delaware River Commission created by that compact consisted of three members from each state, plus three advisory members of the federal government, and was charged to plan for the future water needs of the basin.131 In 1954, the Supreme Court nearly doubled New York's apportionment from 440 m.g.d. to 800 m.g.d.,132 prompting the signatory states to realize that the powers of the commission were too limited to achieve the goals sought. In response, the states negotiated a second compact.

1. A New Type of Compact

The Delaware River Basin Compact, signed into law in 1961, heralded a new type of agreement: the federal-interstate compact.133 While all interstate compacts involve some degree of federal participation (i.e., approval), the new commission not only consists of a representative from each state, but also includes one member of the federal government.134 Direct participation can be a means of encouraging states to undertake certain actions, or a direct measure

---

127. Id. at 841.
129. Dellapenna, supra note 126, at 841.
131. Id. arts. I, II, IV.
134. Id. at arts. 2, 2.2, 2.3., 75 Stat. at 691.
of control over collective state action. Critics contend that states lose part of their sovereignty when compacts create commissions, but others find that "by involving [the federal government] in the process of compact formation, national concerns may be aired, obviating the need for congressional statutory preemptio..." In the next Part, I discuss the possibility of federal statutory preemption as an alternative to adjudication before the Supreme Court.

The Delaware River Commission must create a comprehensive plan, and may grant or deny water permits according to their compatibility with its plan and consistent with the "just and equitable interests and rights of other lawful users from the same source." In addition to the authority to manage individual withdrawals, the federal projects in the Delaware basin are subordinated to the planning authority of the Commission. This subordination of federal projects gives states more local control over the Delaware River, and the ability to allocate the waters to individual and public entities within the basin. Finally, a sunset provision in the compact ensures that the compact will last only one hundred years, unless renegotiated at a later date.

No plaintiffs have successfully challenged the regulatory authority of the Commission. This compact has been the model for other water allocation compacts in the eastern United States. A framer of a nearly identically worded interstate agreement, the Susquehanna River Basin Compact, noted that "each time the commission meets, the dialogue among its members is an exercise in cooperation which often heads off possible disputes and identifies areas where the states can work together either on their own initiative or through the commission." Such a regulatory mechanism settles river basin water disputes and obviates the need for a "more expensive, time consuming, and unpredictable" original jurisdiction suit. Overall, the Delaware River Basin

135. BROWN ET AL., supra note 66, at 67.
137. Delaware River Basin Compact, art. 10, 10.5, 75 Stat. at 700.
138. Id. at arts. 11, 11.1, 75 Stat. at 700-01.
139. Dellapenna, supra note 126, at 831.
140. Delaware River Basin Compact, art. 1, 1.6, 75 Stat. at 691.
141. Suits can be brought against the Delaware River Basin Commission, but the actions of the Commission cannot be the basis for a suit against one of the participating states. See id. at art. 3, 3.8, 75 Stat. 694-95. The most important litigation relating to the compact was Dublin Water Company v. Delaware River Basin Commission, 443 F. Supp. 310 (E.D. Pa. 1977) (holding that the obligation of the Water Company to provide services to the Public Utilities Commission did not mean that the Delaware River Basin Commission was preempted from protecting the resource).
142. ZIMMERMAN, supra note 136, at 167 (quoting Letter from Richard A. Cairo, Gen. Counsel of the Susquehanna River Basin Commission, to Joseph F. Zimmerman (July 14, 1995)).
143. Id.
Compact has successfully achieved "its various goals including allocation of the waters of the Delaware River and its tributaries."

There are obvious differences between the Colorado and Delaware Rivers. The Colorado River drains 247,600 square miles; the Delaware River drains 17,500 square miles. The West is arid or semi-arid, and competition over water has been fierce for nearly a century. In contrast, eastern states, until recently, did not experience frequent water shortages relative to demand. However, the basic conclusions should be applicable to both regimes: systems of ongoing cooperative management allow states to develop and adapt to changed circumstances, and fixed agreements do not.

A fixed compact preserves greater autonomy to each state to manage its own water resources; however, litigation is the only mechanism for enforcing such a compact should a problem arise over its interpretation or implementation. Litigation, as in New Jersey v. Delaware III, may temporarily settle a disagreement, but the Court's interpretation does not necessarily consider the modern circumstances that initiated the dispute.

IV. THE FUTURE OF INTERSTATE COMPACTS

In part due to the success the Delaware River Basin Compact, the modern trend in interstate compact formation is towards the establishment of a joint managerial authority. The flexibility of regulatory entities and their ability to develop cooperative solutions to changing circumstances allows states to "reap the benefits of uniform regulatory systems . . . without sacrificing state sovereignty to the federal government." The Supreme Court has encouraged this position by stating a preference that states settle their controversies by "mutual accommodation and agreement." Interstate disputes are "more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted." Sunset provisions, duties to renegotiate, and a regulatory commission designated to manage the interests of all parties ensure that a compact will not float into oblivion with the passing of years.


145. Getches, supra note 93, at 413 n.1 (citing U.S. WATER RESOURCES COUNCIL, THE NATION'S WATER RESOURCES 6-1-4, 6-13-4, 6-14-4 (1968)).


147. BROUN ET AL., supra note 66, at 178.

148. Id. at 179.


However, there are over two hundred compacts already in existence in the United States, and many of those do not contain means for the signatory parties to settle their differences besides litigation. While the perils of litigation may prompt some states to negotiate before filing suit, the dozens of original jurisdiction cases before the Supreme Court suggest that threat is not sufficient.

The next Part of this Note focuses on the inadequacies of the Court’s decision in New Jersey v. Delaware III, and how modifications to existing compacts might avoid such an irrational decision-making process in the future. With adjudication leading to unsatisfactory results, states have slowly begun to seek changes to their compacts because those existing agreements no longer adequately meet contemporary challenges. These proposals have taken the form of amendments and rewrites, or expanding participation to additional states. Another alternative includes federal legislation that alters the terms of the agreement. Congressional consent to a compact is not subject to rescission or alteration, but this does not preempt “federal legislation that may alter the landscape in which the compact operates.” The Supreme Court could also selectively manage its original jurisdiction docket, forcing parties to reach a settlement on their own. Negotiation may not please everyone, but neither does litigation, and it would, at the very least, function as a warning system; for example, had New Jersey understood the import of the 1905 Compact, it undoubtedly would have hesitated before embarking on such an expensive project without first obtaining the go-ahead from Delaware.

A. A Satisfactory Solution?

As shown by the success of the Delaware River Basin Compact, an interstate compact with an administrative agency component provides the most flexibility for cooperative management. While such a body associated with the 1905 Compact might not have been practical, it could have stymied the suit by New Jersey by informing both states of their duties and responsibilities after the boundary resolution in 1934. Knowing from an official source that it did not possess exclusive jurisdiction over structures extending into Delaware’s territory, New Jersey would have been more conciliatory towards Delaware and might have tried to negotiate with its neighbor before investing so many resources into the Crown Landing project. Instead of building an enormous

151. BROUN ET AL., supra note 66, at 178.
153. BROUN ET AL., supra note 66, at 181.
154. Id.
155. Id. at 44.
facility, New Jersey may have settled for a more modest terminal and mitigated its environmental effects in exchange for a DCZA permit.

Because the 1905 Compact left boundary issues between Delaware and New Jersey unresolved, the drafters' words took operative effect only after the 1934 decision that fixed the state line. For seventy-four years after that, the meaning of the phrase "riparian jurisdiction" remained in limbo. Therefore, when the Supreme Court interpreted the meaning of the 1905 Compact in 2008, it did so for the first time since the boundary designation, and in the face of vastly changed circumstances. Interpreting a century-old document in the context of a modern problem poses several concerns. First, compact drafters did not consider conservation issues; the environmental movement and resulting statutes were still sixty years away. Second, the framers of the 1905 Compact envisioned the building of fishing wharves rather than two-thousand-foot piers unloading millions of gallons of flammable natural gas. Lastly, in the early twentieth century, Delaware limited riparian developments only to the extent they constituted public nuisances; one hundred years later, a myriad of statutes restricted the scope of development. By allowing the Court to rely upon old text to solve a complex contemporary problem, the states lost the opportunity to settle the matter in a way that might have been more agreeable to both of them and to consider the complex issues incident to the construction of the wharf, like energy needs and environmental concerns.

Unfortunately, the 1905 Compact provided for no administrative body to resolve disputes and New Jersey and Delaware were left to sort their differences through an expensive lawsuit before the Supreme Court. By relying on inadequate ex post dispute resolution mechanisms, the saga ultimately leaves future developments to wonder whether they meet the definition of "extraordinary." However, the Supreme Court decided the case by the only means it could. In the future, it lies with the states, Congress, and the Supreme Court's gate-keeping mechanisms to ensure that interstate compacts "avoid the uncertainties and costs of litigation." Several possibilities exist to encourage flexible dispute resolution and to prevent complex interstate compacts from landing in a venue ill-suited to issue a decision.

158. See Report of the Special Master, supra note 4, at 69.
161. Muys et al., supra note 9, at 23.
B. Alternative Resolutions

1. State-Driven Amendments and Re-Negotiation

"During the last 10 years or so . . . [some] interstate compacts and representatives of key stakeholder groups affected by them have undertaken various efforts to update and strengthen those agreements." Amendments can update compacts by taking into consideration current regulations, such as those associated with the Interstate Compact for Adult Offender Supervision. In that compact, which provides the framework for the interstate transfer of supervisory authority over criminal offenders who move between states, the reconstruction of state parole and probation systems called into question the strength of the original agreement. To remedy the flailing system, a series of amendments was incorporated into the compact, bringing it up to date with the various state regulations. Amending a compact proves an attractive alternative to an entire re-write, as the "long negotiations and arduous course [the compacts] must run before becoming effective" limit states’ willingness to negotiate a new agreement from scratch.

An amendment to the 1905 Compact could have prevented the current conflict by specifying the meaning of "riparian jurisdiction" in the face of the 1934 boundary designation. However, New Jersey and Delaware’s course of conduct left the impression that each understood the obligations "riparian jurisdiction" implied; New Jersey had repeatedly accepted Delaware’s regulatory power over structures extending beyond the low-water mark of the eastern shore of the river. Therefore, there would be no impetus to begin negotiations, as both parties were seemingly in accord.

2. Subsequent Federal Legislation

The Supreme Court has rendered several “opinions holding Congress, the political branch, [as] better equipped to address the instant interstate controversy” than the judiciary. The Supreme Court in Quill Corporation v. North Dakota, which considered whether the state possessed the authority to tax mail order sales to its citizens, wrote, “the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve.” In Missouri v. Illinois, in which Missouri

---

162. BROUN ET AL., supra note 66, at 181.
163. Id.
164. Id. at 181–82.
165. Id.
166. Id. at 28.
168. ZIMMERMAN, supra note 136, at 162.
challenged Chicago's practice of dumping sewage into Lake Michigan, Justice Holmes indirectly referenced the power of Congress when he wrote that "it was hardly disputed that Congress could deal with the matter under its power to regulate commerce."170 This preference to have Congress resolve interstate disputes belies the often-inadequate forum the Court provides in original jurisdiction suits. 171

The power of Congress could have likewise been exerted in New Jersey v. Delaware III. While congressional consent to a compact, once given, cannot be rescinded or altered by Congress, there are other ways to amend an agreement. 172 Congress, unlike the states, is not bound by the compacts it approves. It can condition its consent or simply supersede its approval with subsequent legislation. 173 This asymmetry in power has been criticized for depriving the states the benefit of full reliance on a compact, 174 but preemptive legislation could also prevent litigation. For example, New Jersey could have lobbied Congress to pass legislation that prioritized the building of LNG terminals, regardless of state regulation to the contrary. Using the power of the commerce clause, Congress might be able to declare the procurement of natural gas a national priority and authorize the construction of the Crown Landing Project. Alternatively, Congress could have sided with Delaware and enacted legislation that prohibited new LNG facility construction within a certain proximity to a metropolitan area.

Congress could also threaten preempt the compact in the event that New Jersey and Delaware could not come to an amicable resolution of their disagreement. 175 If Congress's threat was sufficiently undesirable, the two states would likely undergo arbitration. This process might have resulted in a negotiated resolution between the two parties, such as a system of revenue sharing if Delaware allowed the Crown Landing project to progress. 176 Congress could have also instructed the Federal Energy and Regulatory Commission (FERC) to deny New Jersey the federal permit required under the Natural Gas Act 177 unless the state went through an adjudication process with Delaware. These scenarios do not exhaust the possibilities at Congress's
fingertips; the legislature could remedy the situation in any number of ways. However, the "continued failure of Congress to address important interstate issues"178 suggests that the inertia necessary to pass overriding legislation is difficult to overcome.

3. Discourage Original Jurisdiction Suit

The Supreme Court controls its original jurisdiction docket by a procedural method unique among trial courts. Plaintiff states do not simply file a complaint but must file a motion seeking the Court's express leave to file a complaint commencing an original jurisdiction suit.179 In a thirty-year span, the Supreme Court denied nearly half of these motions, demonstrating its willingness to serve as a discretionary gatekeeper.180 Clearly the Supreme Court does not "consider itself bound to follow what it has itself called a 'time-honored maxim of the Anglo-American common-law tradition' that a trial court generally must hear and decide any and all lawsuits that fall within its jurisdiction."181 On several occasions the Court has "urged states not to invoke its original jurisdiction if there are equally effective and less costly means of resolving controversies."182 After rendering a decision in Texas v. New Mexico, the Court mused that "it [was] difficult to believe that the bona fide differences . . . justif[ied] the expense and time necessary to obtain a judicial resolution of this controversy."183

There are several reasons for the Supreme Court's restraint in accepting original jurisdiction cases to its docket. Most importantly, the Court is the final appellate tribunal within the federal judiciary system. With such a role, "the Court [...] is under heavy pressure to marshal its resources to address only those cases where a decision by the highest court of the land is urgently needed on an important federal question."184 In addition, public perception of the Court's function is that of the ultimate decider on many important social and political questions; the "diminished societal concern in [the Court's] function as a court of original jurisdiction" results in the "enhanced importance" of its appellate docket.185 Lastly, the Supreme Court is ill-suited to act as a trial court.186

Special Masters have recently come under heavy criticism, primarily because

178. ZIMMERMAN, supra note 136, at 162.
179. SUP. CT. R. 17. This paragraph refers only to original jurisdiction cases between states, and not any other kind of original jurisdiction case that the Supreme Court is authorized to hear.
180. McKusick, supra note 156, at 188-89.
181. Id. at 189 (quoting Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 496-97 (1971)).
182. ZIMMERMAN, supra note 136, at 155.
184. McKusick, supra note 156, at 191.
185. Id. at 192 (quoting Wyandotte Chems., 401 U.S. at 499).
186. In his dissent in Maryland v. Louisiana, Justice Rehnquist revealed the inner workings of the court when he referred to the "appellate-type review which this Court necessarily gives to [the Special Master's] findings and recommendations." 451 U.S. 725, 765 (1981) (Rehnquist, J., dissenting) (emphasis added).
they have wide procedural discretion and are neither elected nor appointed by an elected body. Even so, the Court has held that their "findings . . . deserve respect and a tacit presumption of correctness."

Faced with these restraints, the Court performs its gatekeeping function by applying a flexible set of rules that determine which cases deserve a decision on the merits. While interstate boundary disputes are almost always accepted by the Supreme Court, a simple way for the Court to dissuade signatories to an interstate compact from pursuing litigation would be to deny the state's initial motion. The Court in New Jersey v. Delaware III could have easily done this and forced the states to settle their disagreement through different means, such as negotiation or arbitration. However, the lack of an alternate venue could make this option less likely. Because the 1905 Compact provided for no other way for the parties to resolve their jurisdictional dispute, the Supreme Court was forced to be inconsistent with its own advice that states settle their disputes by "conference and mutual concession."

CONCLUSION

The Supreme Court's decision in New Jersey v. Delaware III gave Delaware a right the drafters of the 1905 Compact likely believed to be retained by the phrase "riparian jurisdiction." However, deciding the fate of a lucrative processing facility by the terms of an arcane fishing agreement illustrates the problems inherent in adjudicating static interstate compacts. Without a way to evolve or refine the scope of the agreement, the compact struggled to adapt to contemporary circumstances and fit within the modern scheme of regulation. Absent a regulatory commission between New Jersey and Delaware, the signatories had no alternative but to resolve the meaning of the compact through expensive and time consuming litigation before the Supreme Court.

In the last one hundred years, compacts have proven a useful tool for states. While they allow states to resolve complex problems, they often do not "provide sufficient elasticity to allow adaptation to address future developments," and thus are rendered irrelevant over time. The Colorado River Compact, which did not create a commission to equitably distribute the river, has not surprisingly been the subject of complicated and continuing

187. See generally Carstens, supra note 75.
188. See id. at 644–46. While the "selection and appointment mechanism for Special Masters is not publicly known," the "majority of appointments likely result from some degree of joint decision or assent among the Justices." Id. at 644–45.
189. Id. at 628 (quoting Colorado v. New Mexico, 467 U.S. 310, 317 (1984)).
190. See McKusick, supra note 156, at 194–98.
191. Id. at 198.
192. Id. at 202. "[T]he existence of an alternative forum . . . was a significant factor in every case where the Court published an opinion explaining its reason for rejecting the suit as inappropriate for its original jurisdiction." Id.
194. BROUN ET AL., supra note 66, at 27.
conflict between its signatory states. In contrast, the Delaware River Basin Compact, which included a regulatory commission to collectively manage the uses of the river, is a model for future interstate agreements. These two variants of the interstate compact demonstrate the attractiveness of an administrative commission component in compacts and the potential consequences of failing to include one. For those compacts with no regulatory mechanism, litigation before the Supreme Court is seen as the only way to solve a disagreement.

Even though the Supreme Court discourages states from pursuing original jurisdiction suits, the Court is often called upon to act in cases for which there is no other venue. This pattern is not inevitable; the alternatives to formal adjudication are numerous. The States, Congress, and the Supreme Court all have powers to alter the way compact conflicts are resolved. While these alternate forums may not have saved the Crown Landing terminal, they most likely would have resolved the issue in a more cost-effective and time-efficient manner. In the end, New Jersey lost not only the prospect of bringing a much needed energy source to the region, but the investment of innumerable resources in the related planning and litigation.

Despite the unfavorable ruling, New Jersey has not given up hope. In late November 2008, six weeks after announcing that it was shelving plans for the Crown Landing facility, BP asked FERC to extend its construction deadline for the Crown Landing facility by four years, to 2013.195 While Delaware still retains concurrent jurisdiction over structures extending below the low-water mark of the Delaware River, BP terminal designers are trying to reconfigure the site in order to avoid conflicts with Delaware.196 This announcement, nine months after the Supreme Court ruling and over four years after the initial permit request from Delaware, illustrates the lengths to which New Jersey will go to build the LNG facility. Had New Jersey attempted to negotiate with its neighbor in 2005 it might have arrived at this state of affairs with considerably less commotion. However, it did not, and it remains to be seen whether the Supreme Court will once again be called upon as the final arbiter. If the latest reconfiguration enters Delaware’s territory, as it undoubtedly will, does the terminal fit the Court’s definition of “extraordinary,” therefore subjecting it to regulation by Delaware?197 Time will tell, and the litigation saga continues.

196. Id.

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.