

STEVENS, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 129 Orig.

COMMONWEALTH OF VIRGINIA, PLAINTIFF *v.*  
STATE OF MARYLAND

ON BILL OF COMPLAINT

[December 9, 2003]

JUSTICE STEVENS, with whom JUSTICE KENNEDY joins, dissenting.

The basic facts that should control the disposition of this case are not in dispute. Maryland owns the water in the Potomac River to the low-water mark on the river's southern shore. Virtually the entire river is located within Maryland. Maryland is therefore the sovereign that exercises regulatory jurisdiction over the river, subject only to the provisions of the Maryland-Virginia Compact of 1785 (1785 Compact)<sup>1</sup> and the Virginia and Maryland Boundary Agreement of 1878 (Black-Jenkins Award),<sup>2</sup> and to the authority of the United States to preserve the river's navigability and protect its water quality.

Article Seventh of the 1785 Compact provides that the "citizens of each state respectively shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging," including the specific privilege of making wharves and other improvements, and a "right of fishing in the river that shall be common to, and equally enjoyed by, the citizens of both states . . . ."<sup>3</sup> The 1785 Compact is silent

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<sup>1</sup> 1785–1786 Md. Laws ch. 1; 1785 Va. Acts ch. 17.

<sup>2</sup> 1878 Md. Laws ch. 274; 1878 Va. Acts ch. 246; Act of Mar. 3, 1879, ch. 196, 20 Stat. 481.

<sup>3</sup> Va. Code Ann. Compacts App. pp. 342–343 (Lexis 2001).

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on the subject of water withdrawals. Nevertheless, the owners of property abutting the river unquestionably enjoy full riparian rights as part of the “emoluments and advantages” appurtenant to their title. Indeed, the Black-Jenkins Award confirms this understanding; under Article Fourth, Virginia “has a right to such use of the river beyond the line of low-water mark *as may be necessary to the full enjoyment of her riparian ownership . . .*”<sup>4</sup>

The question for decision, therefore, is simple: Are riparian landowners’ rights to withdraw water unlimited, or may they be restricted by the sovereign that owns and controls the adjacent water body (in this case, Maryland)? In my opinion—an opinion apparently shared by the responsible Virginia and Maryland officials in the years between 1956 and 1996, see *ante*, at 5, 17—the common law provides a straightforward answer to that question. Although riparian owners may withdraw water for domestic and agricultural purposes, the Federal Government and, “[i]n the absence of conflict with federal action or policy,” the States “may exercise [their] police power[s] by controlling the initiation and conduct of riparian and nonriparian uses of water.” Restatement (Second) of Torts §856, Comment *e* (1979). Moreover, this case does not involve individual riparian landowners’ withdrawals of water for their own domestic use, but the Fairfax County Water Authority’s withdrawals for the use of county residents. Under Virginia law, such “‘use of the waters of a stream to supply the inhabitants of [an area] with water for domestic purposes is not a riparian right.’” *Purcellville v. Potts*, 179 Va. 514, 521, 19 S. E. 2d 700, 703 (1942). Clearly, then, the authority’s proposed use of Potomac waters cannot be defended as an exercise of absolute and unregulable riparian rights. It necessarily follows, I be-

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<sup>4</sup>*Id.*, §7.1–7, at 94 (emphasis added).

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lieve, that such a use may only be made with the consent of the sovereign that owns the river. That sovereign is, indisputably, the State of Maryland.

We need go no further. This case does not require us to determine the precise extent or character of Maryland's regulatory jurisdiction. Rather, the narrow issue before us is whether Maryland may impose *any* limits on withdrawals by Virginia landowners whose property happens to abut the Potomac. Because those landowners' riparian rights are—like all riparian rights at common law—subject to the paramount regulatory authority of the sovereign that owns the river, I would sustain Maryland's exceptions to the Report of the Special Master and enter judgment dismissing Virginia's complaint.