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Cover Page Footnote

I extend my sincerest appreciation to Professor Sara Gosman, then at the University of Michigan Law School, for teaching me more about the Supreme Court than I ever thought I could learn and for help editing this article. In addition, I am grateful for the work of the editors of the *Seattle Journal of Environmental Law*, whose work improved this piece immensely.

The Compromise Verdict: How the Court’s Resolution of *New Jersey v. Delaware III* Implicitly Advanced Environmental Litigation

Joel M. Pratt[†]

New Jersey and Delaware have often fought over their territorial boundaries in the Delaware River. Three times, they have litigated cases in the Supreme Court under the Court’s original jurisdiction to hear cases or controversies between states. In 1905, a Compact negotiated by the states and confirmed by Congress settled the first case between the two states. The second case between the two states led the Supreme Court to issue a Decree confirming the boundaries of the two states. The third case, which began in 2005, asked the Court to decide the scope of each state’s power to regulate development in the Delaware River. The Court came up with a compromise, argued for by neither state, which gave lasting effect to the 1905 Compact between the states while recognizing how water regulation has developed over the last century. The Court’s resolution, though seemingly counterintuitive, can be best understood with reference to federal and state common law principles. More important, however, is how the case was argued. Though it presented a traditional “environment v. the economy” debate, the party supporting the pro-environment argument (Delaware) did not argue it as such. This case, therefore, presents a roadmap to victory for environmentalists in front of the Roberts Court: to win an environmental case, it may be best to avoid mentioning the environment at all.

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[†] J.D. Candidate, University of Michigan Law School, December 2014. I extend my sincerest appreciation to Professor Sara Gosman, then at the University of Michigan Law School, for teaching me more about the Supreme Court than I ever thought I could learn and for help editing this article. In addition, I am grateful for the work of the editors of the Seattle Journal of Environmental Law, whose work improved this piece immensely.

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I. INTRODUCTION

In response to a threat from New Jersey to remove state investments in Delaware banks, Delaware's legislature considered authorizing the National Guard to protect Delaware and resist New Jersey's encroachment.¹ One New Jersey state legislator openly contemplated commissioning a battleship docked in a museum "in the event the State was forced to repel an armed invasion from Delaware."² These events are not a historical recounting of the early days of the United States; they occurred in 2005.³

New Jersey and Delaware have been fighting for jurisdiction over the Delaware River for more than a century.⁴ Three times, these fights have resulted in litigation in the Supreme Court under its original jurisdiction.⁵ The first case arose in 1907⁶ and was dismissed as a result of an agreement between the states, which was ratified by Congress.⁷ The second case

1. Report of the Special Master at 21, *New Jersey v. Delaware III*, 552 U.S. 597 (2008) (No. 134, Original) [hereinafter Special Master Report].

2. *Id.*

3. *Id.*

4. *Id.* at 2.

5. *Id.* at 2, 14, 17.

6. *New Jersey v. Delaware I*, 205 U.S. 550 (1907).

7. S. 4975, 59th Cong., 34 Stat. 858 (1907). See Special Master Report, *supra* note 1, at 13.

established the boundary between the states.⁸ The third case is the subject of this article.

Other commentators have focused largely on the inconsistencies in the Court's resolution of this dispute.⁹ This article seeks to do the opposite. The Court's Opinion can be understood squarely in the context of federal common law and state water law and is, thus, neither illegitimate nor unpredictable.¹⁰ This article argues that the Supreme Court's resolution of *New Jersey v. Delaware III* in properly balancing states' interests in accordance with general common law principles gives environmental advocates a roadmap to properly frame, argue, and win environmental cases. This article proceeds in three parts. Part II explores the history of the conflict between the two states and explains the factual background of the controversy. Part III analyzes the development of each side's arguments—from the proceedings in front of the Special Master to the Oral Arguments before the Supreme Court—and concludes with an explication of the Court's Opinion. Part IV then synthesizes the Court's resolution with long-standing legal principles. Ultimately, the non-environmental framework of this case allowed the Court to cut across ideology to give pro-environmental regulations a decisive, legally consistent, and narrowly drawn victory.

II. THE DISPUTE

"Disputes between New Jersey and Delaware concerning the boundary along the Delaware River . . . have persisted almost from the beginning of statehood."¹¹ This historic conflict carried into the twenty-first century, where it took the form of a dispute over a gas pipeline. Section II.A explains the historical dispute between New Jersey and Delaware. Section II.B describes the factual dispute that led to this lawsuit.

8. Delaware I, 205 U.S. 550.

9. See D. David DeWald, *Police Power Versus Riparian Rights in the Interstate Compact Context*, *New Jersey v. Delaware*, 128 S. Ct. 1410 (2008), 88 NEB. L. REV. 433 (2009) (proposing an alternative to the test adopted by the Court in *New Jersey v. Delaware III*). See also Norene Napper, Case Note, *Water Law--States' Rights and Riparian Rights—Riparian Jurisdiction: Ordinary and Usual v. Extraordinary*, 76 TENN. L. REV. 187 (2008) (attacking the legitimacy and predictability of the new test announced in *New Jersey v. Delaware III*).

10. See *infra* Part IV.

11. *New Jersey v. Delaware III*, 552 U.S. 597, 603 (2008) (internal quotation marks omitted), citing *New Jersey v. Delaware II*, 291 U.S. 361, 376 (1934).

A. History of Conflict

First, it is important to define the precise geographical area in contest. Inside of the so-called “Twelve-Mile Circle,”¹² Delaware claimed ownership of the Delaware River and the “subaqueous soil up to the low-water mark on the New Jersey side.”¹³ New Jersey claimed ownership of the river and the subaqueous soil up to the thalweg.¹⁴

The conflict between the two states flared up for the first time near the end of the nineteenth century. In 1871, Delaware’s legislature passed a statute requiring fishing licenses on the Delaware River. Delaware residents paid five dollars for the privilege to fish in this area; nonresidents paid twenty dollars.¹⁵ The following year, “Delaware arrested several New Jersey citizens at gunpoint” for fishing on the river without the requisite licenses.¹⁶ The arrests set off a chain of fruitless negotiations, which ended with New Jersey suing Delaware in 1877.¹⁷

The Court never issued an opinion on the merits in this first lawsuit because the parties settled the dispute with a Compact in 1905.¹⁸ In 1907, Congress ratified the Compact, giving it both the structure of a contract and the force of federal law.¹⁹ The Compact contains nine articles,²⁰ only

12. The Twelve-Mile Circle is an area of land and water, centered on New Castle, Delaware, with a diameter of twelve miles. See New Jersey’s Brief in Support of its Motion for Summary Judgment to the Special Master at 47, *New Jersey v. Delaware III*, 552 U.S. 597 (2008) (No. 134, Original), available at <http://goo.gl/Ex1g2> [hereinafter New Jersey Special Master Brief] for a relatively clear visual representation of the area.

13. *Delaware III*, 552 U.S. at 605.

14. Special Master Report, *supra* note 1 at 15. The thalweg is the area of strongest current, typically close to or in the middle of the river. *Id.* Delaware’s claim to the entire river was based on “a deed of feoffment from the Duke of York to William Penn on August 24, 1682.” *Id.* In other words, within the Twelve-Mile Circle, Delaware claimed ownership of the river and subaqueous soil extending to the low tide line on the New Jersey side of the river, while New Jersey claimed that each state owned half of the river and soil.

15. *Id.* at 3.

16. *Id.* at 3–4. The New Jersey citizens were fishing on the part of the river New Jersey claimed as its own. *Id.* at 4.

17. *Id.* at 5.

18. *Id.* at 8.

19. Report of the Special Master Apps. at B-1, *New Jersey v. Delaware III*, 552 U.S. 597 (2008) (No. 134, Original) [hereinafter Appendices].

20. *Id.* at B-2–B-6. Articles I and II use parallel language to give the States of New Jersey and Delaware the ability to serve civil and criminal process upon individuals anywhere on the Delaware River. *Id.* at B-2–B-3. This ability is essentially limited only by the state’s jurisdiction over the criminal and civil defendant. *Id.* Article III gives the States common rights of fishing. Article IV directs the States to appoint a commission charged with the drafting of uniform fishing laws. *Id.* at B-3–B-5. Article V preserves the status quo with respect to fishing laws, except those that are inconsistent with common fishing rights. *Id.* at B-5. Article VI preserves the status quo with respect to oysters and other shellfish. *Id.* Article IX directs the way by which the Compact will be ratified and further mandates the dismissal of the pending lawsuit upon passage. *Id.*

two of which—Articles VII and VIII—were at play in this dispute. Article VII provides: “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.”²¹ Article VIII states: “Nothing herein contained 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.”²² It is the interpretation of this text that drives the advocacy and decision-making in the recent dispute.

Though the subject of the conflict was ownership of the Delaware River, the Compact did not actually settle the boundary between the two states.²³ Instead, the Supreme Court decided that controversy in 1935.²⁴ Delaware won.²⁵ Within the Twelve-Mile Circle, Delaware owns the river and subaqueous soil up to the low water mark on New Jersey’s shore. Below the Circle, the boundary line is the thalweg.²⁶

The two states also have an uneven history of regulation. New Jersey argued that it regulated riparian developments appurtenant to its own shores since at least 1854.²⁷ By contrast, Delaware’s first regulatory statutes over the same water arose more than a century later.²⁸ Until 1969, Delaware regulated riparian developments in an extremely limited way using common law nuisance principles, rather than comprehensive statutory regulations.²⁹ After 1969, however, Delaware did claim regulatory authority over any projects within the Twelve-Mile Circle; New Jersey and Delaware worked together to approve and regulate

21. *Id.*

22. *Id.*

23. Special Master Report, *supra* note 1, at 8.

24. Decree, *New Jersey v. Delaware II*, 295 U.S. 694 (1935).

25. *Id.* at 694. “Within the twelve mile circle (that is, within the circle the radius of which is twelve miles, and the center of which is the building used prior to 1881 as the courthouse at New Castle, Delaware, certain arcs of which are hereafter described and determined), the Delaware River and the subaqueous soil thereof up to mean low water line on the easterly or New Jersey side is adjudged to belong to the State of Delaware, and the true boundary line between the States within said twelve mile circle is adjudged to be mean low water mark on the easterly or New Jersey side of the Delaware River.” *Id.*

26. *Id.*

27. New Jersey Special Master Brief, *supra* note 12, at 4.

28. Special Master Report, *supra* note 1, at 18.

29. *Id.* at 69.

development in the river, even developments appurtenant to New Jersey's shore.³⁰

B. The Most Recent Dispute

In September of 2004, Crown Landing, LLC, a wholly owned subsidiary of British Petroleum (BP), applied to Delaware for permits to begin testing and construction of a liquefied natural gas (LNG) transfer system in the Delaware River.³¹ The facility would be inside of the Twelve-Mile Circle, appurtenant to New Jersey's shore.³² Delaware issued a status decision in February of 2005 that the project would violate Delaware's environment-protecting prohibitions of "offshore bulk transfer [facilities]" and "heavy industrial [uses]."³³ BP pursued an administrative appeal in Delaware, which it lost, and Delaware never issued any permits for the project.³⁴

New Jersey, with jobs at stake, did not take this decision lightly. After a series of communications between New Jersey and Delaware, the Court granted New Jersey leave to file a new Bill of Complaint.³⁵ Delaware answered New Jersey's complaint and "moved for appointment of a Special Master."³⁶ In 2006, the Court appointed Ralph I. Lancaster, Jr. as Special Master.³⁷ Ultimately, the Court would be tasked to decide between

30. *Id.* at 74–76. Of particular importance to the case at hand was that "Delaware rejected as prohibited bulk transfer facility El Paso Eastern Company's request to build an LNG unloading facility extending from New Jersey into Delaware." Reply Brief of Delaware in Response to Exceptions by New Jersey to the Report of the Special Master at 8, *New Jersey v. Delaware III*, 552 U.S. 597 (2008) (No. 134, Original) [hereinafter *Delaware Supreme Court Brief*].

31. Special Master Report, *supra* note 1, at 19–20. For the purposes of this article, most notably the filing of the Amicus Brief, there is no relevant distinction between Crown Landing, LLC and BP. The remainder of the article will refer to the interested private party in this case as BP.

32. *Id.* at 20.

33. *Id.*

34. *Id.* at 20–21.

35. *Id.* at 24.

36. *Id.*

37. *Id.* The parties submitted almost 6,500 pages to the Special Master, who considered the evidence and the parties' arguments and submitted a Report to the Supreme Court. *Id.* at 27. New Jersey then filed a brief excepting to the Report, to which Delaware filed an opposing brief. The Court heard Oral Argument on November, 27, 2007 and issued its Opinion on March 31, 2008. *New Jersey v. Delaware III*, 552 U.S. 597, 601 (2008). For the purpose of understanding the decision, it is useful to think about the Special Master's Report as a lower court's opinion. Though the Supreme Court heard this case under its original jurisdiction, the Court left the findings of fact and initial decision-making to the Special Master. There are legally significant differences between the Special Master's Report and the Court's Opinion and Decree. Ultimately, because the Supreme Court hears the vast majority of its cases under its appellate jurisdiction, the Court's structure is ill fitted to decide this kind of case. Therefore, the Court structured this case so that it could decide it as if it were an appellate case.

New Jersey's desire to permit the LNG transfer system and Delaware's prohibition of it.

III. THE PARTIES' ARGUMENTS

New Jersey and Delaware argued this case from 2005 to 2007, first in front of the Special Master and then in front of the Supreme Court. This Section tracks the evolution of the parties' arguments, the Special Master's response to them, and the Supreme Court's ultimate resolution of the dispute. Section III.A explores New Jersey's arguments, while Section III.B explores Delaware's. Section III.C explicates the resolution of the dispute, first by the Special Master and then by the Court.

A. New Jersey's Arguments

New Jersey advanced two principal legal arguments. First, New Jersey argued that the text of the 1905 Compact gave New Jersey exclusive jurisdiction to regulate all riparian developments appurtenant to its own shore.³⁸ This was a key argument for New Jersey; if the Court were to accept this argument, New Jersey would win because Delaware's laws would not apply, and the Crown Landing project could go forward.³⁹ Though these textual arguments were dispositive of the issue, New Jersey did not spend the majority of its brief to the Special Master arguing these points.⁴⁰ Like most textual arguments, New Jersey's can be met with an equal and opposite interpretation;⁴¹ a factual argument, then, makes New Jersey's case substantially more appealing.

New Jersey made more compelling textual arguments to the Court than to the Special Master because of Delaware's big win on the facts in

38. New Jersey Special Master Brief, *supra* note 12, at 26. On the text of the Compact itself, New Jersey makes three sub-arguments. One, New Jersey argues that the right to wharf out (build a dock) is a long-recognized, historical right attendant to ownership of riparian land. *Id.* at 27. *See, e.g.*, Recent Decisions, *Navigable Waters: Riparian Rights: Wharfing Out*, 5 MICH. L. REV. 709–10 (1907). Two, New Jersey argues that the Compact's use of the phrase "riparian jurisdiction of every kind and nature" confers upon New Jersey the full police power to regulate the wharf. New Jersey Special Master Brief, *supra* note 12, at 29. Third, New Jersey claims that laws to protect the public, including "New Jersey's environmental laws," are included in the Compact's grant of authority and, thus, jurisdiction can be exercised only by New Jersey. *Id.* at 32.

39. *See generally*, *Wharf Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/wharf> (last visited Sept. 29, 2014) ("Wharf: a flat structure that is built along the shore of a river, ocean, etc., so that ships can load and unload cargo or passengers.").

40. New Jersey Special Master Brief, *supra* note 12 at 23–32.

41. *See infra* Section III.B.

front of the Special Master.⁴² First, New Jersey carefully parsed the text to argue that, by granting “each state” the authority to “exercise riparian jurisdiction of every kind and nature,” this could *only* mean the grant of exclusive jurisdiction to each state on its own side of the Delaware River; given that wharfing out is a core riparian right, the state that owns the land to which the wharf is attached should be the one with exclusive rights to regulate.⁴³

New Jersey also argued that the grant of “riparian jurisdiction” includes the sole right to regulate activities *on* the wharf once the wharf has been approved.⁴⁴ New Jersey has to win this part of the argument as well because the right to regulate riparian land does not necessarily carry with it the right to regulate the activities on the wharf itself, because the dock would have been grounded in Delaware’s subaqueous soil.⁴⁵

The essence of New Jersey’s second major legal argument is a fact-based, adverse-possession-styled argument. Just as one who has openly and adversely possessed land for a long period may acquire title to the land, New Jersey argued that, because they have historically exercised exclusive regulation of the Twelve-Mile Circle, exclusive authority is vested in New Jersey. Because Delaware did not enact any comprehensive regulatory scheme until 1969, and New Jersey had developed and regulated for more than one hundred years before that, New Jersey argued that it had acquired the exclusive right to regulate through prescription and acquiescence.⁴⁶ Though New Jersey’s brief to the Special Master only devoted a small portion of the brief to this argument,⁴⁷ a good portion of its Statement of Facts addressed this issue.⁴⁸ New Jersey’s arguments were thus not solely based on the text of the Compact. New Jersey, having been a long-standing steward of the river, wants the right to regulate it for both economic and environmental benefits. Having had so little involvement in managing riparian developments in the river, Delaware cannot claim sweeping authority once it happened to disapprove of New Jersey’s plans. In front of the Supreme Court, New Jersey also incorporated the “course of conduct” argument into its textual argument. By invoking the words

42. See *infra* Section III.C.

43. Exceptions by New Jersey to the Report of the Special Master and Supporting Brief at III-IV, *New Jersey v. Delaware* III, 552 U.S. 597 (2008) (No. 134, Original) [hereinafter *New Jersey Supreme Court Brief*].

44. *New Jersey Special Master Brief*, *supra* note 12, at 32–41.

45. See *infra* Section III.B for Delaware’s argument about the scope of its police power. See *infra* Section III.C for the Special Master’s favorable treatment of Delaware’s argument.

46. *New Jersey Special Master Brief*, *supra* note 12, at 41.

47. *Id.* at iii.

48. *Id.* at 4–5; 10–11; 14–23.

“continue to exercise riparian jurisdiction,” New Jersey argued that the language of the Compact reaffirms the parties’ long-standing relationship in exercising riparian jurisdiction, under which New Jersey had regulated developments on its own side of the river without interference from Delaware.⁴⁹

At Oral Argument, the Justices were primarily concerned with setting appropriate limits on New Jersey’s jurisdiction to regulate lands that belong to Delaware. Even Justice Scalia, who ended up voting in favor of New Jersey,⁵⁰ pressed New Jersey’s lawyer on this point: “So, obviously, the right to wharf out does not include the right to use the wharf for whatever you like, and the only thing we’re arguing about is whether it is New Jersey or Delaware that can impose limitations.”⁵¹ Even those Justices favoring New Jersey’s position were thus not prepared to accept New Jersey’s argument that attaching a wharf to New Jersey’s shore grants it exclusive regulatory authority, even over those activities on the wharf.⁵²

Additionally, we must pause here to note what New Jersey did *not* do—namely, argue this case as an “environmental” case. New Jersey could have argued that the merits of its economic vitality are more important than Delaware’s business-hostile, pro-environmental laws. That argument was harder for New Jersey to make than it was for BP, who was the party with the strongest direct economic interest in this case. BP, however, chose not to pursue its case further in Delaware administrative or state courts. Though it is unclear why BP chose not to pursue remedies in Delaware’s courts, the decision had profound structural consequences for the case and strategic consequences for the attorneys. In arguing on the Compact, instead of on the merits of the permit denial, the “pro-business” interest in this case was deprived of an extremely potent set of arguments weighing the value of a proposed project against environmental interests.

49. *Id.* at 28–30.

50. *New Jersey v. Delaware III*, 552 U.S. at 629 (Scalia, J., dissenting).

51. Oral Argument at 15:37, *New Jersey v. Delaware III*, 552 U.S. 597 (2008) (No. 134, Original), available at http://www.oyez.org/cases/2000-2009/2007/2007_134_orig [hereinafter Oral Argument].

52. Justice Souter was especially troubled by New Jersey’s argument that it could regulate, saying that the “only way” to accept New Jersey’s position is “to give New Jersey the power to grant Delaware land.” Oral Argument, *supra* note 51, at 5:35. Justice Ginsburg is understandably concerned that Delaware would “give up” such an “extraordinary power” with the vague language of Article VII of the Compact. Oral Argument, *supra* note 51, at 17:48.

B. Delaware's Arguments

Delaware's core argument was simple: states get to exercise sovereign power within their own borders. Arguing to the Special Master, Delaware made the strongest version of this argument available: after confirming the "baseline rule" that a state has exclusive jurisdiction to regulate activities in its own territory,⁵³ Delaware argued that Article VII of the Compact gave each state the right to regulate riparian developments on its "own side of the river," which would preclude New Jersey from regulating within the Twelve-Mile Circle at all.⁵⁴ Because *New Jersey v. Delaware II* drew New Jersey's boundary at the low water mark on its own side of the Delaware River, Delaware argued that any regulatory authority over the Delaware river outshore of the low water mark rested exclusively with Delaware.⁵⁵ Delaware's extensive treatment of this argument indicates the importance of it for Delaware's interests; if the Court were to accept this argument, New Jersey would lose all independent regulatory authority over riparian developments within the Twelve-Mile Circle, so long as those riparian developments actually extended into the water.⁵⁶

Delaware did not, however, rely exclusively on the strongest version of this argument. Instead, Delaware dedicated some space in its briefs to a more moderate version of the same argument: accepting that New Jersey has "riparian jurisdiction" to regulate riparian developments, Delaware still has the full police power to determine if the activity *on* the wharves extended into Delaware's sovereign territory.⁵⁷ This argument accepts the conclusion that New Jersey does have jurisdiction to approve and regulate wharves for the purpose of accessing navigable water,⁵⁸ but it also affords Delaware the police power to regulate activities *on those wharves* for the benefit of its own people. In other words, riparian jurisdiction ends once the wharf is built; after that, the owner of the subaqueous soil can regulate for the benefit of the citizens of the sovereign state.

Despite New Jersey's heavy reliance on course of conduct arguments, Delaware barely mentioned this issue to the Special Master. It

53. Delaware's Motion for Summary Judgment and Supporting Brief at 25, *New Jersey v. Delaware III*, 552 U.S. 597 (2008) (No. 134, Original), *available at* <http://goo.gl/XtUrr2> [hereinafter Delaware Special Master Brief].

54. *Id.* at 26.

55. *Id.* at 26–35.

56. All developments would extend into the water. Nobody would build a dock from the top of the beach to the low water mark because such a structure would be utterly useless.

57. Delaware Special Master Brief, *supra* note 53, at 47–59.

58. A core riparian right. DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 34 (4th ed. 2009) (stating that approving and regulating wharves for the purpose of accessing navigable water is a core riparian right).

devoted very little space arguing that the parties' course of conduct actually supports Delaware's ability to say "no" to the Crown Landing project.⁵⁹ Delaware argued that, since its first regulatory laws in 1969, it has expressly permitted every structure appurtenant to New Jersey's shore extending into the Twelve-Mile Circle without objection from New Jersey.⁶⁰ Critically, Delaware denied a permit in 1971 to El Paso to build a similar facility.⁶¹ In addition, Delaware argued that its minimal common law regulation of structures was not an abandonment of the right to regulate; instead, it only regulated nuisance, which it did not have occasion to do regarding wharves attached to New Jersey's shore.⁶² It is unclear why Delaware treated this argument in such a cursory fashion at this point in the litigation; this seems like a fairly strong argument that New Jersey acquiesced to concurrent regulation, and not the other way around.⁶³

Notably, Delaware ended its brief to the Supreme Court with a slightly more extensive treatment of the "course of conduct" argument, persuasively expanding the two points it argued to the Special Master. First, Delaware argued that its minimal pre-1960s regulation indicated that Delaware was only regulating nuisances, not that it was failing to regulate at all.⁶⁴ Second, Delaware argued that New Jersey's failure to protest (and, further, its explicit recognition of) Delaware's previous regulations of projects appurtenant to New Jersey's shore indicated that New Jersey acquiesced to Delaware's regulatory authority.⁶⁵

As they were with New Jersey's counsel, the Justices at Oral Argument were primarily concerned with setting a limit on Delaware's regulatory authority. Justice Souter very quickly asked Delaware's counsel a number of questions about the limits of Delaware's arguments, posing the following hypothetical: "Delaware says enough is enough; no more wharfs and piers from the New Jersey side."⁶⁶ Delaware's lawyer

59. Delaware Special Master Brief, *supra* note 53, at 45–46.

60. *Id.*

61. *Id.* at 45.

62. *Id.*

63. Delaware's lawyers may have thought that they would lose this argument, so they buried the counter-argument deep in the brief. Alternatively, Delaware's lawyers may have thought the point about prescription and acquiescence so obviously fell in their favor (or was a "wash") that their limited space was better-spent arguing against the textual basis of New Jersey's claim. It would have been odd, indeed, for Delaware to fight New Jersey's jurisdiction over and ownership of the Delaware River only to have acquiesced to New Jersey's exclusive regulation of that river.

64. Delaware Supreme Court Brief, *supra* note 30, at 44.

65. *Id.* at 45–48.

66. Oral Argument, *supra* note 51, at 29:47.

was understandably reluctant to admit that the logical consequence of this argument would be Delaware's veto power of any project proposed by New Jersey; such a result would seem contrary to the Compact's express preservation of New Jersey's "riparian jurisdiction." A frustrated Justice Souter pursued this line of questioning until Justice Kennedy accused Delaware's counsel of "running away from the hypothetical."⁶⁷ After wrangling with the Court about the issue, Delaware finally gave an inch and agreed with Justice Souter: "Delaware can prevent [a wharf] only on the grounds of preventing a nuisance."⁶⁸ It is this hook that gives Justice Ginsburg the limiting principle she writes into the Opinion and Decree.⁶⁹

In front of the Court, Delaware made a choice to make this case about sovereignty instead of the environment. Especially because of its big win in front of the Special Master,⁷⁰ Delaware's counsel would assuredly have been pleased with a cursory opinion mirroring the Special Master's Report. Concern for environmental values, and how they weigh against economic values, could only complicate what was a straightforward set of winning arguments for Delaware. Its position was not ostensibly pro-environment; it was pro-sovereignty. That the regulation at issue was an environmental one hardly entered the argument at all, which helped the Special Master and the Court avoid an otherwise ideological battle.

C. The Resolution

Delaware won in front of the Special Master, who, having carefully considered the arguments, decided that Delaware has full police power jurisdiction over wharves extending into its own territory.⁷¹ While the result was a big win for Delaware, the Special Master rejected the strongest version of Delaware's police power argument, writing that it "defies common sense."⁷² Further, the Special Master found that Delaware's contention that it had exclusive jurisdiction to regulate outshore of the low water mark within the Twelve-Mile Circle "effectively would render Article VII meaningless."⁷³ The Compact, negotiated before the issue of

67. *Id.* at 31:53.

68. *Id.* at 52:04. It is worth noting that this limitation actually came from a question posed by Justice Ginsburg in response to New Jersey's arguments about Delaware's failure to regulate: "It's rather recent that Delaware has gotten into the business of regulating at all. I thought that for most of this period until the '60s, Delaware just wasn't doing anything unless something was a nuisance, and that didn't come up." *Id.* at 42:42.

69. *See infra* Section III.C.

70. *Id.*

71. Special Master Report, *supra* note 1, at 84.

72. *Id.* at 36.

73. *Id.* at 38.

subaqueous land ownership, could not possibly have contemplated that the resolution of that issue would have stripped New Jersey of the ability to build wharves; in fact, the language clearly indicates that the opposite result was intended.

However, New Jersey's victory on this point was a hollow one. The Special Master went on to make a textual argument that "riparian jurisdiction" is distinguishable from "exclusive jurisdiction."⁷⁴ The Special Master applied a presumption against the defeat of sovereign title absent express provisions in a Compact.⁷⁵ The Special Master's Report, as well as the case, could have actually ended right here, for if jurisdiction over the area in question is concurrent, rather than exclusive, Delaware was within its authority to deny the Crown Landing permit.

The Special Master, however, went on to agree with Delaware's "course of conduct" argument, carefully analyzing this reasoning and dedicating several pages to carefully resolving it in Delaware's favor.⁷⁶ Additionally, the Special Master noted the fact that New Jersey clearly consented to Delaware's involvement in the regulation of wharves extending outshore of the low water mark on New Jersey's side of the Delaware River,⁷⁷ and that Delaware apparently did not abandon its jurisdiction.⁷⁸ Given the Report's strong support towards Delaware, New Jersey entered the Supreme Court at a disadvantage.⁷⁹

74. *Id.* at 62.

75. *Id.* at 34–35. Had the parties intended for the grant of jurisdiction to be exclusive, they would have used clear language to effectuate their intent. *Id.* at 65. The Special Master compares this Compact to one negotiated between New Jersey and New York in 1834, which granted "the exclusive right of property" to subaqueous land to New Jersey. *Id.* at 66.

76. *Id.*

77. *Id.* at 77–84.

78. *Id.* at 69–70.

79. The Special Master proposed the following substantive portions of the Decree:

1. (a) The State of New Jersey may, under its laws, grant and thereafter exercise riparian jurisdiction over rights for the construction, maintenance and use of wharves and other riparian improvements appurtenant to the eastern shore of the Delaware River within the twelve-mile circle and extending outshore of the low water mark; and further

(b) The State of Delaware may exercise, under its laws, full police power jurisdiction over the construction, maintenance and use of those same wharves and other improvements appurtenant to the eastern shore of the Delaware River within the twelve-mile circle insofar as they extend outshore of the low water mark onto its sovereign territory.

Appendices, *supra* note 19, at A-1–A-2.

The “course of conduct” argument, upon which the Court partially based its decision, can be reframed in light of the underlying dispute between economic and environmental values. From Delaware's perspective, Delaware had always reserved the right to regulate environmental nuisances, and it directly regulated numerous projects on the Delaware River, including those appurtenant to New Jersey's shore. Delaware argued that it always retained the right to protect the environment in the Twelve-Mile Circle, and over time, the State had enhanced its protection of the environment as the public's policy preferences evolved. The resolution of this argument is dispositive of the dispute. In fact, the interpretation of the text of the Compact is driven by the resolution of the “course of conduct” issue. If the parties have regulated since 1905 in a certain manner under the authority of the Compact, then the Compact will be read to support that conduct. In resolving the “course of conduct” argument in Delaware's favor, the Court explicitly upheld Delaware's privileging of environmental over economic values.

Justice Ginsburg, writing for the Court, did not accept the Special Master's approach but still ruled in favor of Delaware.⁸⁰ The Court gives four principal reasons for allowing Delaware to prevent the Crown Landing project from going forward. First, the term “riparian jurisdiction” is what the Court calls a “limiting modifier,” and is not a stand-in for the phrase “exclusive jurisdiction.”⁸¹ Second, the New York-New Jersey Compact supports that construction.⁸² Third, the Court limited *Virginia v. Maryland* to its particular facts and refused to apply the same reasoning to this case.⁸³ Finally, the Court accepted Delaware's argument that New Jersey had acquiesced to Delaware's concurrent jurisdiction by its past actions.⁸⁴

The key point to understand, however, is the difference between the Special Master's suggestion, which Justice Stevens fully supports in his concurring opinion, and the Court's ultimate Decree. The Special Master suggested that New Jersey and Delaware had concurrent jurisdiction, which was subject to Delaware's exercise of police power over the activity conducted on wharves. The Supreme Court, on the other hand, held that

80. *New Jersey v. Delaware III*, 552 U.S. 597, 623 (2008) (stating that “it was within Delaware's authority to prohibit construction of the facility within its domain.”).

81. *Id.* at 609.

82. *Id.*

83. *Id.* See Stuart A. Raphael, *Practical Considerations in Original Action Litigation: Virginia v. Maryland and New Jersey v. Delaware*, 12 WYO. L. REV. 15 (2012) (discussing the Court's limitation of *Virginia* to its facts and the extraordinary room parties have to litigate original actions in the Court).

84. *New Jersey III*, 552 U.S. at 609.

“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.”⁸⁵

The consequence of this holding is that Delaware does *not* have concurrent jurisdiction to regulate developments that are not “of extraordinary character.” This is the limiting principle Justice Souter was seeking during Oral Argument. Though much of the language of the Opinion seems to read heavily in favor of Delaware’s sovereignty, this grant of concurrent jurisdiction is actually quite narrow. The Court admits in a footnote that, under its holding, “Delaware could not rationally” prohibit “a terminal for unloading cargoes of tofu and bean sprouts.”⁸⁶

With characteristic rancor, Justice Scalia wrote a dissenting opinion in which Justice Alito joined.⁸⁷ Justice Scalia took issue with the majority’s “extraordinary character” test as vague and poorly grounded in precedent.⁸⁸ After listing and systematically dismissing a series of reasons why the majority might have picked this standard, Justice Scalia concluded with a jab at the “environmentally sensitive Court” for making its decision.⁸⁹ To Justice Scalia, the majority made an instrumental decision that it failed to legally justify.⁹⁰ Justice Scalia concludes that “[t]he wharf at issue in this litigation would have been viewed as an ordinary and usual riparian use at the time the two States entered into the 1905 Compact,” and, therefore, New Jersey ought to have exclusive authority to regulate it.⁹¹

Additionally, the dissent gives a detailed account of how the framers of the Compact would have understood the riparian right to wharf out.⁹² Justice Scalia rejects the Special Master’s comparison of the Compact at issue to the New York-New Jersey Compact, and instead equates the phrase “riparian jurisdiction of every kind and nature” with the phrase

85. *Id.* at 603 (emphasis added).

86. *Id.* at 623. The question of tofu and bean sprouts does not appear in any of the briefs, nor was it mentioned at Oral Argument. One can only imagine this colorful language arising out of a heated debate between Justice Ginsburg and Justice Scalia during one of the Court’s conferences.

87. *Id.* at 628 (Scalia, J., dissenting).

88. *Id.* at 640–44.

89. *Id.*

90. Ironically, Justice Scalia then dives into an equally irrelevant discussion of the economic value of the Crown Landing project to BP and New Jersey. *Id.* at 644–45.

91. *Id.* at 646.

92. *Id.* at 631.

“exclusive jurisdiction.”⁹³ He explains that because wharfing out was, and is, a core stick in the bundle of riparian land ownership, an express grant of this jurisdiction ought to give each state exclusive authority to regulate riparian developments on its own shore.⁹⁴

Justice Scalia also robustly deals with *Virginia v. Maryland*, 540 U.S. 56 (2003).⁹⁵ In that case, the Court held that Virginia (in a similar situation as New Jersey) may “construct improvements appurtenant to the Virginia shore of the Potomac River free of regulation by Maryland.”⁹⁶ Despite the textual differences between the arbitration award at issue in *Virginia* and the Compact at issue in this case, the most committed textualist on the Court wrote: “The documents in *Virginia v. Maryland* said in other words precisely what the Compact here said.”⁹⁷ Therefore, Justice Scalia fully accepts New Jersey’s argument that the words “continue to exercise riparian jurisdiction” in Article VII indicate that the parties’ course of conduct supports New Jersey, and that, because Delaware had not sought to regulate developments appurtenant to New Jersey’s shore before the 1905 Compact, it gave up the jurisdiction to do so after 1905.⁹⁸

Among the various opinions, Justice Scalia’s dissent comes closest to characterizing this case as environmental. Given his devotion to textualism,⁹⁹ it is hard not to notice a dissent in which he conflates admittedly-different textual provisions and makes bold instrumentalist assertions. Justice Scalia is only able to recruit Justice Alito to join him in this dissent, despite the fact that these two Justices are not the only conservative members of the Roberts Court. The fact that this decision cuts across ideological lines, and is explicitly decided on non-environmental grounds, indicates that the Court has other concerns in mind than ideology when resolving these interstate disputes.¹⁰⁰

The reach of this Opinion in future disputes between these or other parties is not exactly clear. Given the Court’s willingness to limit *Virginia v. Maryland* to its facts, this Opinion may have no impact in future jurisdictional disputes. Thus, understanding the future impacts of the

93. *Id.* at 633–34. For an explanation of the importance of the New York-New Jersey Compact to the Special Master’s decision, see note 75 and accompanying text.

94. *Id.* at 632.

95. *Id.* at 638. The parties wrangled over this case in their briefs, with New Jersey arguing that it controls the outcome and Delaware arguing it should be confined to its facts.

96. *Virginia v. Maryland*, 540 U.S. 56, 79 (2003).

97. *New Jersey III*, 552 U.S. at 639.

98. *Id.* at 632–33.

99. See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

100. See *infra* Part IV for a discussion about the litigation strategy the Court opens up in this case.

particular decision may be unnecessary fortune telling, but understanding the substantive drivers of this Opinion may help litigants predict and shape outcomes in future environmental cases. Part IV explores these forces.

IV. DRIVING THE DECISION: THREE UNDERLYING FACTORS

At first blush, it may be surprising to see the Court announce a new limiting principle (“extraordinary character”) for the purpose of defining “riparian jurisdiction” while providing very little analysis to either justify its adoption or define its applicability. However, Part IV argues that the Court’s adoption of this test actually falls in line with long-standing common law principles. Furthermore, in deciding the case in this manner, the Court has illuminated a path by which pro-environment litigants may win cases, even against strong business and economic interests. Section IV.A explores the way in which the Court’s resolution of the case brings the law full circle; regulating structures of “extraordinary character” seems quite similar to regulating nuisance. Second, Section IV.B argues that the Court’s decision is consistent with modern state water law. Finally, Section IV.C argues that the Court has given policymakers and litigators with otherwise unpopular environmental cases a roadmap for success. The Court remains a legal forum; as long as state environmental regulations are consistent with history and law, they can trump even new and powerful economic interests.

A. Full Circle: Regulation of Nuisance

In many ways, regulating structures of “extraordinary character” is quite similar to regulating nuisances. From the beginning of the dispute over the LNG facility, one of New Jersey’s key arguments was that Delaware did not begin regulating the Twelve-Mile Circle until relatively recently.¹⁰¹ Until 1969, Delaware regulated riparian improvements outshore of the low water mark on the eastern side of the Delaware River only when such improvements constituted a public nuisance under the common law.¹⁰² Though the Court rejected this argument as a reason to hold that New Jersey had exclusive regulatory authority, the Court

101. *See supra* Section III.A.

102. *Id.* On the ground, Delaware was not doing very much, if any, management of development in this area. Special Master Report, *supra* note 1, at 69–70.

accepted the facts underpinning this assertion and used them to craft its ultimate solution.¹⁰³

Public nuisance is not an easy claim to make. The comment to the Restatement (Second) of Torts (1979) § 821B Public Nuisance lists a number of actions that would constitute a public nuisance: “keeping diseased animals,” “shooting of fireworks,” “loud and disturbing noises,” “obstruction of a public highway or navigable stream,” and other “unreasonable interference[s] with a right common to the general public.”¹⁰⁴ Notably, “[i]n each of these instances the interference with the public right was so unreasonable that it was held to constitute a criminal offense.”¹⁰⁵ Accordingly, public nuisance at common law has traditionally been reserved for particularly egregious and obnoxious conduct.¹⁰⁶ In other words, public nuisance law could step in to prohibit “operations of extraordinary character,”¹⁰⁷ but not mere annoyances.

The Supreme Court’s creation of an “extraordinary character” test brings the law full circle and allows Delaware to regulate only those structures that would constitute a public nuisance. For environmentalists, this may be disappointing, though some have argued for an expanded understanding of nuisance law in the context of environmental protection.¹⁰⁸ The Court’s “new” test is driven by the principle underlying long-standing tort law: both parties in this dispute should be in approximately the same position they have always been relative to each other. New Jersey primarily builds and regulates structures extending into the river, and Delaware can only get involved when they constitute a nuisance.¹⁰⁹

103. See *supra* Section III.C.

104. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

105. *Id.*

106. Interstate nuisance, the tort that would technically apply here, is governed by similar principles. See *Missouri v. Illinois II*, 200 U.S. 496, 522 (1906) (Missouri’s scant evidence did not meet the “strictest proof” necessary to prove an interstate nuisance claim).

107. *New Jersey v. Delaware III*, 552 U.S. 597, 603 (2008).

108. See, e.g., Robert Haskell Adams, *Broadening Narrow Perspectives and Nuisance Law: Protecting Ecosystem Services in the ACF Basin*, 22 J. LAND USE & ENVTL. L. 243, 273 (2007). Given the Court’s insistence on a limiting principle in this case, however, it would be surprising for this Court to start expanding the definition of “nuisance” (or, “extraordinary character”) to start covering more environmental harms.

109. It may seem odd, however, that the Court did not just invoke the tried-and-true law of nuisance. The Court has a history of using nuisance to regulate interstate water disputes. See, e.g., *Missouri v. Illinois I*, 180 U.S. 208 (1901) (Missouri’s claim that Chicago’s rerouting of its sewage into the Mississippi River could be brought to the Supreme Court under an interstate nuisance claim). In line with the Restatement, the Court has set a high bar for allowing nuisance claims to succeed. See *Missouri v. Illinois II*, 200 U.S. 496 (1906) (Missouri’s evidence did not meet the strict proof necessary to prove an interstate nuisance claim). Federal common law, however, is very rare and can be displaced by federal statutes. For instance, the Clean Water Act has displaced the law of interstate nuisance when

Thus, the Court gives its first lesson to environmental litigants: pro-environment arguments consistent with longstanding common law principles can win. However, it is important to note that this case was not framed as a common law public nuisance case, or an environmental case. In the briefs, the dispute was framed strictly as a textual and contractual matter.¹¹⁰ Only when questioned at Oral Argument did the use of nuisance as a limiting principle even arise.¹¹¹ Delaware's counsel was understandably uncomfortable adopting this limiting principle; although this concession ultimately paved the way for his win, it undercut his textual and contractual arguments.¹¹² However, properly framed and limited by historical context, Delaware had little reason to fear this limitation, at least as it applies to the resolution of this case.

B. Consistency with Modern Water Law

Basic principles of state water law drive the solution in this case. The Restatement (Second) of Torts addresses reasonable use of water as follows: "A riparian proprietor is subject to liability for making an unreasonable use of . . . water . . . that causes harm to another riparian proprietor's reasonable use of water or his land."¹¹³ Determining whether a use is reasonable is a decision to be based on a number of factors, none of which is dispositive.¹¹⁴ Further, this decision uses a basic balancing test that has been used in the eastern United States since the mid-nineteenth century.¹¹⁵

it comes to interstate pollution cases. *See Illinois v. Milwaukee*, 451 U.S. 304 (1981). The issue here is similar: *New Jersey v. Delaware III* is governed by a Compact, which has the force of federal law. Thus, despite the fact that the Court explicitly referenced nuisance during the Oral Argument, it could not issue an opinion resting on federal common law. Instead, the Court created a standard based on the Compact that would do substantially the same work as the nuisance standard.

110. *See supra* Section III.A. *See also supra* Section III.B.

111. *See supra* Section III.B.

112. If the Court were truly taking seriously the principle that Delaware's reserved rights in the Compact after *New Jersey v. Delaware II* gave Delaware power to regulate structures built into its sovereign land, such sovereignty would not naturally be so limited by so strong a principle as public nuisance.

113. RESTATEMENT (SECOND) OF TORTS § 850 (1979).

114. *Id.* at § 850A. These factors include the "purpose of the use," the suitability of the water, the economic and social values of the use, the harm caused, the ability of each party to avoid the harm, the protection of the existing values of the water use, and "the justice of requiring the user causing harm to bear the loss." *Id.*

115. 1–6 JOSEPH W. DELLAPENNA, *WATERS AND WATER RIGHTS* § 6.01 (Amy L. Kelley et al. eds., 3rd ed. 2014). It is interesting to note, here, that New Jersey's argument about prescription and acquiescence would privilege pre-existing claims to the *use* of the water, rather than claims based on

The Court's newly introduced "extraordinary character" test seeks essentially the same information as a "reasonable use" test. A terminal like the Crown Landing would likely fail on a number of the factors that determine whether a use is reasonable.¹¹⁶ By contrast, a ship carrying tofu and bean sprouts, or a wharf constructed for the purpose of allowing small fishing boats on the water, would likely be considered a reasonable riparian use.¹¹⁷ Thus, the delineation of the extremes the Court mentions fit well within the boundaries of modern state water law.¹¹⁸ In fact, it is not terribly surprising or unusual for the Court to resolve interstate water disputes with an eye towards the background of state law.¹¹⁹ In this case, state water law gave the Supreme Court yet another way to comfortably rule in favor of environmental regulations. In future cases concerning environmental issues, parties would do well to carefully consider background principles of state and federal common law, as such principles might drive otherwise surprising outcomes.

Even so, it is strange to see the Court turn to principles of state law to resolve a dispute *between* conflicting state laws. The reason for this may be found in the Court's unusual positioning in this case. Unlike the vast majority of cases it decides, the Court heard this case under its original jurisdiction. Though the Court used the Special Master to make the case look *more* like an appellate case, the Order and Decree was the first—and only—binding decision the parties would receive. Both States had clear and substantial interests in the Court protecting their sovereignty, and the Court had an interest in maintaining its legitimacy as a forum for civil

ownership of the land. Though the Restatement § 850A(h) does indicate that "the protection of existing values of water uses" are to be considered, that concept comes from the "prior appropriation" doctrine common to western states. 2—12 OWEN L. ANDERSON, ROBERT E. BECK, & C. PETER GOPLERUD III, *WATERS AND WATER RIGHTS* §§ 12.01—02 (Amy L. Kelley et al. eds., 3rd ed. 2014). Perhaps that explains the Court's hostility to New Jersey's acquiescence claim and its simultaneous acceptance of Delaware's.

116. It would cause extensive harm and disruption to the Delaware River, it would be hard for the terminal to take up any less space or be any less intrusive of the public's use and enjoyment of adjacent land, and it seems to be more just, on balance, to require BP to bear the loss of the foregone opportunity to build a terminal than the citizens of Delaware to bear the burden of the nuisance without the corollary economic benefits. While it is true that the terminal would have economic value, that economic value would inure primarily to New Jersey and its citizens, though the nuisance would have been equally borne by Delaware's people.

117. DELLAPENNA, *supra* note 115.

118. See Joseph W. Dellapenna, *The Evolution of Riparianism in the United States*, 95 MARQ. L. REV. 53, 53 n.1 (2011) (casting *New Jersey v. Delaware III* as an application of state riparian law to a federal dispute).

119. Compare *New Jersey v. New York*, 283 U.S. 336 (1931) (balancing two states' interests in line with riparian reasonable use principles), with *Colorado v. New Mexico II*, 467 U.S. 310 (1984) (privileging prior use of water in New Mexico over Colorado's proposed use in line with western water law—prior appropriation—principles).

resolution of this controversy. Thus, instead of blindly applying canons of interpretation to the Compact, or worse, openly balancing policy interests, the Court reached to slyly incorporate state law into its decision. By doing so, it invoked legal principles to which both States would likely agree. Though the Court's resolution necessarily had to impinge on state sovereignty in order to resolve this dispute, it did so in a way consistent with the States' own conception of water disputes and, thus, brought legitimacy to its decision.

C. An Environmental Case?

Commentators have quibbled over whether the Roberts Court is truly an anti-environment Court.¹²⁰ In this case, Justice Ginsburg wrote an opinion for a majority comprised of herself, Chief Justice Roberts, and Justices Kennedy, Souter, and Thomas—hardly a left-wing alliance determined to trade economic development for a clean river. For those in favor of robust environmental protections, this case can be understood with hope. Had this case been argued as an “environment versus the economy case,” and the Court had split along typical ideological lines (with Justice Breyer recused), the case likely would have been decided in favor of the interests of New Jersey and BP. Despite the fact that the Court openly privileged tofu and bean sprouts over natural gas under similar circumstances, the Court made its decision based on long-standing legal principles,¹²¹ not environmental policy preferences.¹²²

Because this case was not decided on an ideological basis, i.e. as an “environmental case,” understanding the underlying principles that governed the course of the case may be useful for attempting to predict

120. See, e.g., Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009) (arguing that the Roberts Court has been far more “pro-government” than “pro-business”). See also Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703 (2000) (arguing that the Court does not even really outwardly appreciate the “environmental” character of its environmental cases).

121. These came especially from state law. See *supra* Section IV.A and Section IV.B for an explanation.

122. There is, of course, considerable debate as to the role of policy preferences in courts, particularly the Supreme Court. See generally Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter?: Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369 (2008) (using a different method of data analysis to argue against the traditional notion that policy drives Supreme Court decisions); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989) (providing significant evidence that ideological preferences play a large role in judicial decision making).

outcomes and the Court's approach in future cases. *New Jersey v. Delaware III*, due to its nature as an original jurisdiction case, gave the parties the opportunity to engage in extremely creative lawyering.¹²³ As the terms of the Compact were unique and hardly analogous even to other similar compacts, the Court turned to historical context and state water law to resolve the dispute.¹²⁴ However, the choice to frame it as a contractual argument, not an environmental argument, helped prevent ideology from trumping sound legal reasoning. If the Court is given solid legal principles upon which it can build a foundation for environmental protection, it will do so.

At the end of the day, it may be that the Roberts Court will favor the environment, at least inadvertently, so long as pro-environmental regulations fit into the long-standing frameworks of the law. For policymakers and environmental litigants, this is not a reason to despair. Instead, the road to environmental protection lies in creative lawyers understanding how to make pro-environmental arguments by relying on established legal precedent, without resorting to soft policy arguments that may amount to requests for the Court to openly balance environmental harms against economic gains. When presented with legal precedent—even outdated federal common law or formally inapplicable state law—and persuasive arguments based thereon, the Court will likely follow the letter of the law and reject policy based decisions upon which such litigants might otherwise attempt to rely. The Roberts Court may even be willing to create new tests to effectively resolve environmental disputes. We do not need a lawyer for the trees; we need a lawyer who understands how the trees fit into the jungle of the law.

V. CONCLUSION

The Opinion of the Court—though it was a compromise between two States' claims of jurisdiction—was decidedly pro-environment and anti-business. It was pro-environment because Delaware's denial of the permit was based on laws specifically geared toward preventing heavy industrial use in the Delaware River.¹²⁵ The decision was anti-business because the immediate effect was to end BP's ability to construct the Crown Landing

123. See Raphael, *supra* note 83.

124. See Dellapenna, *supra* note 118 at 53 n.1. See also Matthew F. Boyer, *The Role of Historical Context in New Jersey v. Delaware III* (2008), 11 DEL. L. REV. 101, 123 (2010) (arguing that historical context was "more than just one consideration among many" in this dispute; instead, it was dispositive).

125. See *supra* Section II.B.

project in the Delaware River; furthermore, Delaware's laws can proscribe any other similar uses.¹²⁶

The result in this case may seem odd for two reasons. First, the Court announced a brand new test for adjudicating interstate conflicts under this Compact. Given many Justices' affinity for textualism, history, and tradition, this result is rather striking. Properly understood, however, the "extraordinary character" test connects the parties' past co-regulation, historic federal common law, and state water law.

Second, despite this obvious pro-environmental result, the case was deliberately framed in non-environmental terms. Only Justice Scalia even gestures toward characterizing this case as environmental. This characterization may seem odd because the dispute between the States is, fundamentally, a policy dispute about the value of environmental protection versus economic gains; Delaware's laws supported the former—New Jersey's, the latter. In front of a Court that has been characterized as pro-business and anti-environment, however, litigants need to be aware that even compelling policy arguments will fall on deaf ears. Instead, the most successful strategies will dig deep into legal history and state law to argue for pro-environment solutions that square with history and tradition.

New Jersey and Delaware have been fighting for more than a century over the Delaware River. These disagreements boiled over in 2005 after Delaware authorities denied BP a permit to build an LNG terminal in the Delaware River inside the Twelve-Mile Circle. After hearings in front of the Special Master and the Supreme Court, the Court resolved the issue rather narrowly in Delaware's favor. Though the Court seemingly invented a new test—the "extraordinary character" test—to justify its holding, the test actually is well grounded in long-standing legal principles. Even if the "extraordinary character" test never appears again, the principles that drive it certainly will, and future environmental litigants would be wise to understand those principles in order to win future cases that take policy positions to which the Court is otherwise hostile.

126. *New Jersey v. Delaware III*, 552 U.S. 597, 624 (2008).

