

BREYER, J., concurring

**SUPREME COURT OF THE UNITED STATES**

No. 120 Orig.

STATE OF NEW JERSEY, PLAINTIFF v.  
STATE OF NEW YORK

ON BILL OF COMPLAINT

[May 26, 1998]

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, concurring.

Many of us have parents or grandparents who landed as immigrants at “Ellis Island, New York.” And when this case was argued, I assumed that history would bear out that Ellis Island was part and parcel of New York. But that is not what the record has revealed. Rather, it contains a set of facts, set forth with care by JUSTICE SOUTER and JUSTICE STEVENS (who do not disagree about the facts), which shows, in my view, that the filled portion of Ellis Island belongs to New Jersey.

I cannot agree with JUSTICE SCALIA that custom, assumption, and late 19th-century history fills in, and explains, an ambiguity in the original Compact between the States, for I do not find sufficient, relevant ambiguity. The word “relevant” is important, for the document, in fact, is highly ambiguous. But what I find the more serious and difficult ambiguity arises in sections upon which New York State does not rely. See *ante*, at 4–6, 12–13, and nn. 3, 4 (discussing Article Third). The State has basically rested its case upon Article First and Article Second. See Brief for Respondent 11–15; Tr. of Oral Arg. 33, 35–36, 46. Those Articles specify that Ellis Island is in New Jersey waters, for the border between the States lies far to the East. Those Articles do mention an exception for

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New York's "present jurisdiction of and over Bedlow's and Ellis's islands," but they are silent about what would happen to an Ellis Island "avulsion," *i.e.*, the creation of significant additional territory through landfill. As JUSTICE SOUTER points out, *ante*, at 14, n. 6, silence is not ambiguity; silence means that ordinary background law applies; and that ordinary background law gives an island's avulsion, not to the State that owns the island, but to the State in whose waters the avulsion is found. See *Georgia v. South Carolina*, 497 U. S. 376, 404 (1990); *Nebraska v. Iowa*, 143 U. S. 359, 361–362 (1892); see also *ante*, at 14–16.

Nor can I agree with JUSTICE STEVENS that New Jersey lost through prescription what once rightfully was its own. Too much of the evidence upon which he relies is evidence of events that took place during the time that neither New York nor New Jersey, but the Federal Government, controlled Ellis Island. At that time, Judge Wyzanski expressed the view that:

"Ellis Island and Bedloe's Island are no more a part of New York or New Jersey than the Philippine Islands or Hawaii are. They are territories of the United States not falling under the jurisdiction of any one of the forty-eight states." N. J. Exh. 43.

The Federal Government's virtually exclusive authority over the Island means that New Jersey could well have thought about the same. Perhaps more specialized property lawyers would have phrased their own conclusions in less ringing terms and with more numerous qualifications. But, still, one cannot reasonably expect New Jersey to have mounted a major protest against *New York's* assertions of "sovereignty" (modest as they were) over territory that was within the control of the Federal Government. Nor can one expect the immigrants themselves to have taken a particular interest in state boundaries, for most

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would have thought, not in terms of “New York” or “New Jersey,” but of a New World that offered them opportunities denied them by the Old. Given this background, any legal rule of “prescription” that found New York to have surmounted its high barrier here would create serious problems of fairness in other cases.

For these reasons, in particular, and others, all spelled out in detail by JUSTICE SOUTER, I must conclude that the filled portion of Ellis Island belongs, not to New York, but to New Jersey. I therefore join his opinion.