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I. INTRODUCTION

New Jersey and Delaware have clashed over the Delaware River for more than two centuries. The most recent dispute was over a proposed natural gas unloading wharf on the New Jersey shore. Pursuant to the Supreme Court’s decision in New Jersey v. Delaware II, Delaware owns the riverbed immediately adjacent to the New Jersey shore. Since the 1970s, Delaware has been regulating these lands to prevent certain industrial uses. However, a 1905 interstate compact between New Jersey and Delaware gave New Jersey the right to exercise “riparian jurisdiction” over improvements appurtenant to its shores. Projects which extend from the New Jersey shore into the Delaware riverbed thus need approval from both New Jersey and Delaware. This concurrent jurisdiction led to the recent controversy: New Jersey wanted to allow the disputed natural gas unloading facility so that it might gain associated jobs and tax revenues; Delaware sought to prevent construction due to the industrial nature of the wharf.

Delaware refused to issue a permit for the proposed project, and the dispute quickly escalated. New Jersey threatened to withdraw state pension funds from Delaware banks; Delaware countered, threatening to utilize the National Guard to protect its riverbed territory. The climax of hysteria was reached when a New Jersey legislator inquired into re-commissioning a World War II battleship, the

7. Id. at 1417.
8. Id. at 1418.
U.S.S. New Jersey. The ship, currently a museum piece on the Camden waterfront, would apparently have been used to repel an armed invasion of the New Jersey shore.

New Jersey eventually sought legal remedy, and the state filed a complaint against Delaware in the United States Supreme Court. New Jersey claimed that it had the exclusive authority over improvements appurtenant to its shores, and sought to enjoin Delaware from exercising police power over such improvements. Delaware claimed that as sovereign over the riverbed, it retained police power over New Jersey improvements which extended beyond New Jersey territory. The Court assigned the case to a Special Master. The Special Master determined that the 1905 compact granted New Jersey the right to extend improvements into Delaware territory, but that Delaware retained its police power to exclude such improvements. The Court upheld the recommendations of the Special Master, but also held that Delaware only had the authority to exclude from the riverbed New Jersey improvements which exhibited “extraordinary character.” However, this novel “extraordinary character” test seems to have appeared in the Court's analysis without previous instance.

In Part II, this Note outlines the common law riparian rights that form the background of the controversy in New Jersey v. Delaware III and compares the facts and holding of the present case with the similar case of Virginia v. Maryland. Part III reconciles the recommendations made by the Special Master in each case and shows that these suggestions, though well-reasoned, nevertheless did not resolve the issue at the heart of New Jersey v. Delaware III. Finally, this Note examines the shortcomings of the Court’s extraordinary character test and proposes a reasonableness test in its stead.

10. Id.
11. The U.S.S. New Jersey is available for your next wedding, graduation or other special event. Further information available at http://www.battleshipnewjersey.org.
14. Id.
15. Id. at 1416.
16. Id. Special Masters are specially appointed judicial officers (usually attorneys) who serve at the pleasure of the court; the Special Master's decisions report is generally reviewed by the appointing court, or a party may file exceptions to the report for further judicial review. See, e.g., BLACK'S LAW DICTIONARY 1118 (8th ed. 2004).
17. Report of the Special Master, supra note 9, at 31–32.
II. BACKGROUND

A. Common Law Riparian Rights

Under common law, riparian land owners enjoy a unique bundle of property rights associated with the ownership of waterfront real property.20 These rights typically include the right to withdraw reasonable amounts of water for the beneficial use of the riparian parcel; the right to use the entire body of water for activities such as sailing, swimming, and fishing; and the right to wharf out to reach navigable water.21 The "right to wharf out" is the right of a riparian land owner to use subaqueous lands to establish a wharf to facilitate the docking, loading and unloading of vessels.22 The riparian landowner has the common law right to wharf out to access navigable water even though the subaqueous lands used for the stabilization of the wharf are owned by the state.23 However, the right to wharf out utilizing state land is by no means absolute; it is limited both by common law and statutory regulation. For example, a wharf cannot interfere with the public's right of navigation on the water body, and is also subject to applicable environmental regulations.24 A state may generally subject wharves to exercises of police power.25 As the Supreme Court once stated, a riparian landowner "has the right of access to the navigable part of the stream in front of his land, and to construct ... a wharf or pier projecting into the stream ... subject to such general rules and regulations as the legislature may prescribe for the protection of the public."26

In the usual situation, the state that regulates a particular landowner's riparian rights is also the state which exercises police power over the owner's wharf.27 It is thus not ordinarily necessary to differ-

20. "Riparian land" refers to land that is immediately adjacent to, and in contact with, a body of water, including a lake, river, sea or ocean. See 1 HENRY PHILIP FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 278–81 (1904).
21. Id. at 279. "Navigable" refers to a body of water that is "capable of allowing vessels... to pass, and [is] thereby usable for travel or commerce." BLACK'S LAW DICTIONARY 1056 (8th ed. 2004). The Commerce Clause of the Constitution gives Congress jurisdiction over the navigable waters of the Unites States. U.S. CONST. art. I, § 8, cl. 3.
23. See, e.g. New Jersey v. Delaware II, 291 U.S. 361, 375 (1934) ("[R]iparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves... though the title to the foreshore or the bed may have been vested in the state.").
24. TARLOCK, supra note 22, at 3–133.
25. Id.
entiate between a state's exercise of riparian authority and its exercise of police power jurisdiction; as both types of jurisdiction are normally exercised by the same sovereign, courts need not determine which controls.\textsuperscript{28} However, this was precisely the issue in \textit{New Jersey III.}\textsuperscript{29} Delaware claimed that it could exercise its police power to prevent the construction of a wharf which would extend into its sovereign territory.\textsuperscript{30} New Jersey claimed that a prior compact between the two states which granted it "riparian jurisdiction of every kind and nature" gave New Jersey exclusive jurisdiction over riparian improvements appurtenant to its shores, free from Delaware regulation.\textsuperscript{31} Because an analogous conflict to \textit{New Jersey III} was recently resolved by the Supreme Court in \textit{Virginia \textit{v.}} \textit{Maryland},\textsuperscript{32} examination of that case is warranted.

\textbf{B. The Clash Over the Potomac River: \textit{Virginia \textit{v.}} \textit{Maryland}}

Virginia and Maryland have disputed the boundary of the Potomac River since the 1600s; conflicting royal charters led both states to assert sovereignty over the river.\textsuperscript{33} Jurisdictional disputes inevitably arose, and the states eventually entered into a compact in 1785 to settle these jurisdictional questions.\textsuperscript{34} Article Seventh of the 1785 compact provided:

\begin{quote}
The citizens of each state respectively shall have full property in the shores of the 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.\textsuperscript{35}
\end{quote}

The 1785 compact addressed fishing rights and criminal jurisdictional issues, but did not resolve the boundary dispute.\textsuperscript{36} The states eventually agreed to binding arbitration to determine their interstate boundary along the Potomac.\textsuperscript{37} It was determined that Maryland owned the subaqueous soil of the Potomac to the low-water mark on the Virginia shore.\textsuperscript{38} However, the arbiters also recognized in Article Fourth of their award:

\begin{itemize}
\item 28. \textit{Id.}
\item 29. 128 S. Ct. 1410 (2008).
\item 30. \textit{Id.} at 1419.
\item 31. \textit{Id.}
\item 32. 540 U.S. 56 (2003).
\item 33. \textit{See id.}, 540 U.S. 56, 60 (2003) (stating that Virginia traces its title to the Potomac from a charter from King James I, while Maryland asserts that its title to the river, granted by King Charles I, is superior.).
\item 34. \textit{Id.} at 61.
\item 35. \textit{Id.} at 62 (citing VA. CODE ANN. Compacts App., pp 342–343 (2001)).
\item 37. \textit{Virginia,} 540 U.S. at 62.
\item 38. \textit{Id.}
\end{itemize}
Virginia is entitled not only to full dominion over the soil to the 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, agreeable to the compact of [1785].

Though Virginia had been given the right to use the Potomac beyond the low-water mark, Maryland enacted legislation in 1933 which required Virginia to obtain Maryland permits for the construction of water intake structures extending into the Potomac. Virginia applied for and was granted such permits between 1957 and 1996. In 1996, Virginia applied for a Maryland permit to extend a pipe 725 feet past the low-water mark on the Virginian shore to obtain improved water for the residents of Fairfax County. Maryland denied the permit, stating that the water intake project would harm Maryland by facilitating urban sprawl in Virginia. Virginia filed several appeals before filing an original action in the United States Supreme Court. Virginia argued that both the 1785 compact and the arbitration award precluded Maryland from requiring Virginia to obtain permits for the construction of water intake improvements along the shores of the Potomac. Maryland countered that as sovereign of the river, it had the authority to regulate the exercise of Virginia's riparian rights, and that Virginia's long acquiescence in the permit system prevented it from later asserting riparian sovereignty. The question before the court was thus: Does the 1785 compact and later arbitration award allow Virginia to construct riparian improvements along the Potomac free from regulation by Maryland, or does Maryland have the right to permit and exclude riparian improvements under its police power as sovereign over the subaqueous soil of the river?

The matter was assigned to a Special Master for determination. The Special Master found that the unique language of the 1785 compact and later arbitration clause gave Virginia and its citizens the right to construct riparian improvements extending beyond the low-water mark without the consent of Maryland. Maryland filed excep-

40. Id. at 63.
41. Id.
42. Id. at 63–64.
43. Id. at 64.
44. Id.
45. Id. at 64–65.
46. Id. at 65.
47. Id. at 60.
48. Id. at 65.
tions to the Special Master's report; the Supreme Court upheld the report in a 7-2 decision.49

1. The Court’s Determination

The Court began its analysis of the language of the 1785 compact by stating that it “interpret[s] a congressionally approved interstate compact just as if we were addressing a federal statute.”50 The Court found that the plain language of the 1785 compact, which granted the citizens of each state “full property rights” in the Potomac and the privilege of building “improvements” gave Virginia citizens the right to construct riparian structures free from Maryland regulation.51 The Court noted that Article Seventh of the compact did not grant sovereign authority to regulate these riparian improvements, and thus, “each state was left to regulate the activities of her own citizens.”52 The Court further stated that Article Seventh “simply guaranteed that the citizens of each State would retain the right to build wharves and improvements regardless of which State ultimately was determined to be sovereign over the River.”53 The Court found that the arbitration award gave Virginia, not just her citizens, the right to use the Potomac beyond the low-water mark.54 The Court found that the arbitration award granting the subaqueous soil to Maryland did not give Maryland the authority to exclude Virginians from the Potomac through the exercise of its police power.55 The right to construct structures appurtenant to Virginia’s shores was therefore “necessary to the full enjoyment of her riparian ownership of the soil to [the] low-water mark[ ]” within the meaning of the language of Article Fourth of the arbitration award.56 The Court thus found that Virginia had the right, *qua* sovereign, to the use of the Potomac beyond the low-water mark, immune from Maryland regulatory authority.57 The only limitations placed on Virginia’s riparian rights were not to impede Maryland’s proper use of the river, and not to impede navigation upon the river.58 The Court quickly disposed of Maryland’s acquiescence argu-

49. Id. at 65.
50. Id. at 66 (quoting New Jersey v. New York, 523 U.S. 767, 811 (1998) (internal quotation marks omitted)).
51. Id. at 66.
52. Id. at 67.
53. Id. at 69.
54. Id. at 70.
55. Id. at 72 (internal quotation marks omitted).
56. Id. at 74. The majority states that Virginia’s rights are subject to, *inter alia*, the federal navigation servitude. Id. Justice Kennedy’s dissent disagrees, stating that because the Potomac is owned entirely by Maryland, federal common law does not apply. Id. at 90 (Kennedy, J., dissenting). Though the federal navigation question is beyond the scope of this Note, Kennedy’s assertions are false;
ment, stating that Maryland did not establish that a substantial period of time elapsed between her 1957 permitting of the first of Virginia's water intake projects and the 1996 dispute. The Court also noted that Virginia had "vigorously protested" Maryland's permitting system in 1976. The Court held that Virginia and its citizens may construct riparian improvements and withdraw water from the Potomac without regulation from Maryland. Aided by a two-century-old compact and Article Fourth of the arbitration award, Virginia's riparian rights trumped Maryland's police power to regulate improvements over its subaqueous territory.

2. Justice Kennedy's Dissent Suggests the Adoption of a Reasonableness Test

Justice Stevens' dissent noted that under Virginia law, the intake of water for domestic use by the inhabitants of Fairfax County was not the exercise of a "riparian right"; therefore, Virginia had no authority to withdraw water without the consent of Maryland. Stevens found that even if such a withdrawal of water was an exercise of riparian rights, "all riparian rights at common law [are] subject to the paramount regulatory authority of the sovereign that owns the river." Justice Kennedy's dissent found the 1785 compact to be a "hedging agreement" that established permanent assurances of riparian rights at a time when ownership of the Potomac was in dispute. Once the boundary dispute was resolved, the riparian rights vested in Virginia by the 1785 compact became subject to Maryland's sovereign powers. Kennedy's dissent also found that the language of the arbitration award, which stated that Virginia had "full dominion" to the low-water mark, was unlimited, while the language that followed—"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"—was limited by Maryland's reasonable use of its sovereign police power over said rights. Though Maryland could not exclude Virginia or its riparian landowners from the river, Kennedy would hold that the state

Maryland's ownership of the Potomac does not change the Potomac's status as an interstate river. See Tarlock, supra note 22, at § 10:4 note 2.1.

60. Id.
61. Id. at 79 (decree of the court).
62. Id. at 81 (Stevens, J., dissenting) (quoting Purceville v. Potts, 179 Va. 514, 521 (1942)).
63. Id. at 81–82 (Stevens, J., dissenting) (quoting Purceville, 179 Va. at 521).
64. Id. at 82.
65. Id. at 85 (Kennedy, J., dissenting).
66. Id. at 85–87 (Kennedy, J., dissenting).
67. Id. at 87–88 (Kennedy, J., dissenting).
would be able to reasonably regulate the riparian rights vested in Virginia and its citizens. 68

B. The Clash Over the Delaware River: New Jersey v. Delaware

1. The 1905 Compact

One early dispute between New Jersey and Delaware concerned the boundary of the Delaware River within a circle of twelve miles around the town of New Castle, Delaware. 69 Delaware claimed that it had superior title to the subaqueous soils all the way to the low-water mark 70 on the New Jersey side of the river within the twelve-mile circle, tracing its title to a 1682 deed of feoffment from the Duke of York to William Penn. However, New Jersey claimed that the Duke of York did not own all of the subaqueous land contained in the grant, and therefore Delaware's title to the subaqueous land on New Jersey's side of the river was invalid. 71

Delaware remained convinced of its superior title, and in 1871 enacted a law which required out-of-state residents to purchase Delaware fishing licenses to fish the Delaware River. 72 New Jerseyans in violation of the new law were later arrested by Delaware officials. 73 New Jersey claimed that Delaware had no right to arrest New Jersey citizens past the thalweg of the Delaware River. 74 After negotiations between the two states failed, New Jersey sought resolution of the boundary dispute in 1877 by filing an original complaint with the United States Supreme Court. 75 The Court issued a preliminary injunction, ordering Delaware to suspend its 1871 license provision for out-of-state fishermen until the pending suit was resolved. 76 The states continued to negotiate, but could not agree to a final resolution regarding the location of the interstate boundary on the Delaware River. 77

However, the states did reach agreement as to their respective fishing rights on the river, as well as to the right to serve criminal and

68. Id. at 86–87 (Kennedy, J., dissenting).
70. The "low-water mark" is "the point to which the water recedes at its lowest stage." BLACK'S LAW DICTIONARY 1623 (8th ed. 2004).
72. 14 Del. Laws 84 (1871).
74. Id. at C-6 to -7. The thalweg is "the middle of the primary navigable channel of a waterway, [usually] constituting the boundary between states." BLACK'S LAW DICTIONARY 1516 (8th ed. 2004).
75. This dispute became New Jersey v. Delaware (New Jersey I), No. 1 Original (1877), withdrawn, 205 U.S. 550 (1907).
76. Report of the Special Master, supra note 9, at C-7.
77. Report of the Special Master, supra note 9, at C-9 to -10.
civil processes to persons within the twelve-mile circle.\textsuperscript{78} This agree-
ment was embodied in the compact of 1905, which was ratified by Con-
gress in 1907.\textsuperscript{79} Pursuant to the compact, New Jersey withdrew its
1877 complaint still pending in the Supreme Court.\textsuperscript{80} Two articles of
the 1905 compact would sow the seeds for later controversy in \textit{New
Jersey III}, as discussed below: Article VII states, "Each State may, on
its own side of the river, continue to exercise riparian jurisdiction of
every kind and nature, and to make grants, leases, and conveyances of
riparian lands and rights under the laws of the respective States."\textsuperscript{81}
Article VIII states, "Nothing herein contained shall affect the territo-
rial limits, rights, or jurisdiction of either State of, in, or over the Dela-
ware River, or the ownership of the subaqueous soil thereof, except as
herein expressly set forth."\textsuperscript{82}

2. Resolution of Delaware’s Title

Tensions between New Jersey and Delaware would develop again
in 1925, when boats from Delaware harvested oysters from subaque-
ous lands south of the twelve-mile circle, lands that were claimed by
New Jersey.\textsuperscript{83} In 1929, New Jersey filed a second original complaint
against Delaware in the United States Supreme Court to determine
the states’ boundary line on the Delaware River.\textsuperscript{84} This resulted in
the second original Supreme Court action between the two states in
\textit{New Jersey II}.\textsuperscript{85} The Court concluded that Delaware’s title from Penn
was valid. Delaware was thus determined to own the subaqueous soil
of the Delaware River to the low-water mark on the New Jersey shore
within the twelve-mile circle.\textsuperscript{86} However, the Court found that south
of the circle, New Jersey owned the subaqueous soil to the thalweg of
the Delaware River.\textsuperscript{87} The Court’s ruling created an anomalous situa-
tion: Delaware owned the subaqueous soil in the twelve-mile circle up
to the low-water mark on the New Jersey shore, but the 1905 compact
was still in effect,\textsuperscript{88} thus giving New Jersey the right to exercise “ripa-
rian jurisdiction of every kind and nature” appurtenant to its

\textsuperscript{78} This is embodied in the Act of Jan. 24, 1907, Pub. L. No. 59-32, 34 Stat. 858.
\textsuperscript{79} \textit{Id.} at 861.
\textsuperscript{80} \textit{Id.} at 860.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} Report of the Special Master, \textit{supra} note 9, at 14.
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.} \textit{See also} \textit{New Jersey v. Delaware II}, 291 U.S. 361 (1934) (Supreme Court’s
opinion in \textit{New Jersey II}).
\textsuperscript{86} \textit{New Jersey II}, 291 U.S. at 374–75, 378.
\textsuperscript{87} \textit{Id.} at 385.
\textsuperscript{88} \textit{Id.} (stating that though Delaware was determined to own the soil up to the low-
water mark on the New Jersey side of the Delaware River within the twelve-mile
circle, this was “subject to the Compact of 1905”).
shores. This provided the framework for the third original action in the Supreme Court between New Jersey and Delaware.

3. Renewed Tensions

In 1971, Delaware began to regulate industrial development within its coastal waters, enacting the Delaware Coastal Zone Act ("DCZA"). Delaware sought to "protect the natural environment of its bay and coastal areas [to] safeguard their use primarily for recreation and tourism." The Delaware legislature determined that the state would prohibit "new heavy industry" and "bulk product transfer facilities" in its coastal waters in order to effectuate its coastal public policy. The DCZA therefore requires that new projects extending past the low-water mark of the New Jersey shore within the twelve-mile circle must be approved and permitted by the Delaware Department of Natural Resources and Environmental Control ("DNREC"). Because New Jersey also has regulations for coastal development, projects which straddle the interstate boundary and extend from New Jersey territory past the low-water mark on the New Jersey shore within the twelve-mile circle need both New Jersey and Delaware approval. This unusual concurrent jurisdiction eventually led to renewed conflict between the two states.

In September 2004, Crown Landing LLC, a subsidiary of British Petroleum ("BP"), applied to DNREC for approval to drill test borings related to a liquefied natural gas terminal that would extend past the low-water mark on the New Jersey side of the Delaware River within the twelve-mile circle. Crown Landing also applied in January 2005 for a waterfront development permit from the New Jersey Department of Environmental Protection ("NJDEP"). The test borings were the first step in the construction of a proposed liquefied natural gas ("LNG") unloading terminal. The proposed wharf would extend 2,000 feet into Delaware territory, consist of a 6,000-square foot LNG unloading facility, and require the dredging of 1.24 million cubic yards of Delaware's subaqueous soil, ultimately disturbing over 29 acres.

93. Id.
94. Id. §§ 7002, 7004.
96. Report of the Special Master, supra note 9, at C-31 to -32.
97. Id. at C-32.
98. Id. at C-31. The proposed terminal is commonly known as the "Crown Landing Project." Id.
BP supertanker vessels with capacities of 200,000 cubic meters would berth at the terminal. The tankers were 40 percent larger than any vessels of their kind, and would pass densely populated areas, consequently requiring a safety zone restricting other ships to keep appropriate minimum distances. The proposed terminal was projected to create more than 1,300 new jobs for New Jersey, and may have increased New Jersey's gross state product by as much as $277 million, thus potentially earning the state and local governments more than $13 million in annual tax revenues.

DNREC characterized the proposed wharf as both a "heavy industry use" and a "bulk product transfer facility" and accordingly found that the project would violate the DCZA, which prohibited offshore bulk product transfer facilities and heavy industry use within Delaware's coastal areas. BP appealed the decision to the Delaware Coastal Zone Industrial Board ("DCZIB"), which affirmed the DNREC's findings. BP did not appeal the DCZIB decision. Instead, New Jersey took up the fight against Delaware, seeking to reopen the Supreme Court's 1934 decision in New Jersey II. But the Court denied the motion to reopen, instead directing that New Jersey's petition be treated as a bill of complaint for a new original action, which would become New Jersey III.

4. The Recommendations of the Special Master

The Supreme Court referred the controversy between New Jersey and Delaware to a Special Master for consideration. The Master noted that the resolution of the riparian lands, rights, and jurisdiction issues in the suit depended upon "the meaning of Article VII of the [1905] Compact." The Master stated that an interpretation of these Articles must take into account the parties' contemporaneous 1905 understanding of the language therein, as well as the parties' course of conduct since the adoption of the compact.

The Master first addressed the issue of whether New Jersey had the authority to make grants of riparian land on its side of the river.

100. Id. at 1418 & n.7.
101. Id.
102. Id. at 1439 (Scalia, J., dissenting).
103. Id. at 1418 & n.11 (majority opinion) (internal brackets omitted).
104. Report of the Special Master, supra note 9, at C-32 to -33.
105. Id.
106. Id. at C-33.
107. Id.
108. New Jersey III, 128 S. Ct. at 1424. The Court appointed Ralph Lancaster, Jr. as Special Master; Mr. Lancaster was also the Court's appointed Special Master in Virginia v. Maryland, 540 U.S. 56 (2003). New Jersey III, 128 S. Ct. at 1424.
109. Report of the Special Master, supra note 9, at 32.
110. Id. at 32–33.
beyond the low-water mark into Delaware subaqueous territory. The Master stated that a sovereign will not be found to have waived its rights unless explicitly declared,\textsuperscript{111} and that there exists a "strong presumption against defeat of a State's title."\textsuperscript{112} The Master noted that Article VIII of the 1905 compact reinforced these presumptions, reciting that nothing in the compact "shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."\textsuperscript{113} The Master found that Article VII expressly declared that each state could continue to grant riparian lands on its own side of the Delaware River, but this provision did not expressly declare that New Jersey could grant Delaware land.\textsuperscript{114} New Jersey could thus only grant lands to which it properly held title, or in other words, down to the low water mark.\textsuperscript{115} The Master reinforced his pronouncement, stating that it was inconceivable that Delaware would have implicitly agreed to waive its sole right to grant lands on the Delaware side of the river via the 1905 compact, which was entered into at a time when both states disputed the interstate boundary.\textsuperscript{116} Finally, the Master agreed with Delaware\textsuperscript{117} that if New Jersey was given the right by Article VII to grant Delaware's subaqueous lands, New Jersey would be able to modify the Supreme Court's boundary determination in \textit{New Jersey II} anytime it so desired.\textsuperscript{118} The Master thought it implausible that the Supreme Court would have labored over the determination of the interstate boundary in \textit{New Jersey II}, only to permit New Jersey to later alter that boundary at will.\textsuperscript{119}

The Master addressed the issue of whether New Jersey had the authority to make grants of riparian \textit{rights} separately from the issue of grants of riparian \textit{lands}.\textsuperscript{120} Article VII provided that each state would have the authority to grant "riparian rights" appurtenant to its shores;\textsuperscript{121} the Master noted that the meaning of riparian rights gener-

\textsuperscript{111} Id. at 43 (quoting United States v. Cherokee Nation, 480 U.S. 700, 707 (1987)).
\textsuperscript{112} Report of the Special Master, supra note 9, at 42 (quoting United States v. Alaska, 521 U.S. 1, 34 (1997)) (internal quotation marks omitted).
\textsuperscript{113} Id. at 43.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 44.
\textsuperscript{117} See Reply Brief of Delaware in Response to Exceptions by New Jersey to the Report of the Special Master at 16, New Jersey v. Delaware III, 128 S. Ct. 1410 (2008) (No. 134 Original) ("Article VII . . . does not give New Jersey power to grant lands within Delaware's territory. If it did, New Jersey would be able unilaterally to change the interstate boundary set by this Court in 1935 every time it made a riparian grant beyond the low-water mark . . . ").
\textsuperscript{118} Report of the Special Master, supra note 9, at 45.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 46.
ally includes the right to wharf out, even though the bed of the river may be vested in the state. Under Article VII, New Jersey retained the right to grant the riparian right to wharf out beyond the low-water mark, even though the river bed was later determined to belong to Delaware. However, the right to wharf out was recognized to be subject to state regulation; the issue was which state or states would be held to regulate this right.

The Master found that Article VII's grant of "riparian jurisdiction of every kind and nature" to each state was not a grant of exclusive riparian jurisdiction to New Jersey, but rather vested both states with overlapping jurisdiction. The Master noted that the term "riparian jurisdiction" was not a legal term of art in 1905, and appeared to be specially drafted for the compact. The Master thus found "riparian jurisdiction" to be ambiguous, and stated, "When construing ambiguous provisions of an interstate compact, it is appropriate to consider extrinsic evidence that helps shed light on the drafters' intentions." The Master found it compelling that the term "riparian jurisdiction" appeared in the same sentence as "riparian rights" in Article VII. He assumed that the drafters intended "riparian jurisdiction" to relate to the governing of "riparian rights." The Master therefore determined that "each State retained the ability to grant riparian rights and exercise jurisdiction over riparian rights on its own shores, regardless of where the boundary might later be located." The Master noted that this was consistent with the "continue to exercise riparian jurisdiction" language in Article VII, as "continue" simply referred to the preservation of New Jersey's right to govern the full scope of its riparian rights—a right it apparently practiced for many years before 1905. However, the Master rejected New Jersey's argument that the riparian jurisdiction granted in Article VII allowed New Jersey to exercise exclusive jurisdiction over the riparian improvements on its shores, stating that "riparian" is a limiting modifier, and is not equivalent to

122. Report of the Special Master, supra note 9, at 48 (quoting New Jersey v. Delaware II, 291 U.S. 361, 375 (1934)).
123. See Report of the Special Master, supra note 9, at 48-49.
124. Id. at 53.
126. Report of the Special Master, supra note 9, at 53.
127. See id. at 54.
128. Id.
129. Id. (citing Oklahoma v. New Mexico, 501 U.S. 221, 235 n.5 (1991)).
130. Id. at 56.
131. Id. at 56-57.
132. See Petition for a Supplemental Decree at 2, New Jersey v. Delaware III, 128 S.Ct. 1410 (2008) (No. 123, Orig.) (stating that the 1905 compact "grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware").
"exclusive." The Master also found compelling Delaware's argument that the word "exclusive" appeared in other Articles of the 1905 compact, but not in Article VII; it was therefore determined to have been intentionally left out of Article VII. The Master cited precedent that when construing ambiguous compact language, it is appropriate to "seek guidance from comparable language in other compacts." For these reasons, the Master took notice of an earlier compact between New Jersey and New York, which had "strikingly similar language," but which conspicuously contained the word "exclusive" in relation to "riparian rights." New Jersey was thus deemed to have been aware that the 1905 compact's grant of "riparian jurisdiction" was not equivalent with "exclusive jurisdiction."

The Master determined that when construing the meaning of a compact, it is entirely appropriate to examine evidence of the parties' course of action since the formation of such compact. He agreed with Delaware that the parties' course of action since 1905 provided credibility to the assertion that New Jersey had acquiesced in Delaware's regulating authority.

The Master noted that Delaware had exercised police power to regulate wharves on the New Jersey shore since the enactment of the DCZA in 1971, and that New Jersey cooperated with this exercise of police power for several decades. The Master also found persuasive Delaware's argument that New Jersey had conceded any claim to exclusive riparian jurisdiction when the NJDEP admitted to the U.S. Department of Commerce in 1980 that "any New Jersey project extending beyond mean low water must obtain coastal permits from

133. Report of the Special Master, supra note 9 at 57–58.
134. See Brief of the State of Delaware in Opposition to the State of New Jersey's Motion to Reopen and for a Supplemental Decree at 56, New Jersey v. Delaware III, 128 S.Ct. 1410 (No. 123, Orig.) (stating that Article IV of the 1905 compact explicitly granted "exclusive jurisdiction" in relation to the states' common rights of fishery; therefore, Delaware argued that if the drafters had intended to grant New Jersey "exclusive" riparian jurisdiction, they would have explicitly stated "exclusive," rather than granting merely "riparian jurisdiction").
136. Id. at 67–68 (paraphrasing Oklahoma v. New Mexico, 501 U.S. 221, 235 (1991)).
137. Id. at 66.
138. Id. at 66–67.
139. Id. at 68–69 (citing United States v. Stuart, 489 U.S. 353, 369 (1989)).
140. See Brief of the State of Delaware in Opposition to the State of New Jersey's Motion to Reopen and for a Supplemental Decree at 63, New Jersey v. Delaware III, 128 S.Ct. 1410 (2008) (No. 123, Orig.) (claiming that Delaware had exercised police power over the lands through the DNREC since the 1970s, without opposition from New Jersey).
141. Report of the Special Master, supra note 9 at 68.
142. Id. at 71–72.
both states.”143 The Master was further compelled by the fact that New Jersey recently sought approval by the DNREC for the modification of a New Jersey state park pier.144 The Master found that although New Jersey issued many riparian grants beyond the low-water mark since 1905, Delaware only had recently attempted to regulate its subaqueous lands.145 Since that time, New Jersey, not Delaware, was the party to acquiesce in the other’s exercise of regulatory authority.146

The Master distinguished Virginia v. Maryland from the present controversy, and thus rejected New Jersey’s assertion that it, like Virginia, should be able to exercise its compact-preserved riparian rights free from interference from the sovereign owner of the subaqueous soil.147 The Master determined that although the holding in Virginia v. Maryland appeared “superficially” to buttress New Jersey’s claim, the unique language of the compact and arbitration award in Virginia v. Maryland was different from the 1905 compact: Virginia was given the “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.”148 The Master concluded that this language was distinctive from the 1905 compact language granting New Jersey “riparian jurisdiction of every kind and nature[,]” and bolstered this assertion by noting that during arbitration, Maryland ceded that the boundary line between the two states should be drawn around “all wharves and other improvements now extending or which may hereafter be extended, by authority of Virginia from the Virginia shore.”149 The Master stated that this type of cession was notably absent from the current controversy.150

For all of the foregoing reasons, the Master determined that New Jersey did not have exclusive authority to regulate riparian improvements appurtenant to its shores extending past low-water within the twelve-mile circle, but was limited to exercising jurisdiction related to its riparian rights granted by the 1905 compact.151 Delaware, as the sovereign, retained the right to exercise its police powers over any improvements which extended into its territory.152 New Jersey riparian improvements were thus subject to both the limited riparian authority

143. Id. at 72–73 (citing New Jersey’s Response to Requests for Admissions No. 62 (DA 4177)).
144. Id. at 75–76.
145. Id. at 98.
146. Id. at 90–91.
147. Id. at 64 n.118 (quoting Virginia v. Maryland, 540 U.S. 56, 62–63 (2003)).
148. Id.
149. Id. (quoting Virginia, 540 U.S. at 72 n.7).
150. Id.
151. Id. at 85–86.
152. Id. at 86.
of New Jersey, as well as the sovereign police power of Delaware. Del-
aware could therefore block the building of the Crown Landing Project
under the DCZA as an exercise of its police power.

New Jersey filed exceptions to the Report of the Special Master;153
the Supreme Court upheld the Master's determinations "in principal
part."154 The Court in fact quoted the Special Master extensively, and
sustained all of his findings, adding relatively little new analysis of its
own.155 As the Special Master's analysis has been discussed at
length, only a brief overview of the Court's opinion is warranted.

5. The Court's Determinations

The Court held that Article VII's grant of riparian jurisdiction did
not confer exclusive jurisdiction to New Jersey, and that Delaware
still retained police power over improvements extending into its sover-
eign territory.156 The Court stated, "To attribute to 'riparian jurisdic-
tion' the same meaning as 'jurisdiction' unmodified, or equating the
novel term with the distinct formulation 'exclusive jurisdiction,' would
deny operative effect to each word in the Compact, contrary to basic
principles of construction."157 The Court also upheld the Master's ex-
amination of the language of the New Jersey-New York compact
(which contained the words "exclusive jurisdiction") as evidence that
New Jersey understood that the New Jersey-Delaware compact's
omission of the word "exclusive" in Article VII was detrimental to its
present claims.158 The Court noted: "Interstate compacts, like trea-
ties, are presumed to be the 'subject of careful consideration before
they are entered into, and are drawn by persons competent to express
their meaning, and to choose apt words in which to embody the pur-
poses of the high contracting parties.'"159

The Court agreed with the Master that Virginia v. Maryland was
distinguishable from the current controversy because of the "unique
language" of the Virginia-Maryland award and later arbitration
award, which were found to differ significantly from the language of
the 1905 compact's provisions which granted "riparian jurisdiction of
every kind and nature."160 The Court found that neither the 1905
compact nor the final boundary settlement in New Jersey II gave New

153. New Jersey v. Delaware III, 128 S. Ct. at 1419. New Jersey did not take excep-
tions to the Master's rulings on the issues of estoppel, acquiescence, and prescrip-
tion. Id. at 1419 n.12.
154. Id. at 1416.
supra note 9 at 42–98.
156. New Jersey III, 128 S. Ct. at 1419.
157. Id. at 1420–21 (citing United States v. Menasche, 348 U.S. 528, 538–539 (1955)).
158. Id. at 1423.
159. Id. (quoting Rocca v. Thompson, 223 U.S. 317, 332 (1912)).
160. Id. at 1424 (quoting Report of the Special Master, supra note 9 at 64 n.118).
Jersey all jurisdictional authority, as did the language of the Virginia-Maryland arbitration award. The Court also noted that Virginia was given sovereign authority over improvements extending into the Potomac as part of a boundary settlement, which the Court found distinct from the riparian jurisdiction granted to New Jersey in 1905 while the New Jersey-Delaware boundary was still in dispute.

The Court agreed with the Master that the parties' course of conduct since the 1905 compact militated toward a ruling in Delaware's favor. The Court found that New Jersey had acquiesced in the DNREC's regulation of projects extending into Delaware for over thirty years, that New Jersey failed to take issue with Delaware's 1971 rejection of a similar LNG unloading facility, and that the NJDEP had conceded that Delaware rightfully exercised its police power beyond the low-water mark.

The Court departed significantly from the Master in one aspect, announcing: "New Jersey and Delaware have overlapping authority to regulate riparian structures and operations of extraordinary character extending outshore of New Jersey's domain into territory over which Delaware is sovereign." This "extraordinary character" language was missing from the Report of the Special Master, which simply stated that Delaware retained the right to exercise its police powers over any improvement which extended into its territory, not just improvements which exhibit extraordinary character. In fact, the only mention of "extraordinary" in the Special Master's Report was in a footnote which stated that "[e]xtraordinary, unusual modes of use . . . are not annexed as incidents in law" in reference to the riparian right to wharf out. This was not part of the Master's recommendations, but was merely used to buttress the Master's finding that the common law riparian right to wharf out was limited by navigability and nuisance considerations. However, the addition of the extraordinary character test to the recommendations of the Master did not change the outcome of the case; the Court found that the proposed Crown Landing Project went "well beyond the ordinary or usual[.]"

161. Id.
162. Id. at 1419.
163. Id. at 1425.
164. Id. at 1425–26.
165. Id. at 1416 (emphasis added).
166. Examine Report of the Special Master, supra note 9 at 100.
169. Id. at 50.
170. New Jersey III, 128 S.Ct. at 1427–28. The Court did not explicitly state what constituted "extraordinary character," but it implicitly suggested that the length of the wharf, size of the unloading platform, capacity of the vessels which would
and thus held that Delaware's rejection of the project was "within the scope of its governing authority to prohibit unreasonable uses of the river and soil within the twelve-mile circle." Delaware could thus only exercise authority over riparian improvements on the New Jersey shore extending past the low-water mark "to the extent that they exceed ordinary and usual riparian uses." Justice Stevens concurred, disagreeing only with the court's extraordinary character test. Stevens agreed with the Special Master that Delaware should be able to exercise its police power over all riparian improvements that extend past the low-water mark. Stevens justified this view, stating that New Jersey's riparian rights would be protected by reasonable limits of Delaware's police power; Delaware thus could not treat New Jersey riparian improvements differently than Delaware riparian improvements, "absent some reasonable police-power purpose."

Justice Scalia dissented, stating that the Court's extraordinary character test had no basis in prior law. Scalia stated that the Court's decision that New Jersey had overlapping jurisdiction with Delaware over riparian improvements beyond the low-water water mark made Article VII of the 1905 compact a "ridiculous nullity." Scalia found that the riparian right of wharfing out was traditionally used to facilitate the loading and unloading of cargo, even of hazardous cargo. He therefore posited that the Crown Landing Project would have been "an ordinary and usual riparian use" in 1905, and thus even if the Court's extraordinary character test were applied to the facts of this case, Delaware could not hinder New Jersey's exercise of riparian authority. Scalia further objected to the extraordinary character test, stating: "What in the world does it mean? Would a pink wharf, or a zigzagged wharf qualify?" Scalia also foresaw the possibility that the Court's rule could spawn further litigation: "we can anticipate a whole category of original actions in this Court that will..."
clarify, wharf by wharf, what is a wharf of 'extraordinary character.'”

Scalia found the Court's decision in *Virginia v. Maryland* to be dispositive in the present controversy. Scalia rejected the Master's statement that the Virginia case turned on the “unique language” of the compact and later arbitration clause: “of course virtually every written agreement or award has 'unique language,' so if we could only extend to other cases legal principles pertaining to identical language our interpretive jurisprudence would be limited indeed.” Scalia found that similar to the arbitration award granting Virginia riparian rights not subject to Maryland's authority, Article VII of the 1905 compact gave New Jersey the right, *qua* sovereign, to regulate riparian improvements without interference from Delaware.

Scalia disagreed with the Master's determination that when construing compacts, there exists a presumption against the defeat of a state's title. Scalia stated that because the purpose of interstate boundary compacts is to formulate a compromised boundary, there is no need to assume that a state has retained its sovereign title; this is precisely the right that is compromised. Scalia thus found it plausible that Delaware had given up the exclusive right to exercise jurisdiction over New Jersey's riparian improvements in order to secure its citizens' right to fish the New Jersey side of the Delaware River at a time when the boundary was still in dispute. Scalia believed that Article VII's grant of “riparian jurisdiction of every kind and nature” granted New Jersey authority over riparian improvements appurtenant to its shores, free from Delaware's authority to exclude such improvements under its police powers. Scalia thus concluded that the word “exclusive” need not have been included in the language of Article VII. Finally, Scalia stated that “course of conduct” evidence was not necessary in this case, as it is only proper to examine such evidence when a compact is ambiguous, and Scalia found no ambiguities in the language of Article VII.

181. *Id.* at 1430.
182. *Id.* at 1435–36 (Scalia, J., dissenting).
183. *Id.* at 1436 (Scalia, J., dissenting).
184. *Id.* (Scalia, J., dissenting).
185. *Id.* at 1430–31 (Scalia, J., dissenting).
186. *Id.* (Scalia, J., dissenting).
187. *Id.* at 1431 (Scalia, J., dissenting).
188. *Id.* at 1431–33 (Scalia, J., dissenting).
189. *Id.* at 1433 (Scalia, J., dissenting).
190. *Id.* at 1434 (Scalia, J., dissenting).
III. ANALYSIS

The similarities between the Virginia-Maryland conflict and the New Jersey-Delaware conflict are striking. Both disputes involved interstate river boundary issues, and both disputes resulted in the ratification of compacts which addressed fishing and jurisdictional questions, but which failed to resolve interstate riparian boundaries. Consequently, further litigation was needed to resolve these river boundary issues. Virginia and Maryland’s boundary dispute was eventually resolved through arbitration; New Jersey and Delaware’s dispute was resolved by a Supreme Court decision. The resulting determinations were nearly identical: Maryland was determined to own the subaqueous soil of the Potomac to the low-water mark on the Virginia side of the river, just as Delaware was held to hold title to the subaqueous soil of the Delaware River to the low-water mark on the New Jersey shore within the twelve-mile circle. Both boundary determinations were still subject to the parties’ earlier compacts, and this inevitably led to subsequent litigation in the Supreme Court to interpret each state’s rights, in view of the earlier compacts and boundary resolutions. In both cases, the principal issue was whether the exercise of one state’s riparian rights was subject to another state’s sovereign police powers. The results were quite different; in Virginia v. Maryland, Virginia’s riparian rights trumped Maryland’s sovereign police powers, but in New Jersey III, New Jersey’s riparian rights were subject to Delaware’s sovereign authority. The nagging question is whether the two cases are reconcilable. This Part asserts that the recommendations of the Special Master in both cases are reconcilable, but that these recommendations did not fully resolve the controversy in New Jersey v. Delaware III. This Part further maintains that the Court’s extraordinary character test is flawed and that instead a “reasonableness” test should be used.

A. The Recommendations of the Special Master in New Jersey v. Delaware III are Reconcilable with Virginia v. Maryland

The Special Master went to great lengths to justify his disparate recommendations in the two cases. He did this chiefly by distinguishing the language of the Virginia–Maryland arbitration award from the New Jersey–Delaware compact.191 Certainly, the language in the former was distinct from the latter: Virginia’s “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” is different from New Jersey’s right to “riparian jurisdiction of every kind and nature.” But does this difference in construction justify disparate treatment of the

two phrases? "[F]ull enjoyment of her riparian ownership" does not, on its face, appear to be all that different from "riparian jurisdiction of every kind and nature." The two phrases certainly do not appear to grant different amounts of riparian authority; yet the Master recommended treating them as distinct phrases which bestowed different rights.\textsuperscript{192} The Master arrived at this conclusion by finding that the Virginia-Maryland award bestowed \textit{exclusive} riparian authority on Virginia, while the New Jersey-Delaware compact granted New Jersey \textit{nonexclusive} riparian authority.\textsuperscript{193}

This was due in part to the fact that the term "riparian jurisdiction" in the New Jersey-Delaware compact was not a legal term of art and was therefore ambiguous.\textsuperscript{194} As an ambiguous term, the Master found it compelling that other articles of the New Jersey-Delaware compact included the modifier "exclusive," while Article VII's grant of "riparian jurisdiction" had no such modifier.\textsuperscript{195} The Master therefore determined that Article VII did not grant New Jersey exclusive riparian authority.\textsuperscript{196} The Master's finding is justified, considering that "exclusive" appeared not only in other articles of the New Jersey-Delaware compact, but also in the earlier New Jersey-New York compact.\textsuperscript{197} The Court noted that portions of the latter were copied verbatim in the former.\textsuperscript{198} It thus appears that if the drafters of the New Jersey-Delaware compact intended to bestow "exclusive riparian jurisdiction," they had the tools at their disposal to do so. Instead, the phrase "riparian jurisdiction" was specially drafted for Article VII. Why would the drafters have bothered to create such ambiguous language, when other clearer language used in the New Jersey-New York compact was readily available? The Master's hypothesis certainly seems plausible: the drafters intended to grant New Jersey a smaller group of rights than was granted in the New Jersey-New York compact, and thus could not borrow the exact language from the earlier compact (which specifically granted \textit{exclusive} riparian rights).

In contrast, the Virginia-Maryland award had no such specially drafted ambiguous language; "full enjoyment of her riparian ownership" was therefore deemed to be a plain grant of exclusive riparian authority to Virginia.\textsuperscript{199} The Master bolstered his recommendation that New Jersey had nonexclusive riparian authority by examining the parties' post-compact course of conduct to shed light on the meaning of "riparian jurisdiction," citing Supreme Court precedent that am-

\begin{itemize}
\item \textsuperscript{192} \textit{Id.} at 64–65.
\item \textsuperscript{193} \textit{Id.} at 64–65.
\item \textsuperscript{194} \textit{Id.} at 54.
\item \textsuperscript{195} \textit{Id.} at 57–58.
\item \textsuperscript{196} \textit{Id.} at 66–67.
\item \textsuperscript{197} \textit{Id.} at 66–68.
\item \textsuperscript{198} \textit{New Jersey v. Delaware} III, 128 S. Ct. 1410, 1413 (2008).
\item \textsuperscript{199} \textit{Report of the Special Master, supra} note 9, at 64–65.
\end{itemize}
biguous language may be interpreted by such evidence. This helps to further reconcile the disparate recommendations of the Special Master in *Virginia v. Maryland* and *New Jersey v. Delaware III;* Maryland expressly conceded in arbitration that the interstate boundary should be drawn around all Virginia riparian improvements, past and future. Delaware was found to have made no such cession, and the Master was thus able to interpret the respective grants of riparian authority, in view of the parties' post-compact course of conduct, differently.

The counterargument to the Master's interpretation theory was espoused by Justice Scalia, who stated that every agreement has "unique language"; therefore, if legal principles were only applicable to identical language in other agreements, interpretive jurisprudence would be severely limited. This is a valid point in general, but it is not applicable to the New Jersey-Delaware controversy. Scalia's view is only correct if the language of the Virginia-Maryland arbitration award and the language of the New Jersey-Delaware compact are both unambiguous, and therefore comparable. Scalia states that this is so. However, his view is fallacious; it ignores the fact that the phrase "riparian jurisdiction" in the New Jersey-Delaware compact was invented especially for Article VII, and had no basis in prior law. The phrase is therefore inherently ambiguous. To attempt to strengthen his claim, (and to avoid New Jersey's damaging post-compact cessions and acquiescences) Scalia states that the parties' post-compact course of conduct is not relevant to the Court's interpretation of the unambiguous terms of the New Jersey-Delaware compact. However, this argument again supposes that the phrase "riparian jurisdiction" is unambiguous, which is simply false. Article VII of the 1905 compact clearly contains inherently ambiguous language. The Master therefore correctly applied Supreme Court precedent which holds that evidence of the parties' post-compact course of conduct is applicable in interpreting such language. As the Master noted, Maryland expressly conceded that the interstate boundary should be drawn around Virginia riparian improvements; Delaware made no similar cession. New Jersey also acquiesced in Delaware's regulating authority, while Virginia fervently denied for over twenty years that Maryland had any regulating authority over Virginia's riparian

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200. *Id.* at 66–67.
201. *Id.* at 64–65.
202. *Id.* at 64–65.
204. *Id.* at 1434 (Scalia, J., dissenting).
The parties' course of conduct thus favored a ruling in Delaware's favor, and the Master's disparate treatment of the two cases is warranted.

The Master's recommendations concerning other aspects of the parties' post-compact and post-arbitration courses of action are similarly reconcilable. Virginia applied for Maryland permits for the construction of riparian improvements from 1957 to 1996. The Master decided that these permit applications were not evidence of Virginia's acquiescence to Maryland's sovereign authority to regulate riparian improvements. However, in New Jersey v. Delaware III, the Master stated that New Jersey's permit applications to Delaware, which spanned from 1971 to 2004, did militate toward a finding in favor of Delaware's understanding of the 1905 compact. At first glance, these findings do not appear to be congruent; Virginia applied to Maryland for riparian permits for thirty-nine years, and was held not to have acquiesced, while New Jersey applied for similar permits for only thirty-three years, and was determined to have acquiesced. When understood in context, however, the Master's determinations appear more consistent. The Supreme Court noted that Virginia previously protested Maryland's permitting system "vigorously" in 1976; New Jersey did not protest until the recent controversy, even though the DNREC had previously blocked a LNG wharf on the New Jersey shore in the 1970s. Furthermore, as the Master noted, New Jersey explicitly conceded exclusive riparian authority in a 1980 statement to the U.S. Department of Commerce. The Master's distinctions between the two cases, when taken in context, thus appear to be justified: Virginia protested Maryland's permitting of riparian improvements before such a permit was withheld; New Jersey, on the other hand, did not protest even when previous projects were blocked by Delaware, and then conceded that New Jersey and Delaware had concurrent jurisdiction over riparian improvements extending beyond the low-water mark. The Master's disparate treatment of the two cases again appears to be justified, and the two cases are still reconcilable.

Other recommendations of the Special Master in New Jersey III appear to be grounded in prior law and are generally well-reasoned.

209. Virginia, 540 U.S. at 63.
210. Id. at 76–77.
212. Virginia, 540 U.S. at 77.
213. See Report of the Special Master, supra note 9, at 77–84.
214. See id. at 72.
215. See New Jersey's Response to Admissions No. 62 (DA 4177).
The Master's determination that the 1905 compact did not give New Jersey the right to grant Delaware's sovereign territory is backed by compelling precedent; as the Master noted, the Supreme Court has held that there is a presumption against defeat of a State's title.\textsuperscript{217} The fact that Article VIII of the 1905 compact reinforced this common law presumption\textsuperscript{218}—coupled with the fact that Article VII did not expressly set forth New Jersey's ability to grant away Delaware territory\textsuperscript{219}—naturally leads to the assumption that only Delaware can grant subaqueous lands over which it is sovereign. This appears to be a sound inference. Why would Delaware have ceded the right to grant the very subaqueous lands over which it adamantly asserted ownership? If it would have done so, it certainly seems reasonable that it would have ceded this right explicitly. Furthermore, the Master's determination that the 1905 compact gave New Jersey only the right to grant riparian rights subject to Delaware's sovereign police power authority is compelling: the compact's grant of "riparian jurisdiction" cannot be equivalent to "exclusive jurisdiction," especially when considering the parties' post-compact course of action and the comparative language of the prior New Jersey-New York compact which explicitly granted such exclusive jurisdiction.\textsuperscript{220} As previously discussed, the Master's findings are still reconcilable with \textit{Virginia v. Maryland} on this issue.\textsuperscript{221}

Justice Scalia disagreed with the recommendations of the Special Master, stating that when interpreting boundary-related interstate compacts, there should be no presumption against the defeat of a state's title.\textsuperscript{222} Scalia posited that the presumption against defeat of state title runs against the very purpose of boundary-related interstate compacts: to resolve boundary disputes by a joint compromised surrender of state title to the disputed lands.\textsuperscript{223} Scalia speculated that it was possible that Delaware surrendered its claimed right to grant subaqueous land on the New Jersey shore within the twelve-mile circle in order to ensure its citizens could fish past the thalweg of the Delaware River, in waters claimed at the time by both states.\textsuperscript{224} Scalia found that the language of Article VII, which granted "riparian jurisdiction," was sufficient to bestow upon New Jersey authority over riparian improvements free from Delaware interference.\textsuperscript{225}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 42–43 (quoting United States v. Alaska, 521 U.S. 1, 34 (1997)).
\item Id. at 42–43.
\item Id. at 43.
\item See supra notes 135, 156, 207–214, and accompanying text.
\item Id.
\item Id. at 1431 (Scalia, J., dissenting).
\item Id. (Scalia, J., dissenting).
\item See id. at 1431–33 (Scalia, J., dissenting).
\end{enumerate}
\end{footnotesize}
crafts a facially plausible argument for his native state. However, he does not sufficiently explain why, if New Jersey was granted this sort of authority, the drafters took the time to formulate the new language "riparian jurisdiction," rather than simply inserting the word "exclusive" (which would have ensured the result Scalia proposes, but with more certainty and less trouble). The Special Master's understanding is more plausible: "riparian jurisdiction" was specially formulated to bestow a lesser amount of authority than "exclusive authority." There is no other credible explanation for why the drafters would have expended the resources to create the unique language of Article VII. Scalia's argument is thus not compelling.

B. Though Reconcilable with Virginia v. Maryland, the Special Master's Recommendations Did Not Adequately Resolve the Controversy

For the foregoing reasons, the Master's recommendations in New Jersey III were grounded in prior law, generally well-reasoned, and reconcilable with his recommendations in Virginia v. Maryland. However, they did not adequately resolve the controversy. The Master's recommendations asserted that New Jersey did not have exclusive authority to regulate riparian improvements appurtenant to its shores extending past low-water within the twelve-mile circle; its riparian authority was subject to Delaware's exercise of police power. This finding, though logical in its application of compact interpretation, and well-reasoned according to prior precedent, did nothing to address the underlying problem: What were the limits of Delaware's sovereign authority? For if Delaware was allowed to exercise its police power to exclude any New Jersey riparian project extending beyond low-water, Article VII of the 1905 compact preserved no undeniable rights for New Jersey. Certainly, Article VII was part of the compact for a reason; it cannot be mere superfluous language. The drafters must have intended to extend to New Jersey some kind of riparian rights over which Delaware had no superior authority. Because the 1905 compact was drafted before the final resolution of the states' boundary on the Delaware River, it makes sense that the

226. See Linda Greenhouse, Court Blocks Plan for New Gas Plant in New Jersey, N.Y. Times, April 1, 2008, at B4, available at http://www.nytimes.com/2008/04/01/washington/01delaware.html?_r=3&scp=2&sq=supremecourt&st=nyt&oref=slogin&oref=slogin&oref=slogin (online version titled Supreme Court Rules for Delaware in River Dispute) (noting that the two dissenters in New Jersey III were the Court's only native New Jersey Justices: Antonin Scalia and Samuel A. Alito, Jr.).

227. See supra notes 125–26 and accompanying text.

228. See supra section III.A.

229. Report of the Special Master, supra note 9, at 86.

parties intended to ensure future riparian rights. Analogous to what Justice Kennedy termed a “hedging agreement” in *Virginia v. Maryland*, the 1905 compact would thus have been formulated to protect the riparian rights of both parties, lest one party gain control over the entire river in subsequent litigation, and exclude the other party from the river.

The Master did not resolve the problems raised by his analysis and final determinations of the compact and later boundary resolution. Indeed, New Jersey and Delaware entered their third original Supreme Court action due to problems which arose from concurrent jurisdiction over the subaqueous soil within the twelve-mile circle, and the Report of the Special Master left them in a similar position: New Jersey still had riparian authority over riparian improvements, subject to Delaware’s police power. The Supreme Court could therefore not adopt the Report of the Special Master exactly as it was presented, for even if the Master’s recommendations were persuasive, they gave no practical solution or test to determine the limits of Delaware’s police power over New Jersey riparian improvements. If the Court found the recommendations of the Special Master convincing, a limit on Delaware’s power to exclude New Jersey riparian projects beyond the low-water mark would need to be developed.

C. The Court’s New Test

The Court upheld the recommendations of the Special Master, but added an “extraordinary character” test to limit Delaware’s police power. Delaware was held to have authority to exercise its police power only over New Jersey riparian improvements extending beyond low-water that exhibited extraordinary character. Delaware could therefore only exercise its police powers to exclude New Jersey riparian improvements which extended into its territory if those improvements “exceed[ed] ordinary and usual riparian uses.” The Court determined that the Crown Landing Project was a project of extraordinary character because it went “well beyond the ordinary or usual[,]” and thus, Delaware was justified in excluding the project from within the twelve-mile circle. The application of the ex-

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232. See Report of the Special Master, *supra* note 9, at 84–86. “This case does not require a determination of the precise extent of Delaware’s regulatory jurisdiction, but only whether Delaware may exercise any jurisdiction over wharves and other improvements extending outshore of the boundary.” *Id.* at 85.
234. *Id.* at 1416.
235. *Id.*
236. *Id.* at 1428 (decree of the Court).
237. *Id.* at 1427 (majority opinion).
238. *Id.* at 1428 (decree of the Court).
The extraordinary character test is a new approach for determining the limits of a state's police power over its sovereign territory that has been subjected to another state's exercise of compact-granted riparian rights. The test is unprecedented; a search of previous Supreme Court decisions which involved riparian rights and boundary disputes failed to reveal any prior application or discussion of such test. A similar search in the treatises also failed to reveal a prior application of the test. Justice Scalia thus appears to have been correct when he stated: "So unheard-of is the [extraordinary character test] that its first appearance in this case is in the Court's opinion." Scalia found that the test had "no basis in prior law," and that the test was "difficult to accept, because the Court explains neither the meaning nor the provenance of its ... test." Scalia's statement is supported by the fact that the Court failed to discuss the test in Maryland v. Virginia in 2003. The same general compact rights that were at issue in New Jersey III were also at issue in Virginia v. Maryland, so the Court surely would have cited such a test had it existed, for it may have been dispositive in the 2003 case, as discussed below. The Court failed to apply the test in Virginia v. Maryland simply because the test did not exist until the Court's opinion in New Jersey III was announced.

1. **The Extraordinary Character Test Limits Virginia v. Maryland**

In Virginia v. Maryland, the Court held that Maryland, as owner of the riverbed abutting Virginia, could not exercise its police power to exclude Virginian riparian improvements from its lands. The Court's decision appeared to rebuff the notion that a state could assert its police power to exclude the riparian improvements of another state that had compact-preserved riparian rights. The Virginia v. Mary-


240. See 1 HENRY PHILIP FARNHAM, THE LAW OF WATERS AND WATER RIGHTS §§ 60–64 (1904); JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS, INCLUDING RIPARIAN RIGHTS, AND PUBLIC AND PRIVATE RIGHTS IN WATERS TIDAL AND INLAND § 181 (2d ed. 1891); A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3 (Marie-Joy Paredes & Lisa A. Fiening eds., release No. 20, 2008).


242. Id. (Scalia, J., dissenting).


244. See infra subsection III.C.1.

245. Virginia, 540 U.S. at 79 (decree of the Court).
land decision thus would have led to the assumption that New Jersey—as a state that had been granted compact-preserved riparian rights—would be able to wharf out into Delaware territory, free from Delaware’s authority to exclude such riparian improvements. However, the Court came to a different conclusion: Delaware had the sovereign authority to exclude New Jersey riparian improvements which exhibited extraordinary character.\textsuperscript{246} The \textit{New Jersey III} holding thus effectively limited the \textit{Virginia v. Maryland} decision to its facts; that Virginia v. Maryland decision turned on the “unique language” of the compact and arbitration award therein.\textsuperscript{247} The language of the New Jersey-Delaware compact was thus found to be distinct from the Virginia-Maryland compact and arbitration award, so the Court determined that different results in the respective cases were warranted.\textsuperscript{248} The apparent holding in \textit{Virginia v. Maryland}—that a state could not exercise its sovereign authority to infringe upon another state’s compact-preserved riparian rights—was thus reduced to a mere language-specific holding of little consequence.

Though the \textit{New Jersey III} decision limited \textit{Virginia v. Maryland} to its facts, the Court’s disparate holdings may still be reconciled. As previously discussed, the contrasting treatment of the language of the New Jersey-Delaware compact from the language of the Virginia-Maryland compact and arbitration award is defensible because the phrase “riparian jurisdiction” was different from the clearer language at issue in \textit{Virginia v. Maryland}. Furthermore, the new “extraordinary character” test itself may be reconcilable with the \textit{Virginia v. Maryland} outcome. That is, an application of the new test to the facts of \textit{Virginia v. Maryland} may have resulted in a Virginia victory. If the Virginian water intake pipe could be characterized as an “ordinary or usual” riparian improvement, then said pipe would not possess “extraordinary character,” and Maryland, as sovereign of the riverbed, would therefore not be able to exclude it under an exercise of its police power. The question remains: What is an ordinary or usual riparian improvement?

2. \textit{Problems With the “Extraordinary Character” Test}

As previously noted, the Court did not specify what constituted an “ordinary or usual” riparian use.\textsuperscript{249} The omission of explicit boundaries for the definition of “ordinary or usual” riparian use gives the Court great latitude in determining whether a riparian improvement exhibits extraordinary character and thus may be excluded by a sovereign’s exercise of police power. Justice Scalia found that this discre-

\textsuperscript{246} New Jersey III, 128 S.Ct. at 1416.
\textsuperscript{247} Id. at 1424.
\textsuperscript{248} Id. at 1424–25.
\textsuperscript{249} See supra note 161 and accompanying text.
tion was unwarranted, and had no basis in prior law.\textsuperscript{250} Scalia noted that at common law, only riparian uses which interfered with the public’s right of navigation on a navigable body of water were beyond ordinary and usual use.\textsuperscript{251} Because the Crown Landing Project would not have interfered with navigation on the Delaware River, Scalia would hold that the project was an ordinary and usual use of the river as understood at common law.\textsuperscript{252} Scalia’s concerns are valid; not only is the new test unprecedented, but it also gives the Court broad discretion to determine extraordinary or unusual uses on an \textit{ad hoc} basis. Scalia apparently noticed the \textit{ad hoc} nature of the new test when he chided the Court for its “environmentally sensitive” decision, stating that if the wharf were used to transfer “tofu and bean sprouts” rather than LNG, the Court would have found for New Jersey.\textsuperscript{253} Scalia also noted, “[The Supreme Court] can anticipate a whole category of original actions in this Court that will clarify, wharf by wharf, what is a wharf of ‘extraordinary character.’”\textsuperscript{254} It certainly appears as though the new test may spawn needless litigation. Without an explicit definition of what constitutes an ordinary or usual riparian improvement, how will New Jersey and Delaware resolve future disputes over proposed wharfs without litigation? And the waste of judicial resources will be at the level at which those resources are most scarce: the U.S. Supreme Court.\textsuperscript{255}

Another problem with the new test is that it apparently prevents Delaware from exercising its police authority to regulate ordinary or usual New Jersey riparian improvements. Delaware has been regulating New Jersey improvements which extend into the Delaware River since the early 1970s.\textsuperscript{256} The Special Master specifically cited this course of conduct in interpreting the language of the New Jersey-Delaware compact, and found that it led to the assumption that New Jersey acquiesced in Delaware’s regulating authority.\textsuperscript{257} The Master also found it probative that New Jersey made a statement against its own interest in declaring to the U.S. Department of Commerce that riparian projects which extend beyond the mean low-water mark need permits from both states.\textsuperscript{258} The Court cited these findings as conclu-

\textsuperscript{250} New Jersey III, 128 S. Ct. at 1430 (Scalia, J., dissenting).
\textsuperscript{251} Id. at 1432.
\textsuperscript{252} Id. at 1440.
\textsuperscript{253} Id. at 1439.
\textsuperscript{254} Id. at 1440.
\textsuperscript{255} Though states may resolve interpretation disputes between themselves without litigation, when negotiations fail, litigation over interstate boundaries and compacts is only proper as an original action in the U.S. Supreme Court. See, e.g., Vermont v. New York, 417 U.S. 270, 275–76 (1974).
\textsuperscript{257} The Report of the Special Master, supra note 9 at 71–72.
\textsuperscript{258} Id. at 72–73.
sive of the fact that the parties' prior course of conduct militated toward a ruling in Delaware's favor. However, the Court then announced the extraordinary character test, which would apparently prevent Delaware from regulating New Jersey riparian improvements which exhibit ordinary or usual character. The Court thus cited New Jersey's acquiescence in Delaware's regulating authority as reason to interpret the compact as bestowing upon Delaware the right to regulate riparian improvements, but then announced a test which prevents Delaware from further exercise of such permitting authority.

D. A "Reasonable" Alternative

The most logical way for the Court to limit Delaware's police power over New Jersey riparian improvements was to simply apply a "reasonableness" requirement to Delaware's exercise of regulatory authority, as Justice Stevens suggested in his concurring opinion. This would have allowed the Court to uphold the recommendations of the Special Master, while still preserving Article VII's grant of "riparian jurisdiction" to New Jersey. Under the reasonableness requirement, Delaware could not arbitrarily exercise its police powers to prevent New Jersey riparian improvements which extended beyond the low-water mark, nor could it regulate New Jersey riparian improvements differently than Delaware riparian improvements without good reason; Delaware's regulation of improvements along both shores would need to be congruent.

The reasonableness requirement is additionally appealing because it is backed by a great deal of precedent. Although apparently never applied to interstate compact disputes over riparian rights such as the ones at issue in New Jersey III, there exist many established tests for what constitutes reasonable police power. This is in contrast to the Court's novel "extraordinary character" test, which has no apparent prior basis in law. Furthermore, the reasonableness requirement would have orchestrated the same result that the Court's "extraordinary character" test ultimately achieved. That is, Delaware could properly prohibit the Crown Landing Project from extending into its sovereign territory under the reasonableness requirement, because the prohibition of "bulk transfer" and "heavy industry" facilities on Delaware subaqueous lands would apply equally to both the New Jersey and Delaware shores of the river. Delaware could reasonably exclude such improvements on its own shores, so it could therefore also exclude such projects on the New Jersey shore, as sovereign over the subaqueous land.

259. Id. at 90.
262. See New Jersey III, 128 S.Ct. at 1430 (Scalia, J., dissenting).
The reasonableness requirement would also have allowed Delaware to continue to regulate all riparian improvements appurtenant to the New Jersey shore extending past low-water, rather than just those which exhibit extraordinary character. The "reasonableness" test would therefore have been more consistent with the Court's determination that New Jersey acquiesced in Delaware's regulating authority. That is, if the Court applied the "reasonableness test" rather than the "extraordinary character" test, there would not be the marked incongruity in the Court's decision (which cited New Jersey's acquiesce as proof of Delaware's authority to regulate, but then ultimately enjoined Delaware from regulating improvements to the full extent of that authority).

However, the Court could not seriously consider the simple implementation of a "reasonableness" test without overruling Virginia v. Maryland. In Virginia v. Maryland, the Court decided that the compact and arbitration award therein gave Virginia the right to the use of the Potomac, free from any Maryland exercises of police power as the sovereign over the subaqueous soil.263 Maryland was thus held to have no regulating authority over its own lands.264 The Court rejected the theory that the arbitration language which granted Virginia the "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" left Maryland any residual police power to exert over Virginia's riparian rights, reasonable or otherwise.265 Justice Kennedy's dissent adamantly disagreed with this holding; he would have held that Maryland retained its authority to exercise reasonable police power over Virginian riparian improvements.266 The Court thus implicitly rejected implementing a "reasonableness" test when it announced its holding in Virginia v. Maryland, and the New Jersey III Court could not resurrect Justice Kennedy's dissent without overruling the earlier decision. While the "reasonableness" test was the superior test to implement in New Jersey III, the "extraordinary character" test allowed the Court to restrict Virginia v. Maryland to its facts without overruling it. It appears that the Court preferred to implement an entirely unprecedented test that allowed a final determination in New Jersey III which was reconcilable with Virginia v. Maryland, rather than implement a test that the Court previously rejected.

264. Id.
265. Id. at 79–80.
266. Id. at 92 (Kennedy, J., dissenting).
IV. CONCLUSION

Though well-reasoned and grounded in prior law, the findings of the Special Master in New Jersey III did not adequately resolve the controversy between the states because no test was proposed with which to determine the limits of Delaware’s police power to exclude New Jersey’s riparian improvements. Instead, the Supreme Court presented what it referred to as an “extraordinary character” test, which was reconcilable with the Court’s holding in Virginia v. Maryland and which also provided limits to Delaware’s exercise of police power. However, this “extraordinary character” test was not rooted in any identifiable precedent. A superior test for the Court to have adopted would have been one of reasonableness; although such a test could not be reconciled with Virginia v. Maryland, it would have a solid basis in precedent and would guide the Court in making future consistent interpretations of interstate compact language.