

thorization, but also unbowed in its efforts to limit the situations that require preclearance.

IV. ORIGINAL JURISDICTION

Controversy Between States — Border Dispute — For several hundred years, New Jersey and Delaware have quarreled over ownership and control of the Delaware River. In 1905, the states finally formed a compact¹ resolving several contested issues regarding the river, and in 1934 the Supreme Court put the ownership dispute to rest by defining the exact interstate boundary line.² Nevertheless, the states clashed again recently, this time concerning Delaware's authority to regulate wharves extending from New Jersey's shore. As a result, the Supreme Court reentered the centuries-old dispute last Term in *New Jersey v. Delaware*³ (*New Jersey III*), ruling that Delaware could prevent a large wharf from being built into the river from New Jersey. The Court upheld Delaware's authority to regulate riparian⁴ structures extending out from the New Jersey shore but limited this authority to situations of extraordinary character. The Court's moderate extraordinary character test is a doctrinal novelty, but in practice it may lead to more socially desirable uses of the river than either of the options offered by the dissenters.

The history of the Delaware River conflict is as colorful as it is long. The origins of the dispute go back at least as far as 1682, when the Duke of York, the heir to the throne, delivered a deed to William Penn for a parcel of land along the Delaware River.⁵ King Charles II owed Penn's late father a large debt, and repaying it to Penn with land in North America was a cheap option.⁶ For his part, Penn had wanted to establish a colony to the west of the Delaware River, and so the land

¹ 23 Del. Laws 12 (1905); 1905 N.J. Laws 67. The 1905 Compact was ratified by Congress and codified as Act of Jan. 24, 1907, ch. 394, 34 Stat. 858.

² *New Jersey v. Delaware (New Jersey II)*, 291 U.S. 361, 385 (1934).

³ 128 S. Ct. 1410 (2008).

⁴ A riparian landowner is one whose property abuts the water's edge. Beyond having the normal rights incident to land ownership, riparians can also take advantage of the water source in a variety of ways. Most frequently, riparians use the water for crop production, household usage, and various industries. A minority of riparians also exercise their right to wharf out to navigable water for commercial purposes. See JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS, INCLUDING RIPARIAN RIGHTS, AND PUBLIC AND PRIVATE RIGHTS IN WATERS TIDAL AND INLAND § 148, at 297 (3d ed. 1900), cited in Expert Report of Professor Joseph L. Sax at 3, *New Jersey III*, 128 S. Ct. 1410 (2008) (No. 134, Orig.) [hereinafter Sax Report] (defining riparian rights as they existed around the time of the 1905 Compact).

⁵ *New Jersey II*, 291 U.S. at 364.

⁶ See JOHN A. MUNROE, HISTORY OF DELAWARE 35 (5th ed. 2006); Expert Report of Carol E. Hoffecker, Ph.D. at 6–7, *New Jersey III*, 128 S. Ct. 1410 (2008) (No. 134, Orig.) [hereinafter Hoffecker Report].

was a valuable addition to his increasing holdings.⁷ The Duke's deed conveyed to Penn a twelve-mile circle of land centered on the town of Newcastle.⁸ The deed explicitly gave to Penn not only the land within the circle, but also the river, its islands, and the soil beneath the water. When the United States was founded, the land in question was part of Delaware.⁹

In 1877, New Jersey brought suit against Delaware in the Supreme Court to challenge the states' boundary line and to gain the right to regulate fishing on the river.¹⁰ The suit persisted unresolved until 1905 when the states finally entered a compact to settle some of the issues surrounding the governance of the river.¹¹ The 1905 Compact maintained the existing oyster industry and clarified fishing rights and service of civil and criminal process on vessels,¹² but explicitly left the boundary line dispute unsettled.¹³ As for riparian control along the river, Article VII of the Compact allowed each state "to exercise riparian jurisdiction of every kind and nature" on its own side of the river, "and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States."¹⁴

The Compact failed to prevent further dispute, though, and in 1934 the Supreme Court entertained arguments by the two states to settle the boundary conflict for good.¹⁵ New Jersey argued that at the time of the conveyance to Penn, the Duke was not the owner of the land, thereby throwing Penn's title into question.¹⁶ Writing for the Court, Justice Cardozo recounted the history of the territory from the Duke's deed through Delaware's statehood, finding the chain of title to be unbroken.¹⁷ In turn, he ruled that within the twelve-mile circle around Newcastle, the entire river was Delaware property, including the sub-

⁷ See *MUNROE*, *supra* note 6, at 35; Hoffecker Report, *supra* note 6, at 6-7.

⁸ *New Jersey II*, 291 U.S. at 364.

⁹ *Id.* at 370.

¹⁰ Hoffecker Report, *supra* note 6, at 3. In general, a river providing the natural border between states is divided along the middle of its main navigable channel. This is true of the Delaware River outside of the twelve-mile circle. *New Jersey II*, 291 U.S. at 379, 385.

¹¹ The Compact was approved and codified by both states on March 20, 1905. 23 Del. Laws 12 (1905); 1905 N.J. Laws 67.

¹² 23 Del. Laws at 13-16; 1905 N.J. Laws at 69-71.

¹³ Article VIII of the Compact states that "[n]othing herein . . . 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." 23 Del. Laws at 16; 1905 N.J. Laws at 71.

¹⁴ 23 Del. Laws at 16; 1905 N.J. Laws at 71.

¹⁵ See *New Jersey II*, 291 U.S. at 361. The dispute arose over regulation of oyster beds. See Hoffecker Report, *supra* note 6, at 48.

¹⁶ *New Jersey II*, 291 U.S. at 365.

¹⁷ *Id.* at 374-75.

merged soil.¹⁸ Delaware's vindicated claim to the river would still be subject, however, to any agreements made in the 1905 Compact.¹⁹

The river conflict surfaced again in 2004 when British Petroleum proposed to build an industrial wharf off the shore of New Jersey into Delaware territory for unloading liquefied natural gas (LNG).²⁰ As had become the practice between the states during the previous several decades, the New Jersey riparian — British Petroleum — submitted a proposal to Delaware's Department of Natural Resources and Environmental Control to construct the wharf.²¹ Delaware rejected the proposal, reporting that it violated Delaware's Coastal Zone Act,²² which prohibited "offshore . . . bulk product transfer facilities" and "[h]eavy industry uses."²³ Tensions mounted quickly after the refusal. New Jersey threatened to retaliate by pulling state pension funds out of Delaware's banks.²⁴ Delaware in turn considered sending National Guard troops to protect its border and prevent the wharf from being built.²⁵ In response, a New Jersey legislator wondered facetiously whether the decommissioned battleship U.S.S. *New Jersey* might still be able to defend against an armed invasion.²⁶

Instead of pursuing these rather interesting options, New Jersey ultimately initiated an action under the Supreme Court's original jurisdiction. New Jersey claimed that the riparian jurisdiction granted to it in the 1905 Compact excluded Delaware from wielding any regulatory authority over New Jersey riparians.²⁷ The Court appointed a special master to investigate the claim and to provide a preliminary report and recommendation. The special master concluded that New Jersey's regulatory authority under the 1905 Compact was not exclusive beyond the low-water mark on its side of the river.²⁸ As a result, he found that Delaware "has overlapping jurisdiction to regulate, under its full police powers, improvements outshore of the low water mark on the New Jersey side of the River."²⁹

¹⁸ *Id.* at 385; *see also* *New Jersey v. Delaware*, 295 U.S. 694 (1935) (containing the official decree, exact boundary description, and surveyor's map).

¹⁹ *New Jersey II*, 291 U.S. at 385.

²⁰ *New Jersey III*, 128 S. Ct. at 1417–18.

²¹ *Id.* at 1418; *see id.* at 1426.

²² DEL. CODE ANN., tit. 7, §§ 7001–7013 (2001).

²³ *Id.* § 7003; *see also* *New Jersey III*, 128 S. Ct. at 1418.

²⁴ *New Jersey III*, 128 S. Ct. at 1418.

²⁵ *Id.*

²⁶ *Id.* at 1419; *see also* David Stout, *Supreme Court Rules for Delaware in River Dispute*, N.Y. TIMES, Mar. 31, 2008, <http://www.nytimes.com/2008/03/31/washington/31cnd-delaware.html>.

²⁷ *New Jersey III*, 128 S. Ct. at 1420.

²⁸ *See* Report of the Special Master at 32, *New Jersey III*, 128 S. Ct. 1410 (2008) (No. 134, Orig.).

²⁹ *Id.*

After receiving the special master's report, Justice Ginsburg delivered the opinion of the Court.³⁰ Ultimately, Justice Ginsburg affirmed Delaware's overlapping authority to regulate the construction and usage of structures extending from New Jersey into Delaware territory past the low water mark.³¹ She limited the exercise of this authority, though, to circumstances of "extraordinary character,"³² holding that "Delaware may not impede ordinary and usual exercises of the right of riparian owners to wharf out from New Jersey's shore."³³ She found the LNG terminal to be clearly outside the ordinary, upholding Delaware's decision to reject British Petroleum's proposal.³⁴

Essentially affirming the recommendation of the special master, Justice Ginsburg described four reasons for the Court's decision: the language of the 1905 Compact itself, an earlier compact with similar language, a prior river boundary case, and the two states' recent pattern of behavior regarding New Jersey wharves. First, she noted, the term "riparian jurisdiction" used in the 1905 Compact was a more limited term than "exclusive jurisdiction" would have been and did not encompass police-power jurisdiction.³⁵ The states had negotiated in the context of an explicitly unsettled boundary dispute and would likely have known that wharfing rights were subject to the regulatory authority of the state where the river lies.³⁶ Second, Justice Ginsburg described an 1834 compact between New Jersey and New York that expressly granted to New Jersey an "exclusive right of property"³⁷ in the submerged land on New Jersey's side of the river and "exclusive jurisdiction" over its wharves even though New York owned the entire river.³⁸ The absence of such clear and explicit language in the 1905 Compact was particularly telling because in other parts of that document the 1834 Compact had been copied almost verbatim.³⁹ Third, Justice Ginsburg distinguished the Court's seemingly similar river boundary settlement decision in *Virginia v. Maryland*,⁴⁰ saying it did

³⁰ Justice Ginsburg was joined by Chief Justice Roberts and Justices Kennedy, Souter, and Thomas. Justice Stevens joined as to paragraphs 1(c), 2, 3, and 4 of the Court's decree. Justice Breyer took no part in the consideration or decision of the case — he reportedly owns stock in British Petroleum. Linda Greenhouse, *Court Blocks Plan for New Gas Plant in New Jersey*, N.Y. TIMES, Apr. 1, 2008, at B4.

³¹ *New Jersey III*, 128 S. Ct. at 1416.

³² *Id.*

³³ *Id.* at 1427.

³⁴ *Id.* at 1426.

³⁵ *Id.* at 1420–21.

³⁶ *Id.* at 1422.

³⁷ *Id.* at 1423 (emphasis omitted) (quoting Act of June 28, 1834, ch. 126, Art. Third, §§ 1–2, 4 Stat. 708).

³⁸ *Id.*

³⁹ *Id.* at 1423–24.

⁴⁰ 540 U.S. 56 (2003).

not support New Jersey's claim to exclusive jurisdiction. Fourth, she demonstrated that prior to this dispute New Jersey had consistently recognized Delaware's authority to regulate riparian structures on both sides of the river.⁴¹ In their previous course of conduct, New Jersey had routinely sought Delaware's permission before building or restoring any structures extending into the river from its shore.⁴² Nevertheless, Justice Ginsburg ended the opinion by limiting Delaware's regulatory authority over New Jersey riparians to situations where the structure is unusual or extraordinary in character.⁴³

Justice Stevens concurred in part and dissented in part. He argued that although the majority correctly affirmed Delaware's authority to prevent the construction of the LNG wharf, it mistakenly limited this overlapping sovereignty to "riparian structures and operations of extraordinary character."⁴⁴ Justice Stevens would rather have affirmed Delaware's police power over *all* riparian structures and operations extending into Delaware territory from the New Jersey shore.⁴⁵

Justice Scalia dissented.⁴⁶ According to his reading of the 1905 Compact, New Jersey's riparian jurisdiction was and is exclusive of Delaware's control. Otherwise, "Article VII was a ridiculous nullity."⁴⁷ He argued that because the Compact was signed against the backdrop of a boundary dispute pending in the Supreme Court at the time, the 1905 agreement shows that the states intended to find a compromise in the scope of their sovereign powers. By relinquishing any claim to riparian jurisdiction or regulation on the New Jersey side of the river, Delaware in exchange received access to fisheries within the entire twelve-mile circle and the termination of an action pending some twenty-seven years on the Supreme Court's docket.⁴⁸ Justice Scalia then noted that among the exclusive riparian rights enjoyed by New Jersey was the longstanding right to wharf out to the navigable portion of the river to load and unload cargo.⁴⁹ If New Jersey could exercise all of its riparian rights exclusive of Delaware's authority, and if wharfing out was an established riparian right, then Delaware had no authority to prevent the LNG wharf.

⁴¹ *New Jersey III*, 128 S. Ct. at 1425–26.

⁴² *Id.*

⁴³ *See id.* at 1427.

⁴⁴ *Id.* at 1429 (Stevens, J., concurring in part and dissenting in part) (quoting *id.* at 1416 (majority opinion)) (internal quotation marks omitted).

⁴⁵ *Id.*

⁴⁶ Justice Alito joined the dissent. Interestingly, the two dissenters are also the only Justices on the Court born in New Jersey. *See* The Supreme Court Historical Society, History of the Court, http://www.supremecourthistory.org/o2_history/subs_current/o2_b.html (last visited Oct. 5, 2008).

⁴⁷ *Id.* at 1430 (Scalia, J., dissenting).

⁴⁸ *Id.* at 1431.

⁴⁹ *Id.* at 1432–33.

Justice Scalia further criticized the Court for explaining “neither the meaning nor the provenance” of its new extraordinary character test.⁵⁰ He wondered whether “a pink wharf . . . or a zig-zagged wharf” would qualify.⁵¹ Justice Scalia was perhaps even more disturbed that the majority would have allowed a wharf of similar dimensions to be built for unloading bean sprouts and tofu.⁵² Justice Scalia concluded that this was not the decision of a Court focused solely on defining the riparian right at issue, but of an “environmentally sensitive Court” worried about an unspoken danger.⁵³

The Court was on solid doctrinal ground in granting Delaware overlapping regulatory authority over New Jersey’s side of the river. The test that now limits Delaware’s regulatory authority to structures and uses of extraordinary character, however, was a novel creation of the Court. Neither the law of riparian rights nor the 1905 Compact provides a basis for it. As a result, the precise meaning of “extraordinary” will likely be the subject of future litigation. Even with the added uncertainty, the Court’s unusual test may still prove to be the most effective way of allocating property and regulatory rights along the contested stretch of the river. Because governments cannot be relied on to seek social welfare-maximizing outcomes, the states likely would not have negotiated effectively to promote the most socially desirable use of the river.

The Court’s move to allow joint regulation of the New Jersey side of the river was entirely justified from a doctrinal standpoint. The majority correctly decided that the term “riparian jurisdiction” used in the 1905 Compact did not give New Jersey the *exclusive* right to regulate its own riparians. The phrase “riparian jurisdiction” was not a term of art.⁵⁴ It was a formulation unique to the Compact, and it consequently created something of an interpretive hurdle for today’s readers. Riparian rights, however, are simply property rights. They are protected as such and regulated by the state in the same way.⁵⁵ In suggesting that the phrase “riparian jurisdiction” includes the ability to exercise exclusive regulatory authority, the dissent conflated two distinct state powers. First, states have the power to protect and facilitate the enjoyment and exercise of property rights by owners. For example, states uphold the private sale of property, permit owners to develop and build on their land, and prosecute trespassers for unlawful invasion. Second, states have the power to police the types of activi-

⁵⁰ *Id.* at 1430.

⁵¹ *Id.* at 1437.

⁵² *Id.* at 1439.

⁵³ *Id.*

⁵⁴ Sax Report, *supra* note 4, at 3.

⁵⁵ *Id.* at 6.

ties that can be enjoyed by property owners in order to protect the public good. For example, states can create zoning laws to prevent a factory from rising next to a school, they can require handicap access to certain buildings, and they can impose environmental regulations on land users. These state regulatory activities do not arise from the law of property; they limit the law of property for the good of the public. In the same way, riparian rights are subject to the state's police power. Police power is not a part of riparian law, but rather a limit on it.

The riparian right of wharfing out at issue in this case falls within this same class of regulated property rights. In the late nineteenth and early twentieth centuries, wharfing out was subject to two state regulations. First, the state was responsible for protecting the navigable channel of the river.⁵⁶ Accordingly, states established bulkhead lines to mark the outermost limit beyond which wharves were prohibited.⁵⁷ Second, the state had to grant permission to the wharf builder to use the submerged soil below the high-water mark because that land was owned by the state.⁵⁸ Wharfing out on ungranted land was a purpresture, a trespass on sovereign authority.⁵⁹ The riparian land owner certainly had a right to wharf out, but it was conditioned on the state granting the submerged soil in accordance with the public good.

What is more, the state of the law was clear at the time of the 1905 Compact: a government's riparian jurisdiction and its police power were distinct. In the contemporary case of *Cummings v. City of Chicago*,⁶⁰ a riparian landowner had fulfilled all the federal requirements incident to wharfing out, but was denied a necessary permit by the City of Chicago.⁶¹ The landowner contended that the city, by exerting its police-power jurisdiction, was violating his property right.⁶² The Supreme Court disagreed, upholding the city's police-power jurisdiction as a separate and appropriate regulation on land ownership, despite the federal government's jurisdiction over all riparian improvements along the river.⁶³

Thus, the background of the 1905 Compact was clear; authority to grant riparian rights and the power to police those rights were distinct

⁵⁶ See *id.* at 7.

⁵⁷ *Id.*

⁵⁸ *Id.*; see also GOULD, *supra* note 4, § 148, at 297 (stating that ownership rights to the riverbed come through "grant or presumption of law").

⁵⁹ See GOULD, *supra* note 4, § 21, at 45; see also 1 HENRY PHILIP FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 113, at 527 (1904).

⁶⁰ 188 U.S. 410 (1903). The majority referred to *Cummings*, but only in passing. *New Jersey III*, 128 S. Ct. at 1421–22. The case clearly demonstrates the distinction between the authority to define riparian rights and the authority to regulate those rights for the public good through the police power.

⁶¹ *Cummings*, 188 U.S. at 474–75.

⁶² *Id.* at 475.

⁶³ See *id.* at 431.

prerogatives of the state. From a doctrinal standpoint, then, the power to police riparian structures need not be vested solely in the same authority that defines and grants the riparian right. Overlapping regulatory authority, as seen in *Cummings*, is appropriate in some cases.

From a practical standpoint, however, overlapping regulatory authority seems at first blush to be a poor and inefficient way to allocate property rights. For instance, according to the Coase Theorem, producing efficient outcomes in conflicting property rights situations is not dependent on which side “wins” so long as there is a clear definition of the parties’ property rights in the end.⁶⁴ In the present case, giving either state exclusive regulatory power would have more clearly defined the rights at issue. The Coase Theorem argues that, if transaction costs are low, two rational actors will negotiate to create the socially optimal solution no matter who has the right to regulate the resource.⁶⁵ If Delaware were given full authority to regulate riparian rights in all circumstances, for example, New Jersey could make some concessions or promises to Delaware in exchange for the right to build riparian structures such as the LNG wharf. There would also be no need to litigate to determine what is or is not an “extraordinary” use because all uses would be subject to Delaware’s control. The ambiguous and undefined extraordinary character test throws a wrench into the works because it creates uncertainty. And this uncertainty will create transaction costs because it will require litigation to determine who has the final word on large projects such as the LNG wharf proposal.

Even in light of these potential costs and disputes, the majority’s extraordinary character test could still prove to be a good practical solution to this conflict. The Coase Theorem assumes that the participating parties will make decisions as rational actors. But public institutions do not act in the same way that private, profit-maximizing entities do. States cannot be relied on to make choices based on an accurate internalization of costs and benefits.⁶⁶ Governments respond to political — not market — incentives. Votes, more than market effi-

⁶⁴ See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 85 (3d ed. 2000) (“When transaction costs are zero, an efficient use of resources results from private bargaining, regardless of the legal assignment of property rights.” (emphasis omitted)); Robert A. Pulver, Comment, *Liability Rules as a Solution to the Problem of Waste in Western Water Law: An Economic Analysis*, 76 CAL. L. REV. 671, 692 (1988) (“In order for a solution to be efficient, property rights must be clearly defined. [P]roperty rights which are uncertain or ill-defined are of little value; only rights which are clear and stable can be enjoyed and used up to their fullest extent.”) (alteration in original) (quoting Jarret C. Oeltjen & Loyd K. Fischer, *Allocation of Rights to Water: Preferences, Priorities, and the Role of the Market*, 57 NEB. L. REV. 245, 246 (1978))).

⁶⁵ But see Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 957–77 (1989) (discussing numerous baseline presumptions that, if changed, can alter the efficient outcome in bargaining situations).

⁶⁶ See, e.g., Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 356–57 (2000).

ciencies, drive political decisionmaking because representatives often act out of self-interest to maximize their chances of reelection.⁶⁷ Also, interest groups tend to wield a disproportionate amount of influence on politicians through campaign contributions, promises of voting blocs, and targeted information.⁶⁸ Moreover, large groups of voters with diverse interests often remain disorganized, making them ineffective at influencing political decisions. Add to this the many layers of government, from elected officials to career bureaucrats, and it makes for an impossibly complex system of competing interests. All of this presents major hurdles to rational, collective decisionmaking aimed at social welfare maximization.

This irrationality on the part of governments — or at least this departure from rational, social welfare-maximizing behavior — reduces the possibility of efficient negotiation with other actors.⁶⁹ And obstacles to bargaining inevitably hinder efficient outcomes.⁷⁰ The present case is a clear example. On the Delaware side, environmental interests feared that even the very small possibility of a spill was too great a risk to the Delaware River ecosystem.⁷¹ Some also feared that a well-planned terrorist attack could create a catastrophic event if one of the “floating bomb” LNG supertankers exploded, especially if it was near one of the two nuclear facilities along the river.⁷² On New Jersey’s side, ever-increasing energy prices and a growing population made the proposed LNG wharf an extremely valuable addition to the state’s economy.⁷³ Construction of the LNG wharf alone would have infused hundreds of millions of dollars into the New Jersey economy.⁷⁴ As a result of these intense competing interests, both sides gained strong political support. So, instead of efficiently bargaining their way to the socially optimal solution, the states threatened to defend their borders with National Guard troops and a decommissioned warship.

Thus, it may be that granting a clear victory to one of the parties would actually have prevented the optimal utilization of the river due to the political obstacles to rationality and efficient bargaining. Unlike in the ideal Coasian scenario, a winner-takes-all result in this case would not have inevitably led to efficient results. To illustrate, assume

⁶⁷ See *id.* at 374.

⁶⁸ *Id.*

⁶⁹ See, e.g., Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 242–43 (1993) (discussing the problem of competing interests when agents negotiate on behalf of their principals).

⁷⁰ See COOTER & ULEN, *supra* note 64, at 85.

⁷¹ Susan Warner, *Abundant Energy or Floating Bombs?*, N.Y. TIMES, Dec. 4, 2005, § 14, at 1.

⁷² *Id.*

⁷³ See *id.*

⁷⁴ *New Jersey III*, 128 S. Ct. at 1439 (Scalia, J., dissenting) (lauding some of the economic benefits the LNG wharf had promised to deliver).

that Delaware had been granted ultimate regulatory authority and had initiated a politically popular environmental plan that prohibited any and all new riparian structures from being built into the river, regardless of their potential impact on the environment and the economy. New Jersey would have little recourse, even if a new proposed wharf would have minimal environmental impact and significant economic benefits, because Delaware would likely be unable to bargain as a rational social welfare-maximizing actor.⁷⁵ Thus, the politically expedient option would foreclose the efficient option. The politically salient fear of a large environmental harm might prevent socially advantageous riparian structures from being built.⁷⁶

By granting regulatory authority to both states, and by limiting the overlap of this authority to situations of extraordinary character, the Court may have created a fairly effective solution to this property dispute. Handing complete jurisdiction over to one of these states would have avoided the costs of future litigation, but at the expense of losing some potentially socially valuable property uses (or non-uses). Thus, if and when negotiations do break down between the parties, a judicial mediator will be able to enter the dispute to evaluate more rationally the competing interests on either side. The transaction cost of additional litigation might then actually help to produce a more desirable result than where neither side can negotiate effectively.

All told, the majority's extraordinary character test is a judicial innovation. Nothing in the law of riparianism or the 1905 Compact dictated that the Court should divide the regulatory authority over the river in that way. From a practical standpoint, though, the extraordinary character test could very well prove itself to be a valuable corrective to the inefficiencies and irrationalities created by the political process. The Court's decision in this river dispute presents a rather unique opportunity to apply the Coase Theorem to public institutions vying for exclusive control of a valuable resource. Only time will tell

⁷⁵ The New Jersey riparian, for example, could try to pay for the right to build the wharf, but this assumes that Delaware officials would know how much Delawareans valued the environmental plan and would know that these citizens would accept such a payment to the government in exchange for their right to block the wharf. Also, interest group pressures would likely skew the information reaching the government, making an efficient decision nearly impossible.

⁷⁶ The reverse is also true. If New Jersey were to have complete police-power jurisdiction, Delaware would likely be unable to protect its submerged land efficiently. Political bargaining would theoretically be available, but would almost certainly not reflect the true social costs and benefits of the proposed projects or environmental programs. The New Jersey riparian would easily be able to value the project, but how would Delaware aggregate in terms of dollars the total social benefit to the Delaware population of having an environmentally protected harbor? See, e.g., Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 116-19 (2002) (discussing various obstacles, such as the offer/asking problem, that can make it impossible to quantify one's willingness to pay).

if the extraordinary character test solves more problems than its ambiguity creates.