

KENNEDY, 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 KENNEDY, with whom JUSTICE STEVENS joins, dissenting.

Failing to appreciate a basic rule of territorial adjudication, the Court concludes it must “reject Maryland’s historical premise” that in 1785 the State had title to the Potomac River (River), its bed, and its waters. *Ante*, at 9. In my respectful view, and contrary to the majority’s premise, the circumstance that two parties both claim rights to a parcel of land has no legal significance if one of the two parties has clear title already, absent some further argument that the claim against the holder of the title is reinforced by a history of prescription, estoppel, or adverse use. *Contra, ibid.* (relying on the fact that “the scope of Maryland’s sovereignty over the River was in dispute both before and after the 1785 Compact” to conclude that Maryland lacked sovereignty over the River in 1785). Just as this basic rule of property adjudication is true of disputes between two private persons, it is true of title disputes between States. “No court acts differently in deciding on boundary between states, than on lines between separate tracts of land.” *Rhode Island v. Massachusetts*, 12 Pet. 657, 734 (1838). See also *Rhode Island v. Massachusetts*, 4 How. 591, 628 (1846) (“[A]scertain[ing] and determin[ing] the boundary in dispute . . . , disconnected with the consequences which follow, is a simple question, differing little, if any, in principle from a disputed line between individu-

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als”). Cf. *Alabama v. Georgia*, 23 How. 505 (1860) (settling quiet title action between States by engaging in traditional quiet title analysis).

Since “[t]here is not in fact, or by any law can be, any territory which does not belong to one or the other state; so that the only question is, to which the territory belongs,” 12 Pet., at 733, a competent authority’s determination that a sovereign’s title lies clear and unimpaired necessarily has retrospective force. This is so despite the losing sovereign’s prior attempt to gain what was not its own.

The majority, in the face of these doctrines and precedents, nonetheless relies on the proposition that Maryland’s historical title is to be doubted because Virginia long disputed it and the parties undertook to resolve the dispute. It is a curious proposition to suggest that by submitting to adjudication, arbitration, or compact negotiations a party concedes its rights are less than clear. The opposite inference is just as permissible. The implication of the majority’s principle, moreover, is that self-help and obdurate refusal to submit a claim to resolution have some higher standing in the law than submission of disputes to a competent authority.

Until today, the competent authorities to whom Maryland and Virginia submitted their dispute have been clear and unanimous on this point: As of 1784, the year before the Compact, the Governor of Virginia could not enter the waters of the Potomac to cool himself by virtue of any title Virginia then had to the riverbed. Title to the whole River, and its bed, was in Maryland. First, in 1877, the parties agreed, with later congressional approval, that Maryland had clear title to the whole River dating from 1632. See Black-Jenkins Opinion (1877), App. to Report of Special Master, p. D–9 (hereinafter App. to Report of Special Master) (“The intent of the [original 1632 Maryland] charter is manifest all through to include the whole

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river within Lord Baltimore’s grant”). Then, as if this 1877 determination were not enough, this Court independently reviewed the question in 1899. The Court, too, reached the conclusion that Maryland had clear title to the whole River dating from 1632. The Court said, “the grant to Lord Baltimore, in unmistakable terms, included the Potomac River.” *Morris v. United States*, 174 U. S. 196, 223 (1899). And the Court confirmed this determination in 1910. See *Maryland v. West Virginia*, 217 U. S. 1, 45–46 (1910). Thus, unless prescription had been worked by some previous conduct to give Virginia at least some limited rights, in 1784 Maryland had clear title to the whole River, as much as in 1632.

Neither Virginia’s counsel nor the majority of the Court today contends that prescription occurred prior to the Compact of 1785. In 1784, therefore, under the law, Virginia had little more than a land border between it and Maryland in the area here under consideration; Virginia did not have a river border since the River was not its own. That in 1784 Virginia did not admit Maryland’s clear title to this territory and was unwilling to comply with Maryland’s continuing and consistent demands that it respect Maryland’s sovereign control over the River did not cloud the smooth stretch of Maryland’s title back to 1632.

Whether the Governor of the Commonwealth, in 2003, may cool himself in the River—or in this case, build a water pipe for the benefit of communities not on the riverbank—without so much as an “if you please” to the State of Maryland entirely depends upon whether in the intervening time since 1784 Maryland has in some way ceded its sovereignty over the River. See *United States v. Cherokee Nation of Okla.*, 480 U. S. 700, 707 (1987) (“[A] waiver of sovereign authority will not be implied, but instead must be ‘surrendered in unmistakable terms’”); 12 Pet., at 733 (“[T]itle, jurisdiction, and sovereignty, are

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inseparable incidents, and remain so till the state makes some cession”).

Virginia asserts that an agreement and an award set out in two documents establish that Maryland ceded Virginia an unqualified right to enter upon Maryland’s territory. The case, therefore, turns on these two documents: the 1785 Compact between the two States and their 1877 arbitrated award (Black-Jenkins Award or Award).

Via the 1785 Compact, Article Seventh, both States promised the other rights to use the River that presuppose neither could exclude the other from the River.

“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, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river.”  
Va. Code Ann. Compacts App., pp. 342–343.

Thus, in effect, they gave one another assurances of River access in exchange for the identical, reciprocal pledge. The mutual promise was sensible enough since at the time both parties claimed to own the whole River, and equally, therefore, neither accepted the other’s claim to have any right to gain access to the River. The Compact, in essence, was a predictable and intelligent hedging agreement (protecting both from the danger that at some later point the other’s claim to full and clear title would be confirmed by a competent legal authority).

Once it was established by a competent legal authority that Maryland had clear title to the whole River, the terms of Article Seventh of the Compact, in retrospect, became the sole fount of Virginia’s right to River access. The terms by which the parties promised River access to one another became relevant, as one would expect from a

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hedging agreement, after occurrence of the development the parties hedged against.

Maryland, as the territory's sovereign, once could have excluded Virginia landowners from the River, but Article Seventh abrogates Maryland's right of sovereignty to this extent. By its clear language, Article Seventh creates a right for citizen landowners to have some access to the River territory by, for example, the construction of improvements appurtenant to the shore.

Article Seventh, however, does not abrogate Maryland's sovereign right to exercise its police power, and the regulatory authority that implies, over its River territory; and the majority does not contend otherwise. The citizen landowner rights created by Article Seventh, as a consequence, remain subject to Maryland's sovereign powers insofar as that consists with Virginia's guaranteed access. That the landowners' rights are so limited is well illustrated by the very different language the parties used when they wanted to abrogate one another's police power over citizens or the other State. For example, as the majority agrees, Articles Fourth, Eighth, and Ninth of the Compact all contain express and particular police power abrogations. See *ante*, at 8–9. So does Article Tenth. Article Seventh, however, stands in clear contrast to these provisions. It does not contemplate the transfer or abrogation of Maryland's police power. It cannot be the basis for concluding that Virginia's citizens now have not just a right of access to the River, but the additional right of access free of Maryland's regulatory police power. See *Massachusetts v. New York*, 271 U.S. 65, 89 (1926) (“[D]ominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged”).

As a result, Article Seventh sets up an awkward situa-

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tion, forcing this Court to reconcile a landowner right not to be excluded with Maryland's sovereign regulatory authority. In effect, it forces the Court to inquire whether any particular regulation amounts instead to an exclusion prohibited by the Compact. That the Compact forces this determination, parallel to that at issue in a case of an overburdened easement, is no reason to deny its plain language or the accepted proposition that Maryland has long had title to the River and its bed.

The next step is to consider the 1877 Black-Jenkins Award and to ask whether that Award expands Virginia's rights of River access beyond what was provided in the Compact. The Black-Jenkins Award affirms that Virginia, as much as its citizens, has riparian rights under the 1785 Compact, to the extent of the Commonwealth's own riparian ownership. See *ante*, at 11. The question remains, however, whether Black-Jenkins converted Virginia's right of riparian ownership under Article Seventh to a right of sovereignty in the waters. For, if it did not do so, then Virginia's right of access to the River is limited like that of any other riparian owner under Article Seventh. In relevant part, the Award states:

“Fourth. Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but 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, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.” Act of Mar. 3, 1879, ch. 196, 20 Stat. 482 (internal quotation marks omitted).

The majority suggests this language gives Virginia sovereign rights to the River because it uses the words “Virginia” and “full dominion.” See *ante*, at 14 (“The

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arbitrators did not differentiate between Virginia's dominion over the soil and her right to construct improvements beyond low-water mark"). That reading cannot be right for two reasons. First, the evident design of Paragraph Fourth is to acknowledge a Virginia access right parallel to that of its own citizens who were riparian landowners. Paragraph Fourth sets out two recitations, and they are in contradistinction. Virginia is granted "full dominion" up to the low water line. This is unlimited. What comes next is not. As to the rights beyond this full dominion, that is to say beyond the low water line, Virginia has only the rights of a riparian owner. If the arbitrators meant to set the two rights in parallel, as Virginia argues, they would not have used the word "but" to distinguish them. Further, the phrase "a right to such use" is limited by the phrase "riparian ownership." This is far different from saying Virginia has full dominion "up to the low water line, and with respect to" any improvements it makes appurtenant to its shore.

Second, Black-Jenkins states that the limited rights Virginia has, the Commonwealth achieved by prescription. Maryland acquiesced to Virginia's adverse use, Black-Jenkins says, as a result of Maryland's adherence to Article Seventh of the Compact.

"Virginia, from the earliest period of her history, used the South bank of the Potomac as if the soil to low water-mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but on the contrary, she expressly reserved 'the property of the Virginia shores or strands bordering either side of said rivers, (Potomac and Pocomoke,) and all improvements which have or will be made thereon.' By the compact of 1785, Maryland assented to this, and declared that 'the citizens of each State respec-

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tively shall have full property on the shores of Potomac . . . and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.’ We are not authority for the construction of this compact, because nothing which concerns it is submitted to us . . . . Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low watermark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.” App. to Report of Special Master D18–D19 (quoting Article Seventh of the Compact).

That Maryland’s “assent” and “declaration” in the Compact prove Maryland’s acquiescence in Black-Jenkins’ prescription analysis illustrates the limits of the Award: The prescriptive rights it recognized stemmed from the Compact. Virginia’s claims under Black-Jenkins rise as high as the Compact but no higher. The Commonwealth can do no more than assert those rights granted to landowners by Article Seventh.

The above analysis, of course, does not depend on the conclusion that Maryland’s acquiescence was the sole basis for the Black-Jenkins Award, as the majority contends. See *ante*, at 17. A factor in any test can be a necessary though not sufficient element. Here, the arbitrators’ express aim was to apply “[u]sucaption, prescription, or the acquisition of title founded on long possession, uninterrupted and undisputed,” which they noted were intended to help sovereigns avoid the “bloody wars” that territorial disputes occasion. See App. to Report of Special Master D17–D18. The inquiry into acquiescence (*i.e.*, whether the territory was disputed) fits into that analyti-

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cal framework as a necessary, though not sole, factor. The other factors, such as Virginia's long use, were also necessary, though not sole factors. This explains why the arbitrators said Virginia's long use and Maryland's acquiescence were "Tak[en] all together." See *id.*, at D19. It also explains why the text of the Award—which after all is of greater significance than the arbitrator's attached opinion—distinguishes between Virginia's full dominion up to the low water line and its use rights beyond that point, a distinction consistent with Article Seventh.

The majority's decision ultimately seems to rely on rights stemming from some other, additional prescription to conclude that Paragraph Fourth expands Virginia's rights. See *ante*, at 16. It fails to explain, however, what other rights Black-Jenkins identified other than those achieved by the prescription discussed above. Notwithstanding the majority's conclusory position, the sole right acknowledged in Black-Jenkins was that which was delimited by the operation of Article Seventh.

The majority also implies, in footnote 8 of its opinion, that Virginia's right to use the River free from Maryland's regulation is equally a matter of federal common law. See *ante*, at 17, n. 9 (relying on *Colorado v. New Mexico*, 459 U. S. 176 (1982)). That suggestion cannot be right, however. The doctrine on which the majority relies pertains to interstate bodies of water. As explained above, the Potomac River belongs to Maryland and so is not an interstate body of water. Those cases in which we have considered the common-law rights of sovereigns who either both had title to half of a river, or who both had full title to a river but at different points in its flow, such as *Colorado*, are inapposite to this unique, sole-title context.

Since Black-Jenkins does not expand Virginia's right of access, Article Seventh's framework controls. The awkwardness of asking whether a regulation by Maryland amounts to exclusion is heightened here, where Virginia,

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as a riparian landowner, asserts its right to have access to the River for the purpose of serving needs well beyond recognized riparian use. This, in turn, raises the question whether Maryland can decide Virginia has too much population, and on that ground deny Virginia access for the purpose of meeting water demands.

This, to be sure, is a question of considerable difficulty, for it is not our law or our constitutional system to allow one State to regulate transactions occurring in another or to project its legislative power beyond its own borders. See *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 523 (1935). Virginia's access rights, though not rights of sovereignty, are rights held by a sovereign, which Maryland well knew when it signed the Compact. And, nothing in the Compact gives Maryland the power to regulate the Commonwealth of Virginia as most States can regulate their own riparian landowners; specifically, Paragraph Fourth of the Award (like Article Seventh of the Compact) prohibits Maryland from excluding Virginia from the River. These considerations counsel careful deliberation before deciding whether Maryland regulation amounts to an exclusion in light of the particular riparian use at issue.

Determining whether a regulation is either (1) a legitimate River regulation of riparian use, or (2) a wrongful exclusion, under the Compact, of the riparian owner from the River, may implicate some limitations based on a reasonable prediction of consequences to the River's flow. That is the question that Virginia should have submitted to the Special Master. The majority, however, simply holds that Virginia has a right to gain access to and enjoy the River coextensive with Maryland's own. Its ruling denies the force of the historical documents at issue. It has no logical basis either, unless the majority also makes the silent assumption that Virginia is constrained by some principle of reasonableness. The majority's interpretation,

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that Virginia's right is whole, sovereign, and unobstructed, otherwise leads to the conclusion that Virginia could build all the way across the River if the Commonwealth so chooses, as long as the Commonwealth itself concludes the construction is an improvement appurtenant to its shoreline and not an obstruction to the River's navigability.

The anomaly that exists because of the rather unusual circumstance that Maryland owns the entirety of the River affects this case's difficulty; but it does not affect the fact that the Court must confront the problem, not ignore it and send Maryland and its rights away by fiat. This is particularly true in light of the fact that Virginia's right to access and Maryland's right to regulate have coexisted in actual application for nearly 50 years. See *ante*, at 5. History shows the framework can be workable.

If Maryland's attempted regulation of Virginia contradicts Virginia's place in the federal system, that matter can be explored from case to case. Here, however, the Commonwealth did not ask the Special Master, as it should have, to consider whether, given the nature of the riparian rights at issue, see *ante*, at 2–3 (STEVENS, J., dissenting), the effect of the proposed use on the River, and the attempted regulation at issue, Maryland has in effect excluded Virginia from its rightful riparian use, as distinct from enacting reasonable regulations of that use. Virginia is not due the broad relief it instead now receives: the majority's declaration that Virginia is the sovereign of whatever Maryland territory appurtenant to Virginia's shoreline Virginia now chooses to claim. In agreement with JUSTICE STEVENS, I would sustain Maryland's objections to the Report of the Special Master and enter judgment dismissing Virginia's complaint. For these reasons, with respect, I dissent.