Sporhase, the Commerce Clause, and State Power to Conserve Natural Resources - Is the Local Well Running Dry Symposium - Selected Topics on Constitutional Law - Comment.

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I. Introduction

Conserving natural resources for future generations while adequately satisfying current demand for these assets has become one of America's most complex problems, with no easy answers in sight. Often in conflict are state goals to preserve for their own citizens nature's local bounty and a recognition on the federal level that deference to jurisdictional borders can jeopardize efficient resource use.[1] The United States Supreme Court has on numerous occasions provided a forum for the airing of these divergent views.[2] The Commerce Clause,[3] historically a subject of extensive lit-

1. *Compare* House Joint Interim Comm., 66th Legislature of Texas, Report On A State Energy Plan 2 (1978) (congressional legislation has stymied hopes for increased state control over natural resources) *with* United States Water Resources Council Nat'l Conf. On Water 53-54 (April 22-24, 1975) (piecemeal approach to water law fails to meet needs of society confronted with limited supplies).

2. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (state efforts invalid to reserve landfill space for locally generated waste only); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 285-86 (1977) (residency requirement for commercial fishermen would encourage other states to erect similar barriers disrupting effective pattern of fishing practices); Pennsylvania v. West Virginia, 262 U.S. 553, 596 (1923) (state restriction requiring satisfaction of local needs for natural gas prior to export violates single nation principle

igation,[4] has become the primary tool for resolution of federal and state conflicts over natural resource control.[5]

Nowhere has this confrontation between national and local interests been more intense than in controversies regarding allocation of water, an element essential to life. Like other natural resources, the supply of water is finite.[6] Competition among agricultural, industrial, and residential users has steadily intensified[7] and prompted Texas, along with other states, to undertake detailed studies of projected water needs and future availability.[8] At least seventeen states have gone beyond the data-gather-

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behind Commerce Clause). *But see* Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 187 (1950) (interests of national and state governments same regarding preventing waste of state's natural resources).

3. U.S. CONST. art. I, § 8, cl. 3. This clause enumerates the power of Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

4. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964) (Commerce Clause empowers Congress to prohibit racial discrimination in places of public accommodation); United States v. Darby, 312 U.S. 100, 117-18 (1941) (wages and hours of employees in local enterprise affect interstate commerce); Champion v. Ames, 188 U.S. 321, 355 (1903) (congressional prohibition of interstate shipment of lottery tickets within commerce power); *see also* D. WATSON, THE CONSTITUTION OF THE UNITED STATES, 453-54 (1910) (over 2000 cases involving Commerce Clause had reached courts of last resort by 1910).

5. *See, e.g.*, Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 471-73 (1981) (promotion of resource conservation through banning milk sales in plastic containers constitutional under Commerce Clause); Hughes v. Oklahoma, 441 U.S. 322, 337-38 (1979) (prohibition of out-of-state transportation of natural minnows seined within state violates Commerce Clause); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960) (Commerce Clause does not invalidate Detroit's Smoke Abatement Ordinance aimed at reducing city's air pollution).

6. *See* T. DETWYLER & M. MARCUS, URBANIZATION AND ENVIRONMENT 131 (1972) (fixed amount of water available worldwide); *see also* R. FREEZE & J. CHERRY, GROUNDWATER 5 (1979) (table showing estimates of global water balance). The world's water supply, although constant, is continually changing form. *See* L. B. LEOPOLD, WATER—A PRIMER 4 (1974). The heat of the sun causes water to evaporate from the surface of the earth and enter the atmosphere as a gas. When the gas condenses, forces of gravity return it to the earth as rain. This process, known as the hydrologic cycle, represents the ongoing exchange of water between the earth and atmosphere. *See id.* at 4.

7. *See Water Availability for Energy Development in the West: Hearings Before the Subcomm. on Energy Production and Supply of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. 1 (1978) (statement of Senator Floyd Haskell, presiding).

8. *See* Wall St. J., July 6, 1982, at 29, col. 1 (Texas one of several states undertaking long-range water planning). The Staff of the Texas Department of Water Resources in June 1981 prepared a study entitled *Texas Water—An Outlook to the Year 2005*. The Department's research reveals that in urban areas throughout the state serious water shortages could exist almost immediately given the inevitable recurrence of drought conditions. *See* TEXAS DEPARTMENT OF WATER RESOURCES, TEXAS WATER—AN OUTLOOK TO THE YEAR 2005, at 7 (June 1981); *cf.* Hayton, *The Ground Water Legal Regime as Instrument of Policy Objectives and Management Requirements*, 22 NAT. RESOURCES J. 119, 119-21 (1982) (as

ing stage and have taken action to conserve their water through laws regulating or prohibiting its export.[9] The validity of one such statute was recently challenged in *Sporhase v. Nebraska*,[10] a case in which the Supreme Court reached a two-fold conclusion. In response to the defendant's claim of a Commerce Clause violation, the Court held constitutional a Nebraska statute conditioning interstate water export on certain agency findings.[11] A second statutory requirement, however, allowing export of water only if a water-receiving state granted Nebraska reciprocal water withdrawal rights, was declared an impermissible burden on interstate commerce.[12]

The *Sporhase* opinion has major ramifications both for states with

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wells go dry, world attention focuses on water supply problems). While campaigning for the passage of a state water amendment, the Mayor of Austin, Texas, Carole McClellan, cited statistics revealing that by the year 2005, Texas' population is expected to total twenty million and unless action is taken soon, critical water scarcities will exist statewide. *See* C. McClellan, Texas Water Crunch Nearing Reality 5 (1981) (unpublished paper prepared for Water for Texas Committee, available from Office of Speaker of the Texas House of Representatives). The legislation backed by Mayor McClellan and proposed by Bill Clayton, former Speaker of the Texas House of Representatives, provided for a water trust fund to finance projects designed to relieve water supply problems. *See* 1981 Tex. Sess. Law Serv., ch. 15, § 15.011, at 104 (Vernon). The implementation of this legislation depended upon the passage of a Constitutional Amendment which was rejected by voters in November 1981. *See* Proposed Constitutional Amendment-Excess State Revenue, Guarantee of Local Government Obligations, and Interest on Bonds, 1981 Tex. Sess. Law Serv. at 254 (Vernon); San Antonio Express, Nov. 1, 1981, at 11A, col. 7.

9. *See* ARIZ. REV. STAT. ANN. § 45-153 B (Supp. 1982); CAL. WATER CODE § 1230 (Deering 1971); COLO. REV. STAT. §§ 37-81-101, -103 (Supp. 1981), 37-90-136 (1973); IDAHO CODE §§ 42-401, -408, -411 (1977); KAN. STAT. ANN. § 82a-72b (1977); MONT. CODE ANN. §§ 85-1-121, -2-104 (1981); NEB. REV. STAT. § 46-613.01 (1978); NEV. REV. STAT. § 533.515 (1979); N.M. STAT. ANN. § 72-12-19 (1978); N.Y. ENVTL. CONSERV. § 15-1505 (McKinney 1981); OKLA. STAT. ANN. tit. 27, § 7.6 (West Supp. 1982); OR. REV. STAT. §§ 537.810, .870 (1981); R.I. GEN. LAWS § 46-15-9 (1980); S.D. COMP. LAWS ANN. §§ 46-1-13, -5-20.1 (Supp. 1982); UTAH CODE ANN. § 73-2-8 (1980); WASH. REV. CODE ANN. §§ 90.03.300, .16.110, .16.120 (1962); WYO. STAT. §§ 41-1-105, -3-105, -3-115(b), (c) (1977).

10. ___ U.S. ___, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

11. *Id.* at ___, 102 S. Ct. at 3465-66, 73 L. Ed. 2d at 1266. The Nebraska statute read:

> Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.

NEB. REV. STAT. § 46-613.01 (1978).

12. Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3467, 73 L. Ed. 2d 1254, 1269 (1982).

water export laws already in place and for those, like Texas, currently grappling with the water management dilemma.[13] The fate of existing and proposed statutes largely depends upon the changing constitutional definition of commerce, as well as the application of established Supreme Court tests. This comment will examine the mounting trend evidenced in Supreme Court decisions toward disallowing local attempts to prohibit the export of natural resources. *Sporhase*'s bearing on this line of cases and its guidelines and implications will provide the major focus of analysis.

II. THE EVOLUTION OF "COMMERCE"

Whether the challenge raised under the Commerce Clause is based upon a claim that Congress exceeded its commerce power [14] or that a state unduly burdened the interstate market,[15] reference is often made to

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13. *See* Note, *Interstate Transfer of Water: The Western Challenge to the Commerce Clause*, 59 TEX. L. REV. 1249, 1250-51 (1981). In December 1981, Governor William Clements of Texas authorized a Water Task Force to study water development and conservation and to recommend legislative alternatives. *See* Exec. Order No. WPC-23A, 6 Tex. Reg. 4571 (Dec. 11, 1981). In response to the Governor's Task Force, the Edwards Underground Water District, which encompasses five counties in Central Texas, held regional forums, beginning in July 1982, to assist in determining what actions were needed to insure future water supplies. *See generally* EDWARDS UNDERGROUND WATER DISTRICT, REGIONAL WATER RESOURCES ISSUES—A BACKGROUND FOR DISCUSSION (1982) (available at Edwards Underground Water District Office). In September 1982, the Governor's Task Force announced its recommendations, which included the appointment of a Multi-State Water Resources Planning Commission to study and supervise water importation as part of a long-range water plan. *See* GOVERNOR'S TASK FORCE ON WATER RESOURCE USE AND CONSERVATION, RECOMMENDATIONS ON FINANCE, WATER RESOURCE USE AND CONSERVATION, AND IMPORTATION, H-12 (September 2, 1982) (available from Office of the Governor of Texas).

14. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 281 (1981) (Congress did not exceed Commerce Clause powers by adopting Surface Mining Act to protect environment); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (Civil Rights Act of 1964 constitutional exertion by Congress of power to protect interstate commerce from adverse effects of racial discrimination); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31, 41-42 (1937) (National Labor Relations Act valid assertion of congressional authority to safeguard interstate commerce from effects of unfair labor practices at steel factory). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-4 to 5-8, at 232-44 (1978) (summary of litigation centered around Commerce Clause as affirmative grant of power to Congress).

15. *See, e.g.*, Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 128-29 (1978) (Maryland law prohibiting producers or refiners of petroleum goods from operating retail outlets in state not undue burden on interstate commerce); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959) (Illinois mud flap requirement for trucks and trailers posed impermissible burden on interstate commerce); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) (practical effect of city ordinance banning sales of milk not processed in nearby plants was discriminatory burden on interstate commerce). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-2 to 6-5, at 320-27 (1978) (limits imposed on state action by Commerce

the intent of the Constitution's framers.[16] Indeed, the principal reason for calling the Constitutional Convention was a desire to grant power over interstate and international commerce to the national government.[17] This desire arose as a direct result of the trade wars proliferating among the states under the weak Articles of Confederation form of government.[18] The Commerce Clause was intended to end this Balkanization by guaranteeing consumers the benefit of free competition among all regions of the nation and producers equal access to all markets.[19]

Since the days of John Marshall and *Gibbons v. Ogden*,[20] the term "commerce" has come to include a vast range of goods and activities. From navigable rivers[21] to wheat grown on an Ohio farm,[22] from lottery tickets[23] to narcotics,[24] "commerce" embraces a spectrum of transactions surely unforseen by the Founding Fathers.[25] This semantic evolution mirrors not only the increasing complexity of society's economic interactions,

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Clause).

16. *Compare* Houston & Texas Ry. v. United States, 234 U.S. 342, 350 (1914) (congressional power to regulate intrastate railroad rates based on purposes behind Commerce Clause) *with* Baldwin v. G. A. F. Seelig, 294 U.S. 511, 522 (1935) (New York's price discrimination against imported milk would encourage reprisals by other states leading to trade wars Commerce Clause intended to prevent).

17. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 113 (10th ed. 1980); D. WATSON, THE CONSTITUTION OF THE UNITED STATES 38 (1910); *see also* C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 40-46 (1941) (summary of economic interests motivating backers of Constitution who lobbied for protection of commerce by national government).

18. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring). Justice Johnson described the reaction of the states to their newly won freedom during the aftermath of the Revolution. *See id.* at 224. Jealous of powers finally wrenched from England, the states imposed a maze of commercial regulations which ultimately damaged interstate relations, as well as foreign trade. *See id.* at 224.

19. *See* H. P. Hood & Sons v. DuMond, 336 U.S. 525, 533-35 (1949).

20. 22 U.S. (9 Wheat.) 1 (1824).

21. *See id.* at 197. Chief Justice Marshall described commerce as more than simply the buying and selling of goods. "Every species of commercial intercourse" fit within his defintion, easily including navigation. *See id.* at 193.

22. *See* Wickard v. Filburn, 317 U.S. 111, 114, 127-28 (1942) (wheat grown on 12 acre plot and intended for home consumption within scope of commerce power).

23. *See* Champion v. Ames, 188 U.S. 321, 357-58 (1903) (power to regulate includes power to prohibit traffic in lottery tickets thought to pollute interstate commerce).

24. *See* United States v. Esposito, 492 F.2d 6, 10 (7th Cir. 1973) (Congress has power to regulate distribution of cocaine without requiring proof of nexus with interstate commerce), *cert. denied*, 414 U.S. 1135 (1974).

25. *Compare* A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 503 (1968) (Madison's journal of Constitutional Convention reports Pinckney's list of commercial interests which included fishing and trade in flour, tobacco, rice, and indigo) *with* United States v. Darby, 312 U.S. 100, 123 (1941) (hours and wages of employees in local industries can substantially affect interstate commerce and therefore are subject to congressional regulation).

but also the growing interdependence of one section of the nation upon another.[26] Interstate reliance has been fostered by the specialization of certain geographic areas in identifiable fields[27] and by the dwindling of supplies in regions where growing population or other pressures have been brought to bear.[28]

Even after an item has been labeled an article of interstate commerce, Congress' power over it is not exclusive.[29] Unless preempted by a federal statute, states retain authority to regulate matters affecting interstate commerce.[30] As set forth in *Pike v. Bruce Church, Inc.*,[31] a statute which operates evenhandedly to accomplish a legitimate local purpose will be upheld unless the burden on interstate commerce is clearly excessive in relation to the professed local benefits.[32] This test, it must be emphasized, is only pertinent to dormant Commerce Clause cases, situations in which

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26. *See* W. VON ECKARDT, THE CHALLENGE OF MEGALOPOLIS 82, 113 (1964).

27. *See id.* at 66, 68.

28. *See id.* at 112-13 (New York City has been forced to go into New Jersey and Pennsylvania to obtain water supplies); *cf.* F. CHAPIN, JR. & E. KAISER, URBAN LAND USE PLANNING 13-14 (1979) (states' prior reluctance to conserve actively only those resources significant to own citizens changing as national awareness of impending shortages increases).

29. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) (subjects potentially open to federal control can be regulated by states in manner compatible with Commerce Clause); Southern Pacific Co. v. Arizona, 325 U.S. 761, 766-67 (1945) (states possess residuum of power to regulate matters affecting interstate commerce); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851) (states free to legislate if subject matter of regulation requires diversity of treatment rather than uniform national rule). Chief Justice Marshall wrestled with this exclusivity issue in *Gibbons v. Ogden* and, as a consistent proponent of strong national government, noted with favor the argument behind treating the commerce power as an entirely federal one. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824). By 1829, Marshall had apparently concluded, however, that the states possessed some residuum of power over matters affecting interstate commerce, at least where the health of their citizens was concerned. *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829) (erection of dam authorized by Delaware law not repugnant to commerce powers of Congress).

30. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) (absence of federal legislation frees states to regulate subjects of interstate commerce within constitutional limits); Aldens, Inc. v. LaFollette, 552 F.2d 745, 752 (7th Cir. 1977) (where Congress has not legislated regarding specific subject matter, Commerce Clause does not vitiate state powers to do so unless local regulation poses impermissible burden on interstate commerce), *cert. denied*, 434 U.S. 880 (1977); Feldman v. Philadelphia Nat'l Bank, 408 F. Supp. 24, 37 (E.D. Pa. 1976) (unless Congress clearly intended to occupy field, states may continue to regulate).

31. 397 U.S. 137 (1970).

32. *See id.* at 142. Steps followed by the Court in applying this test include determining whether the burden on interstate commerce is trivial or substantial, whether a local public interest is really at stake, and whether the regulation effectuates this interest. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471-73 (1981). If the state regulation discriminates against interstate commerce, either on its face or in practical effect, the court surveys the alternatives to gauge their potential impact and practicability. *See id.* at 473-74.

Congress has not yet acted but nevertheless possesses the power to do so.[33] When the Court engages in this type of review, the state legislature's purported intent, as well as any independent evidence of its real motivation, are open to scrutiny.[34] The *Pike* test calls for a balancing process applied according to subjective standards.[35] In different contexts, uncertainty always exists whether the burden imposed on interstate commerce will be deemed to outweigh the local benefits achieved by a state regulation.[36]

III. The Anti-Embargo Trend

One category of dormant Commerce Clause cases in which the result appears increasingly predictable includes challenges of state statutes prohibiting the export of local natural resources. In the past, such prohibitions have frequently been conditioned on the occurrence or nonoccurrence of a specific event.[37] In *Pennsylvania v. West Virginia*,[38] the Supreme Court struck down a West Virginia statute making the export of natural gas contingent on the prior fulfillment of all statewide requirements.[39] In 1979, Louisiana enacted legislation requiring that intrastate purchasers be given the first opportunity to buy natural gas produced

33. *See, e.g.*, Breard v. Alexandria, 341 U.S. 622, 634 (1951) (until Congress acts, states retain power to regulate solicitation for interstate sales); California v. Zook, 336 U.S. 725, 728 (1949) (state action valid where Congress silent and activity regulated predominantly local); Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346, 351 (1939) (until Congress chooses to exercise its preeminent authority, states free to control conditions affecting citizen welfare). *See generally* J. Nowak, R. Rotunda, & J. Young, Constitutional Law 243-44 (1978) (absent preempting federal legislation, Court interpreting congressional silence when ruling on validity of state regulation affecting interstate commerce).

34. *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (Court not bound by legislature's characterization of statute's goals); BT Inv. Managers, Inc. v. Lewis, 461 F. Supp. 1187, 1196 (N.D. Fla. 1978) (mere incantation of legitimate legislative purpose insufficient to rescue discriminatory statute), *aff'd in part and vacated in part*, 447 U.S. 27 (1980).

35. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (balancing approach used to resolve what degree of burden inflicted on interstate commerce is tolerable).

36. *See* Hellerstein, *Hughes v. Oklahoma: The Court, The Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 71. Although the *Pike* standard is now the test consistently used by the Court when state regulations face a Commerce Clause challenge, the imprecision of its components produces unpredictable results. *See id.* at 71.

37. *Compare* Tenneco, Inc. v. Sutton, 530 F. Supp. 411, 422 (M.D. La. 1981) (construing Louisiana statute which blocked natural gas produced in-state from entering interstate market unless offer to sell made to intrastate users first) *with* Pennsylvania v. West Virginia, 262 U.S. 553, 582-85 (1922) (construing West Virginia export ban on natural gas in effect as long as local needs unfulfilled).

38. 262 U.S. 553 (1923).

39. *See id.* at 597-98.

within the state.[40] Tenneco, engaged in the interstate transport and sale of natural gas, successfully petitioned a Louisiana federal district court to declare this statute violative of the Commerce Clause on the ground that the measure, both on its face and in practical effect, operated as a trade embargo.[41] In February 1982, the Supreme Court struck down an attempt by New Hampshire to prohibit the export of hydroelectric energy generated at plants located inside the state.[42] The ban had been preconditioned upon a finding by the New Hamsphire Commission that such energy was needed for use within the state.[43]

Unconditional bans have likewise failed the Commerce Clause test. In *West v. Kansas Natural Gas Co.*,[44] Oklahoma's prohibition on the transport of gas produced in the state to points outside its borders was held unconstitutional.[45] The Court reasoned that allowing such a statute to stand would violate the ideal behind the Commerce Clause and lead to a situation where "Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals."[46]

Embargoes which are either motivated by economic protectionism or at least have this effect are especially vulnerable to a Commerce Clause attack regardless of their purported conservationist objectives.[47] In *H. P.*

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40. *See* LA. REV. STAT. ANN. § 30:607C(2) (West Supp. 1982).

41. *See* Tenneco, Inc. v. Sutton, 530 F. Supp. 411, 439-40 (M.D. La. 1981). Texas has a natural gas statute, similar to the one held unconstitutional in *Tenneco*, which provides preferences to in-state users during times of shortage. *See* TEX. NAT. RES. CODE ANN. arts. 52.291- .296 (Vernon 1978). The Texas statute, however, only applies to state-owned natural gas, a difference perhaps critical to its constitutionality. *But see* Anson & Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 93-94 (1980) (Texas statute unconstitutional because in-state preference requirement applies beyond stage of state's award of leases to sales by producers).

42. *See* New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982). In a unanimous opinion written by Chief Justice Burger, the Court noted that a national awareness of the need for comprehensive water resource planning found expression as early as 1920 when Congress, through exercise of its commerce powers, enacted the Federal Power Act. *See id.* at 340.

43. *See id.* at 346. The statute containing this contingent embargo had been in effect since 1913 but had never been utilized until 1980. *See id.* at 345.

44. 221 U.S. 229 (1911).

45. *See id.* at 262.

46. *See id.* at 255.

47. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981) (almost per se rule of invalidity applies to statutes which facially promote environmental interests but in reality protect economic concerns); Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978) (Court decisions reflect alertness to state laws furthering economic protectionism); Baldwin v. G. A. F. Seelig, 294 U.S. 511, 522-23 (1935) (economic parochialism practiced by New York inconsistent with Commerce Clause principles); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-6, at 328 (1978) (state regulation aimed at safeguarding local economic interests repeatedly held unconstitutional).

Hood & Sons v. DuMond,[48] New York denied a milk depot license because of a possible increase in market competition.[49] Harshly critical of such monetary parochialism, Justice Jackson stressed that "our economic unit is the Nation"[50] and found New York's action constitutionally unsound.[51] Thirty years later in *Hughes v. Oklahoma*,[52] Justice Brennan quoted this language in declaring invalid an Oklahoma law prohibiting the transport for sale outside the state of minnows seined within state waters.[53] In so ruling, the Court described Oklahoma's ecology arguments as post-hoc rationalization unsupported by any factual determinations.[54]

The anti-embargo trend reflected by this line of decisions is underscored by the two primary water cases which lay the foundation for *Sporhase*. The first, *Hudson County Water Co. v. McCarter*,[55] was decided in 1908 in an opinion written by Justice Oliver Wendell Holmes. Holding that a state could constitutionally maintain its rivers in substantially undiminished form, the majority upheld a New Jersey statute forbidding the interstate transfer of state surface water.[56] Juxtaposed against this decision is the more recent case of *City of Altus v. Carr*,[57] in which the Court summarily affirmed a district court's judgment as to the invalidity of a Texas statute which barred the export of Texas groundwater without prior legislative authorization.[58] The Oklahoma city of Altus had negotiated a lease with landowners in nearby Wilbarger County,

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48. 336 U.S. 525 (1949).

49. *See id.* at 529.

50. *Id.* at 537.

51. *See id.* at 537. The Court reasoned that New York could not strive to maintain a constant milk supply for its own markets by blocking the establishment in New York of a milk processing plant serving Massachusetts markets. *See id.* at 539-40.

52. 441 U.S. 322 (1979).

53. *See id.* at 329-30.

54. *See id.* at 338 n.20. On appeal, Oklahoma argued that the ban was justified because minnows bought in the state were more likely to be returned to state waters as bait, thereby maintaining ecological balance. The lack of evidence supporting this position together with the fact that Oklahoma did not raise the issue until appeal led the Court to conclude such argument was only rationalization. *See id.* at 338 n.20.

55. 209 U.S. 349 (1908).

56. *See id.* at 356-57.

57. 385 U.S. 35 (1966) (per curiam).

58. *See id.* at 35; *see also* City of Altus v. Carr, 255 F. Supp. 828, 839-40 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966) (since water is article of commerce in Texas, its export cannot be constitutionally prohibited). The statute at issue read:

> No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it.

Act of June 17, 1965, ch. 568, § 2, 1965 Tex. Gen. Laws 1245.

Texas, for the purpose of mining subsurface waters.[59] Subsequently, State Representative W. S. Heatly, whose district included Wilbarger County, proposed the statute at issue in *Altus* which, if upheld, would have thwarted the Oklahoma municipality's efforts to obtain a reliable future water supply.[60] Without distinguishing *Hudson,* the district court relied on the natural gas cases, *Pennsylvania v. West Virginia*[61] and *West v. Kansas Natural Gas Co.*,[62] to find water a commercial commodity and the Texas statute an unreasonable burden on interstate commerce.[63] Since the Supreme Court's affirmance was issued in a per curiam format, the basis for the decision, as well as its scope, remained uncertain.[64] Did *Altus* overrule *Hudson*? Is the article of commerce designation only applicable to water in states following the same system of water law as Texas? Does water still retain a special status, or should it be handled judicially like other natural resources? These questions lingered after *Altus* and awaited clarification in *Sporhase.*

Before proceeding to a closer look at the answers *Sporhase* yields, three exceptions to the anti-embargo trend should be noted. When a state acts as taxing agent, as market participant, or as environmental protector, the Court has retreated from its usually careful scrutiny of state regulations of natural resources.[65] The Court upheld Montana's increase in the maximum rate of taxation on coal severance to thirty percent[66] despite the

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59. *See* City of Altus v. Carr, 255 F. Supp. 828, 831 (W.D. Tex.), *aff'd per curiam,* 385 U.S. 35 (1966).

60. *See id.* at 832.

61. 262 U.S. 553 (1923).

62. 221 U.S. 229 (1910).

63. *See* City of Altus v. Carr, 255 F. Supp. 828, 839-40 (W.D. Tex.), *aff'd per curiam,* 385 U.S. 35 (1966). Altus had spent $110,720 on engineering studies and on execution of the lease in addition to having held a bond election to finance the project; thus, the equities were largely on Oklahoma's side. *See id.* at 832.

64. *See, e.g.,* Special Project, *Reasonable State Regulation of the Interstate Transfer of Percolating Water,* 2 NAT. RESOURCES LAW 383, 389-90 (1969) (doubt cast on validity of *Hudson* after *Altus* but exact ramifications unknown); Comment, *"It's Our Water!"—Can Wyoming Constitutionally Prohibit the Exportation of State Waters?,* 10 LAND & WATER L. REV. 119, 122-23 (1975) (arguments both for and against constitutionality of water statutes dependent upon interpretation of *Altus*); Comment, *Do State Water Anti-Exportation Statutes Violate the Commerce Clause? or Will New Mexico's Embargo Law Hold Water?,* 21 NAT. RESOURCES J. 617, 619-20 (1981) (problems in reconciling *Hudson* and *Altus* aggravated by lack of full opinion in latter case).

65. *See, e.g.,* Commonwealth Edison Co. v. Montana, 454 U.S. 609, 636-37 (1981) (30% severance tax on coal valid); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471-72 (1981) (ban on milk sold in plastic containers protects environment in manner consistent with Commerce Clause); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (Commerce Clause does not preclude states from entering marketplace and favoring own citizens).

66. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 636-37 (1981). In evaluating

combined facts that this state contains more than half the national low-sulfur coal reserves and that most coal consumers are out-of-state residents.[67] In *Hughes v. Alexandria Scrap Corp.*,[68] a similarly deferential approach emerged. Distinguishing between states as market participants and as market regulators, the Court upheld a Maryland subsidy program designed to accelerate the disposal of scrap automobiles blighting the landscape although conditions for obtaining payment favored state residents.[69] Moreover, states are apparently given considerable leeway in solving environmental problems, even those commonplace nationwide.[70]

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the Commerce Clause challenge to Montana's severance tax, the Court did not employ the *Pike* criteria but rather applied a four-part test developed in *Complete Auto Transit, Inc. v. Brady*. If the activity taxed possesses a substantial nexus with the taxing state, is apportioned equitably, reflects no discrimination against interstate commerce, and is fairly related to state services, then the tax is constitutional. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). Justice Marshall, in *Commonwealth Edison Co.*, observed that the amount of tax paid depends on the amount of coal bought and not on the destination of shipment; therefore, state residency plays no part in the tax calculation. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 618 (1981). The plaintiffs also argued that the amount of tax far exceeded the costs incurred by Montana as a result of mining activities. Such costs allegedly included expenditures for roads, police, fire, and environmental protection. *See id.* at 620 n.10. The majority, however, accepted the Montana Supreme Court's interpretation that the tax was for general revenue purposes and thus need not be measured against mining costs only. *See id.* at 621. Justice Blackmun, in dissent, noted that commentators had labeled Montana's severance tax policy an OPEC-like method of income maximazation. *See id.* at 643 (Blackmun, J., dissenting).

67. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 638-39 (Blackmun, J., dissenting).

68. 426 U.S. 794 (1976).

69. *See id.* at 809-10. The Court concluded that, absent federal action, the Commerce Clause does not preclude states from entering the marketplace and giving preference to their own citizens. *See id.* at 810. In line with the *Hughes* reasoning, the Court later upheld South Dakota's decision to limit the sale of cement from a state-owned plant to state residents during times of shortages. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 446-47 (1980). The Court emphasized the state's ownership of the plant and its resulting entry into the market in this capacity. *See id.* at 438-40. When so acting, a public entity, just like a private business, can exercise discretion in its dealings. *See id.* at 439 n.12. In answering the challenger's protectionist argument, the Court pointed out that the plant, like state universities, business development programs, and even police and fire protection, was totally funded by South Dakotans. *See id.* at 442. Channelling citizen-financed benefits to citizens was protectionist only "in a loose sense" and more clearly an example of state government serving those whose interests it was designed to represent. *See id.* at 442. The Court distinguished prior anti-embargo cases by stating that cement, unlike coal, wild game, or minerals, was the "end-product of a complex process whereby a costly physical plant and human labor act on raw materials." *Id.* at 444. The dissent viewed this distinction as meaningless since the exploitation of all natural resources involves similar processing. *See id.* at 448 n.2 (Powell, J., dissenting).

70. *See* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960) (city's Smoke Abatement Code valid exercise of police power to relieve air pollution); *see also* Wall

Although challenged as an economic protectionist measure favoring local industry, Minnesota's ban against milk sold in plastic containers passed the Court's traditional dormant Commerce Clause test with ease.[71]

IV. THE SPORHASE DECISION

The Ogallala Aquifer, which underlies parts of Kansas, Nebraska, Oklahoma, South Dakota, and Texas,[72] was the center of the controversy in *Sporhase v. Nebraska*.[73] The two defendants were farmers who co-owned adjoining tracts of land, one in Colorado and the other in Nebraska.[74] A well situated on the Nebraska tract pumped water from the Ogallala for irrigation of both tracts.[75] The State of Nebraska sued to enjoin the defendants from exporting local water into Colorado without first obtaining a permit as required by state law.[76] The statute in question conditioned permit approval upon certain administrative findings and upon a reciprocal grant to Nebraska of the right to remove water from the receiving state.[77] Rejecting the defense that the Nebraska statute violated the Commerce Clause, the trial court granted an injunction halting the cross-state irrigation;[78] and the Nebraska Supreme Court affirmed.[79] The United States Supreme Court held constitutional that part of the statute which conditioned water export on agency approval, but invalidated the section requiring reciprocity.[80]

St. J., Jan. 22, 1981, at 8, cols. 1 & 2 (Supreme Court reaffirms states' latitude in devising local solutions to environmental problems of national importance).

71. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471-74 (1981); *see also* Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762, 1784 (1974) (federal system encourages adoption of problem solutions reflective of local preferences).

72. *See* J. FRYE & A. LEONARD, CORRELATION OF THE OGALLALA FORMATION (NEOGENE) IN WESTERN TEXAS WITH TYPE LOCALITIES IN NEBRASKA 5 (August 1959) (Bureau of Economic Geology Report of Investigations No. 39). Aquifers are layers of rock or soil which contain and transmit water. *See* T. DETWYLER & M. MARCUS, URBANIZATION AND THE ENVIRONMENT 127 (1972). Experts predict that at the current rate of water removal, the Ogallala will be depleted in 40 years. *See The Browning of America*, NEWSWEEK, Feb. 23, 1981, at 30.

73. ___ U.S. ___, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

74. *Id.* at ___, 102 S. Ct. at 3458, 73 L. Ed. 2d at 1258.

75. *Id.* at ___, 102 S. Ct. at 3458, 73 L. Ed. 2d at 1258.

76. *Id.* at ___, 102 S. Ct. at 3458, 73 L. Ed. 2d at 1258.

77. *See* note 11 *supra* for text of the Nebraska statute.

78. *See* Nebraska v. Sporhase, 305 N.W.2d 614, 616 (Neb. 1981), *rev'd*, ___ U.S. ___, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

79. *See id.* at 620. The Nebraska Supreme Court held that groundwater in Nebraska was not an article of commerce and that the Commerce Clause, therefore, had no application to the state statute regulating its export. *See id.* at 618.

80. *See* Sporhase v. Nebraska, ___ U.S. ___, 102 S. Ct. 3456, 3464-65, 3467, 73 L. Ed. 2d 1254, 1265-66, 1269 (1982).

The majority concluded in *Sporhase* that groundwater is an article of commerce,[81] that Nebraska's reciprocity requirement inflicted an undue burden on interstate commerce,[82] and that Congress had given the states no authority to impose such a burden.[83] In arriving at these conclusions, the Court answered the questions that had remained after its memorandum decision in *Altus*. That case struck down Texas' ban on groundwater export but did not expressly overrule *Hudson*, the Holmes opinion validating New Jersey's water embargo statute.[84] The Court's reasoning in *Sporhase* reveals that *Altus* did not overrule *Hudson* by implication either and that the results, if not the reasoning, in both cases could still be sound.[85] *Sporhase* also clearly establishes that groundwater is to be considered an article of commerce in all states, not only those following a particular system of water law.[86] Lastly, the *Sporhase* decision teaches that water retains a special status among natural resources giving states the ability to favor their own citizens during times of scarcity.[87]

A. *Groundwater Held an Article of Interstate Commerce*

The Court began its analysis with a discussion of the *Hudson* and *Altus* decisions.[89] In *Hudson*, the export statute had been found a valid exercise of state police powers.[89] With regard to water, "a great public good," Justice Holmes observed that a state could keep all that it has and "give no one a reason for its will."[90] The *Sporhase* Court followed Justice Holmes' approach that a state's authority to regulate water export derives from its police powers.[91] The requirements of proof, however, which the Court developed later in its opinion, are highly demanding.[92] The *Sporhase* major-

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81. *See id.* at ___, 102 S. Ct. at 3463, 73 L. Ed. 2d at 1264.

82. *Id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267.

83. *Id.* at ___, 102 S. Ct. at 3466, 73 L. Ed. 2d at 1268.

84. *See* Hudson Water Co. v. McCarter, 209 U.S. 349, 358 (1908); City of Altus v. Carr, 255 F. Supp. 828, 839-40 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966).

85. *See* Sporhase v. Nebraska, ___ U.S. ___, 102 S. Ct. 3456, 3461, 3463-64, 73 L. Ed. 2d 1254, 1261-62, 1264-66 (1982).

86. *See id.* at ___, 102 S. Ct. at 3463, 73 L. Ed. 2d at 1264.

87. *See id.* at ___, 102 S. Ct. at 3464, 73 L. Ed. 2d at 1266.

88. *See id.* at ___, 102 S. Ct. at 3458-61, 73 L. Ed. 2d at 1259-62.

89. *See* Hudson Water Co. v. McCarter, 209 U.S. 349, 355-56 (1909).

90. *Id.* at 357.

91. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3464, 73 L. Ed. 2d 1254, 1266 (1982). The Court stressed that a state's ability to regulate water use during periods of scarcity to foster the health of its citizenry, not just that of its economy, was at the heart of the police power. *See id.* at ___, 102 S. Ct. at 3464, 73 L. Ed. 2d at 1266.

92. *See id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267. A state can still, consistent with *Sporhase*, keep all its water in-state, as Holmes contended, but must undergo full Commerce Clause analysis in order to do so. *See id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d

ity pointed out that *Hudson* revolved primarily around a just compensation claim.[93] The few sentences in *Hudson* that dealt with the Commerce Clause challenge[94] focused on *Geer v. Connecticut*,[95] a case which had promulgated the theory of state ownership of wild animals.[96] *Geer* was overruled in 1979[97] and the *Sporhase* Court emphasized that the public ownership theory of game or other natural resources is only a legal fiction evidencing a state's police powers to regulate for the health of its citizens.[98] Nebraska, like New Jersey in *Hudson*, had argued that under its state law water was publicly owned and that state ownership shielded water regulations from Commerce Clause attack.[99] Terming public ownership a fiction, not a reality, the majority in *Sporhase* rejected this approach, thereby paving the way for Commerce Clause review.[100]

Turning next to *Altus*, the Court observed that its memorandum decision indicated only a concurrence in the result reached by the district court, not necessarily in the reasoning.[101] The district court in *Altus* had

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at 1267.

93. *See id.* at ___, 102 S. Ct. at 3459, 73 L. Ed. 2d at 1259. The defendant in *Hudson*, the party desiring to pipe New Jersey stream water into New York, alleged that the New Jersey anti-export statute, as applied, resulted in a taking without compensation in violation of due process. *See* Hudson County Water Co. v. McCarter, 209 U.S. 349, 354 (1908). The Court held that the statute was a legitimate exercise of police powers and not an exercise of eminent domain authority necessitating compensation. *See id.* at 355-56.

94. *See* Hudson County Water Co. v. McCarter, 209 U.S 349, 357 (1908). "The other defenses also may receive short answers. A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end." *Id.* at 357.

95. 161 U.S. 519 (1896).

96. *See id.* at 529-30.

97. Hughes v. Oklahoma, 441 U.S. 322, 326 (1979). The *Hughes* Court observed that the logical consequence of *Geer*'s public ownership theory was the state's ability to remove wild game from interstate commerce. *See id.* at 327. Classification of this doctrine as only a legal fiction enabled the *Hughes* Court to apply the same tests to state wildlife regulation as applied to state controls imposed on other natural resources. *See id.* at 335. *See generally* Comment, *State Wildlife Regulation and the Commerce Clause: Fall of the State Ownership Doctrine*, 20 URB. L. ANN. 215, 219-25 (1980) (state ownership theory of *Geer* no longer screens state wildlife regulations from burden on commerce analysis).

98. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3461, 73 L. Ed. 2d 1254, 1262 (1982); *see also* Brief for City of El Paso at 5, Sporhase v. Nebraska, ___ U.S. ___, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982) (public ownership claim mere fiction expressing public interest in controlling use of scarce resource).

99. *See* Sporhase v. Nebraska, ___ U.S. ___, 102 S. Ct. 3456, 3462, 73 L. Ed. 2d 1254, 1262-63 (1982); *see also* Anson & Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 85-86 (1980) (regulation of resources owned by state beyond dormant Commerce Clause scrutiny).

100. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3455, 3462, 73 L. Ed. 2d 1254, 1263 (1982).

101. *Id.* at ___, 102 S. Ct. at 3461, 73 L. Ed. 2d at 1261.

placed great emphasis on groundwater as an article of commerce under Texas law.[102] In *Sporhase,* Nebraska urged that, unlike Texas, its state law precluded groundwater from becoming an article of commerce by restricting the sale and transportation of water off the overlying land.[103] Writing for the majority, Justice Stevens rejected this argument and eliminated the significance of local patterns of water law in determining whether the article of commerce designation applied.[104] In view of the multi-state dimension not only of groundwater's use in irrigating crops bought and sold nationwide but also of the Ogallala Aquifer's location beneath several states, the *Sporhase* majority proceeded to place all groundwater squarely within the definition of commerce.[105] To do otherwise, the Court remarked, would imply that if Congress chose to exercise its commerce powers in the area of groundwater legislation, limitations on such regulation would hinge upon state property laws, an apparently unacceptable result.[106]

Until *Sporhase,* groundwater had escaped the reach of the Commerce Clause.[107] Prior water cases were largely decided on the basis of sovereign power concepts rather than on the theory that water was a commodity of interstate commerce.[108] Furthermore, Congress and the Court had tradi-

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102. *See* City of Altus v. Carr, 255 F. Supp. 828, 839-40 (W.D. Tex.), *aff'd per curiam,* 385 U.S. 35 (1966). The court dwelt on the character of a Texas landowner's absolute right to the waters beneath his soil, as well as the obvious hollow ring to the state's claim of a conservation motive. *See id.* at 839-40.

103. *See* Brief for Appellee, at 13-18, Sporhase v. Nebraska, ___ U.S. ___, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982) (Texas landowner can appropriate all groundwater for own purposes regardless of neighbor's needs while Nebraska landowner can remove only what is reasonable for use on overlying lands). *Compare* Olson v. City of Wahoo, 248 N.W. 304, 308 (Neb. 1933) (landowner may only extract quantity of underground waters he can reasonably and beneficially use on property) *with* City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 294, 276 S.W.2d 798, 802 (1955) (landowner can sell groundwater just like "any other species of property").

104. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3462, 73 L. Ed. 2d 1254, 1262-63 (1982). Local approaches to water law, according to *Sporhase,* influence the decision regarding burden on interstate commerce, not whether the term "commerce" applies at all. *See id.* at ___, 102 S. Ct. at 3463, 73 L. Ed. 2d at 1264.

105. *See* ___, 102 S. Ct. 3462-63, 73 L. Ed. 2d 1263-64.

106. *See id.* at ___, 102 S. Ct. at 3463, 73 L. Ed. 2d at 1264.

107. *See id.* at ___, 102 S. Ct. at 3463, 73 L. Ed. 2d at 1264. Experts state that the substance known as groundwater moves through soil and permeable areas of rock until reaching nonporous layers. Collection then continues, creating a zone of saturation from which water can be drawn. *See* C. MEYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 554-55 (1971).

108. *See* Arizona v. California, 373 U.S. 546, 587 (1963) (based on authority to promote general welfare and control navigable water, Congress has full power to provide for damming, storing, and distributing waters of navigable stream); Kansas v. Colorado, 206 U.S. 46, 85-86 (1907) (commerce power allows Congress to eliminate obstructions in navigable water-

tionally deferred to state water law, which varies extensively among the jurisdictions.[109] Percolating waters, the kind of groundwater at issue in *Sporhase,* constantly move beneath the earth's surface outside any defined channel.[110] Texas applies the English rule to this classification of underground waters entitling the landowner to absolute ownership.[111] The American rule, adopted in various states both East and West, dictates that an individual's water rights are restricted to uses which are reasonable with regard both to his own land and to that of other landowners drawing from the same reservoir.[112] The majority of Western states employ a prior appropriation doctrine administered through various permit procedures.[113] The English rule, the American rule, and the prior appropriation system reflect a spectrum of water rights ranging

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ways); *cf.* Trelease, *Government Ownership and Trusteeship of Water,* 45 CALIF. L. REV. 638, 651 (1957) (Supreme Court has based water case decisions not on property law concepts but on allocation of sovereign powers in federal union).

109. *See* California v. United States, 438 U.S. 645, 653 (1978). The majority opinion written by Justice Rehnquist, author of the dissent in *Sporhase,* stated that Congress had purposefully deferred to state water law during the process of reclaiming arid Western lands. *See id.* at 653. The motivation behind this deference derived from the reality of tremendous differences in climate and topography among the states and the need for the individualized response such diversity mandates. *See id.* at 648.

110. *See* 1 R. CLARK, WATERS AND WATER RIGHTS § 52.2 (B), at 326 (1967).

111. *See, e.g.,* Houston & T. C. Ry. v. East, 98 Tex. 146, 149, 81 S.W. 279, 280-81 (1904) (uncertain movement of percolating waters necessitates adherence to English rule of absolute ownership); Bartley v. Sone, 527 S.W.2d 754, 759-60 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (rule that owner of land also owns water beneath surface well settled in Texas); Pecos County Water Control & Improvement Dist. v. Williams, 271 S.W.2d 503, 505 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.) (Texas law clear that landowner owns percolating waters). In addition to case law, Texas expressly recognizes the rights of landowners to groundwater by statute. *See* TEX. WATER CODE ANN. § 52.002 (Vernon 1972). This rule of absolute ownership is said to be founded upon the ancient maxim "Cujus est solum, ejus est usque ad coelum et ad infernos" (whoever owns the soil, also owns to the heavens above and to the depths beneath). *See* Finley v. Teeter Stone, Inc., 248 A.2d 106, 110 (Md. 1968).

112. *See* 1 R. CLARK, WATERS AND WATER RIGHTS § 17.2, at 73 (1967). A variant of this reasonable use theory is the correlative rights doctrine. *See id.* Under this approach, the quantity of water which each landowner may extract depends upon his percentage of ownership of the acreage above the water source. *See id.* § 52.2 (B), at 330-31.

113. *See, e.g.,* IDAHO CODE §§ 42-202 (1977), 42-226 (Supp. 1982) (groundwaters are public and appropriation requires permission of water resources department); N.M. STAT. ANN. § 72-12-1 (1978) (underground waters are public and state engineer's approval necessary before appropriation); WYO. STAT. § 41-3-101 (1977) (water is property of state and rights to use can be acquired through conformance to state law and procedures); *see also* Clark, *The Role of State Legislation in Ground Water Management,* 10 CREIGHTON L. REV. 469, 474 (1977) (state legislatures and courts formulating methods of relating aquifer depletion with acceptable amounts of withdrawal).

from absolute to only permissive;[114] however, these jurisdictional differences did not deter the *Sporhase* Court from labeling groundwater an article of interstate commerce.[115] As a result, regulation of subterranean waters untouched by human technology can be subjected to the full rigors of Commerce Clause testing.

B. *Application of the Pike Test*

The definitional question now answered, the Court applied the *Pike* test to the statute at issue.[116] The purported intent of the measure, conservation of water supply, was determined to be sincere in light of Nebraska's comprehensive intrastate groundwater regulations.[117] Conservation objectives were advanced by statutorily requiring the Director of Water Resources to ascertain the reasonableness of a water export project, its consistency with conservation goals, and its effect on public welfare.[118] This provision, although pertinent only to out-of-state water shippers, nevertheless resulted in the requisite evenhandedness since intrastate users faced equally tough restrictions.[119] Concluding that this part of the Nebraska statute passed constitutional muster, the Court stated its reluctance, in the absence of congressional action, to find unreasonable a state's effort to preserve for its own citizens during periods of scarcity such a vital resource.[120] The Justices pointed out that state boundaries are not irrelevant in the allocation of water, an element which

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114. *Compare* Bartley v. Sone, 527 S.W.2d 754, 759-60 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (underground waters belong to owner of surface) *with* IDAHO CODE §§ 42-202 (1977), 42-226 (Supp. 1982) (appropriation of groundwater conditioned on permission of water resources department).

115. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3455, 3463, 73 L. Ed. 2d 1254, 1264 (1982).

116. *See id.* at ___, 102 S. Ct. at 3463, 73 L. Ed. 2d at 1264-65. The *Pike* test requires a determination of whether the state regulation operates evenhandedly to accomplish a legitimate local purpose and poses no undue burden on interstate commerce. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

117. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3463-64, 73 L. Ed. 2d 1254, 1265, (1982); NEB. REV. STAT. §§ 46-601 to -673 (1978). Nebraska requires registration of wells, employs conservation districts to compile research data, and designates control areas where water supplies are inadequate. *See* NEB. REV. STAT. §§ 46-601, -629(2), -658 (1978).

118. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3464, 73 L. Ed. 2d 1254, 1265 (1982); NEB. REV. STAT. § 46-613.01 (1978).

119. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3464, 73 L. Ed. 2d 1254, 1265 (1982); *see also* NEB. REV. STAT. § 46-659 (1978) (persons intending to build well in control area must first obtain permission of Director of Water Resources based on findings of beneficial use and conformance with applicable regulations).

120. *See* Sporhase v. Nebraska, ___ U.S. ___, 102 S. Ct. 3456, 3464, 73 L. Ed. 2d 1254, 1266 (1982).

has "some indicia of a good publicly produced and owned."[121] Thus, while state regulation of groundwater is, after *Sporhase,* fully open to Commerce Clause scrutiny, water itself retains in the Supreme Court's view a unique status among natural resources.[122] Consequently, the flexibility afforded states in devising methods to conserve it appears significantly more substantial.

The reciprocity clause of the Nebraska statute, however, did not receive such favorable treatment. Categorizing this part of the regulation as an explicit barrier to interstate commerce,[123] the Court found no narrow tailoring of a means to an end since even in the event of water abundance, a permit would be refused unless a receiving state granted Nebraska reciprocal rights.[124] Former congressional deference to state water law did not indicate federal consent to such undue burdens on interstate commerce as Nebraska's reciprocity clause.[125] On remand, the lower courts were required to decide the severability of this unconstitutional portion of the Nebraska statute.[126]

Justice Rehnquist, joined by Justice O'Connor in dissent, argued that the majority erred in deciding two issues when only one was presented.[127] Rather than confining itself purely to the question of whether the Nebraska statute violated the Commerce Clause, the Court undertook a discussion of congressional power to regulate groundwater overdraft.[128] Justice Rehnquist reasoned that the positive authority of Congress to legislate with regard to interstate commerce may extend significantly further than the negative limitation of the Commerce Clause absent federal

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121. *Id.* at ___, 102 S. Ct. at 3464-65, 73 L. Ed. 2d at 1266. This position is inapposite to the majority's view in *Commonwealth Edison Co.* that state boundaries are irrelevant in severance tax cases even though the consumer taxpayers are primarily out-of-state residents. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 618-19 (1981).

122. *Compare* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3464, 73 L. Ed. 2d 1254, 1266 (1982) (during times of shortage, states may give own citizens preference to water) *with* Pennsylvania v. West Virginia, 262 U.S. 553, 598-600 (1923) (prior fulfillment of statewide needs for natural gas during times of waning supply unconstitutional).

123. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3465, 73 L. Ed. 2d 1254, 1266-67 (1982).

124. *See id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267.

125. *See id.* at ___, 102 S. Ct. at 3465-67, 73 L. Ed. 2d at 1267-69. The majority noted that 37 congressional statutes require the application of state law to resolve water conflicts regarding federal projects. *See id.* at ___, 102 S. Ct. at 3465-66, 73 L. Ed. 2d at 1267-68.

126. *Id.* at ___, 102 S. Ct. at 3467, 73 L. Ed. 2d at 1269.

127. *See id.* at ___, 102 S. Ct. at 3467, 73 L. Ed. 2d at 1269 (Rehnquist, J., dissenting).

128. *See id.* at ___, 102 S. Ct. at 3467, 73 L. Ed. 2d at 1269 (Rehnquist, J., dissenting). Groundwater overdraft occurs when water withdrawal exceeds the rate of replenishment or recharge. *See* Clark, *Groundwater Management—Law and Local Response,* 6 ARIZ. L. REV. 178, 189 (1965).

action.[129] Arguing that only the latter dormant Commerce Clause kind of situation existed in *Sporhase*, he then pointed to early twentieth century cases supporting the view that states own or possess a quasi-sovereign interest in their natural resources.[130] While citing no authority for his proposition, Justice Rehnquist concluded that as a result of such ownership, local governments may regulate so as to prevent a natural resource from ever becoming a commercial article.[131] Nebraska accomplished this with regard to groundwater by recognizing a right to its use only on immediately overlying lands.[132] The dissent determined that Nebraska could not, therefore, be burdening or discriminating against interstate commerce since commerce in groundwater simply did not exist.[133]

V. EMERGING GUIDELINES

Water embargo statutes fall into three categories: those conditioning export on agency or legislative approval,[134] those requiring reciprocal action by the receiving state,[135] and unqualified bans.[136] As the dissent

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129. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3467, 73 L. Ed. 2d 1254, 1269 (1982) (Rehnquist, J., dissenting). Consistent with its constitutional grant of power, Congress can regulate not only articles of commerce but also more remote activities which affect commerce. Justice Rehnquist submits that Congress may reach more deeply intrastate when affirmatively exercising its commerce authority than when the power lies dormant. *See id.* at ___, 102 S. Ct. at 3467, 73 L. Ed. 2d at 1269 (Rehnquist, J., dissenting).

130. *See id.* at ___, 102 S. Ct. at 3468, 73 L. Ed. 2d at 1270 (Rehnquist, J., dissenting); *see also* Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (over and above right of local citizens to Georgia resources exists state's independent interest); Kansas v. Colorado, 185 U.S. 125, 142, 145-46 (1902) (state's quasi-sovereign interest in its water equal in magnitude to that in its air and forests).

131. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3468, 73 L. Ed. 1254, 1270 (1982) (Rehnquist, J., dissenting).

132. *Id.* at ___, 102 S. Ct. at 3468, 73 L. Ed. 2d at 1271 (Rehnquist, J., dissenting).

133. *See id.* at ___, 102 S. Ct. at 3469, 73 L. Ed. 2d at 1271-72 (Rehnquist, J., dissenting).

134. *See* ARIZ. REV. STAT. ANN. § 45-153 B (Supp. 1982); MONT. CODE ANN. § 85-1-121 (1981); N.Y. ENVTL. CONSERV. § 15-1505 (McKinney 1981); OR. REV. STAT. §§ 537.810, .870 (1979); R.I. GEN. LAWS § 46-15-9 (1980); S.D. COMP. LAWS ANN. §§ 46-1-13, -5-20.1 (Supp. 1982); UTAH CODE ANN. § 73-2-8 (1980); WYO. STAT. §§ 41-1-105, -3-115 (b), (c) (1977).

135. *See* CAL. WATER CODE § 1230 (Deering 1971); COLO. REV. STAT. § 37-81-101 (Supp. 1981); IDAHO CODE § 42-408-411 (1977); KAN. STAT. ANN. § 82a-72b (1977); NEV. REV. STAT. § 533.515 (1979); S.D. COMP. LAWS ANN. § 46-1-13 (Supp. 1982); WASH. REV. CODE ANN. § 90.16.120 (1962); WYO. STAT. § 41-3-115 (c) (1977).

136. *See* N.M. STAT. ANN. § 72-12-19 (1978). On January 17, 1983, a federal district court held that New Mexico's total ban on the out-of-state export of water violated the Commerce Clause. City of El Paso v. Reynolds, No. 80-730, slip op. at 36 (D.N.M. Jan. 17, 1983). Montana and Oklahoma ban the use of water to transport coal out-of-state in coal slurry pipelines. *See* MONT. CODE ANN. § 85-2-104 (1981); OKLA. STAT. ANN. tit. 27, § 7.6 (West Supp. 1981).

pointed out in *Sporhase*, the majority invalidated only the reciprocity portion of the Nebraska statute.[137] In so doing, however, the Court described fact situations under which reciprocity clauses, as well as conditional and total bans, could survive Commerce Clause scrutiny.[138] The key to a finding of constitutionality hinges on whether a state can muster the evidence *Sporhase's* guidelines require.

A. *Conditional Export Statutes*

The section of the Nebraska statute making water export contingent on administrative approval successfully met the requirements of the dormant Commerce Clause test.[139] The Court reasoned that conservation of water was clearly a legitimate local goal and that Nebraska's sincerity of purpose was amply demonstrated by the stringent controls imposed on its own citizens.[140] The Court likewise regarded with favor the standards which the state had established to guide administrative decision-making;[141] thus, it appears that a state, like Nebraska, which both conditions water export on similar agency findings and regulates water usage by its own residents, is in a strong position to withstand a Commerce Clause challenge. New York, an example of states in this grouping, conditions water export on the acquisition of an administrative permit and counterbalances this requirement with equally rigid intrastate regulations.[142]

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137. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3469 n.3, 73 L. Ed. 2d 1254, 1272 n.3 (1982) (Rehnquist, J., dissenting).

138. *See id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267.

139. *See id.* at ___, 102 S. Ct. at 3463-65, 73 L. Ed. 2d at 1264-66.

140. *See id.* at ___, 102 S. Ct. at 3463-64, 73 L. Ed. 2d at 1265. Nebraska law provides for the registration of wells and establishment of control areas where particularly tough regulatory measures can apply. *See* NEB. REV. STAT. §§ 46-601, -658 (1978). Groundwater users within a designated control area must install flow meters to gauge water flow from irrigation wells and are limited to an allotted amount of water per acre per year. *See* Brief for Appellee, at 3-4, Sporhase v. Nebraska, ___ U.S. ___, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

141. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3464, 73 L. Ed. 2d 1254, 1265 (1982). Before an export permit can be granted, Nebraska's Director of Water Resources must find the project reasonable and consistent with conservation objectives and the public welfare. *See* NEB. REV. STAT. § 46-613.01 (1978).

142. *See* N.Y. ENVTL. CONSERV. §§ 15-1501, -1503, -1505 (McKinney 1981). Before a permit can issue, the Director of New York's Department of Environmental Conservation must determine whether public necessity justifies the project, whether protection of the supply and watershed will be proper, and whether present and future needs of affected municipalities are treated equitably. *See id.* § 15-1503(2). Rhode Island similarily conditions the export of its water on the approval of a water resources board. *See* R.I. GEN. LAWS § 46-15-9 (1980). Intrastate users are governed by the same requirements. *See id.* §§ 46-15-7 to -8. Reasons, in both cases, must be set forth justifying the need to exploit the specific water

The type of statute which succumbed to attack in *City of Altus v. Carr* conditioned interstate transfers of water on legislative approval.[143] Moreover, no standards were provided to direct the legislature's consideration.[144] Requiring legislative approval places an extraordinary burden on interstate users. On the other hand, agency approval may be obtained by interstate shippers with no greater effort than that required of intrastate applicants. Equality of treatment shows that it is the resource being protected, not simply local interests.[145] Montana and Wyoming currently condition water export on legislative consent unguided by any express standards.[146] These statutes, in light of *Sporhase*, appear especially vulnerable to a Commerce Clause challenge.

B. *Reciprocity Clauses*

The *Sporhase* Court stated that a requirement of reciprocity might not, given certain facts, inflict an impermissible burden on interstate commerce.[147] The Court set forth three elements of proof essential to sustain a reciprocity clause. A state must first be able to show the existence of water shortages throughout its jurisdiction.[148] Evidence is then required that intrastate transfer of water from areas of greater supply to areas of shortage is possible without regard to distance.[149] Finally, the regulating state must prove that exported water would be compensated for by supplies imported from the applicant state.[150] The Court implied that had Nebraska presented evidence of the above three elements, its reciprocity

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source. *See id.* § 46-15-8.

143. *See* Act of June 17, 1965, ch. 568, § 2, 1965 Tex. Gen. Laws 1245, *quoted in* City of Altus v. Carr, 255 F. Supp. 828, 830, 839-40 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966).

144. *See id.*

145. *See* City of Altus v. Carr, 255 F. Supp. 828, 834 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966). The district court in *Altus* termed legislative approval a political remedy lacking in real viability. *See id.* at 834.

146. *See* MONT. CODE ANN. § 85-1-121 (1981); WYO. STAT. § 41-3-105 (1977). Montana provides no criteria for the legislature to consider in making its decision. *See* MONT. CODE ANN. § 85-1-121 (1981). Wyoming requires that once the legislature has given its consent, a control board must receive proof of beneficial use before adjudicating water rights. *See* WYO. STAT. § 41-3-105 (1977).

147. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3465, 73 L. Ed. 2d 1254, 1267 (1982).

148. *See id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267.

149. *See id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267. *But cf.* Wall St. J., July 6, 1982, at 29, col. 1 (intrastate exchange of water may be technically feasible but in reality impossible because of intense public opposition to such proposal).

150. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3465, 73 L. Ed. 2d 1254, 1267 (1982).

clause could have passed constitutional scrutiny.[151] Nebraska did not do so and as a result failed to persuade the Court that requiring reciprocal action was a narrowly tailored means of achieving its accepted conservationist goal.[152] The water export statutes in effect in Idaho and Nevada also contain reciprocity clauses;[153] thus, their constitutionality will depend on whether each state can meet the burden of proof described in *Sporhase*.

C. *Total Bans*

Leaving all avenues partially open, the *Sporhase* majority declared that, under a certain circumstance, even a total ban on water export could be found closely related to a legitimate water conservation objective.[154] This circumstance is an arid climate.[155] In contrast, a state with areas of plentiful water supply could sustain a reciprocity clause since the feasibility of intrastate exchange is one of the Court-mandated requirements of proof in that category of embargo statutes.[156] On January 17, 1983, a federal district court, applying *Sporhase*'s standards, declared unconstitutional New Mexico's unconditional ban on water export.[157] In light of evidence that the state's projected water needs for health and safety purposes were well below projected supplies, the court found that a total embargo could not be justified.[158]

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151. *See id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267.

152. *See id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267. The Court observed that Nebraska made no claim that such evidence existed. *See id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267.

153. *See* IDAHO CODE § 42-408 (1977); NEV. REV. STAT. § 533.515 (1979). Washington declares that a permit to appropriate its waters may not be denied on the sole ground that the point of use is in another state. *See* WASH. REV. CODE ANN. § 90.03.300 (1962). The supervisor of water resources may, however, in his discretion, refuse a permit where the receiving state does not reciprocate. *See id.*

154. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3465, 73 L. Ed. 2d 1254, 1267 (1982).

155. *See id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267.

156. *See id.* at ___, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1267.

157. *See* City of El Paso v. Reynolds, No. 80-730, slip op. at 36 (D.N.M. Jan. 17, 1983).

158. *See id.* at 29, 36. This decision, condemned as "un-American" by supporters of the ban, now paves the way for the importation by El Paso of up to 100 billion gallons of water per year. *See* San Antonio Express, Jan. 20, 1983, at 2E, cols. 1, 4. The embargo statute in force in Colorado is also essentially a total ban out of which one small exception is carved. Where an individual owns contiguous, agricultural lands in Colorado and a neighboring state, the General Assembly may approve the interstate transfer of Colorado water for agricultural purposes only. *See* COLO. REV. STAT. § 37-81-101 (Supp. 1981). Before granting its permission, however, the General Assembly is instructed to consider whether or not the receiving state reciprocates by allowing Colorado withdrawal privileges. *See id.*

VI. Implications for Texas

Considerable authority to control water export, nevertheless, remains in state hands as a result of the guidelines established in *Sporhase*.[159] Conditional embargoes, reciprocity requirements, even total bans continue to be possible options, although limited by the restraints of the Commerce Clause. What implications does this decisional development hold for Texas? In oil-rich but water-poor West Texas, wells have already begun to go dry.[160] Projections by the Texas Department of Water Resources show that in less than twenty-five years, demand statewide will exceed availability, thus necessitating the importation of water.[161] The state, therefore, finds itself in the difficult predicament of not only needing to keep what water it has but also having to tap external sources. Yet in *City of Altus v. Carr*, Texas' attempt to prevent the export of its groundwater was struck down.[162] Now, as a consequence of *Sporhase*, adjacent states may be able to block the diversion of their water into Texas. Two of Texas' four neighbors already have elaborate groundwater laws in place.[163] In addition, water is increasingly viewed as a powerful bargaining

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159. *See* Washington Post, July 3, 1982, at A10, col. 3. The Court's decision in *Sporhase* will affect existing embargo statutes but does not deprive the states of their power to regulate water export. *See id.* Richard Dudden, attorney for the defendant farmers in *Sporhase*, commented that a "state will still have control over its water" although transfer into another state cannot be banned "just because of a state line." *See id.*

160. *See* San Antonio Express, July 22, 1982, at 13A, col. 1. In the West Texas city of Rankin, the useable wells are close to dry, the city reservoir drained, and what water there is tastes like oil. *See id.*

161. *See* Texas Department of Water Resources, Texas Water—An Outlook To The Year 2005, at 5 (June 1981) (graph showing gap between supply and demand by year 2005).

162. *See* City of Altus v. Carr, 255 F. Supp. 828, 839-40 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966).

163. *See* N.M. Stat. Ann. §§ 72-12-1 to -22 (1978); Okla. Stat. Ann. tit. 82, §§ 1020.1-.22 (West Supp. 1981). In Arkansas and Louisiana, Texas' other neighbors, drainage rather than supply of water has proved the dominant problem although conflicts over available quantities are increasing. *See, e.g.*, Jones v. Oz-Ark-Val Poultry Co., 306 S.W.2d 111, 113 (Ark. 1957) (large amount of water taken from landowner's wells for processing chickens caused neighbor's well to go dry); Adams v. Grigsby, 152 So. 2d 619, 620-21 (La. Ct. App. 1963) (oil operator's withdrawal of 2800 barrels of water per day from same underground source used by adjoining subdivison allegedly depleting reservoir); Clark, *Groundwater Management—Law and Local Response*, 6 Ariz. L. Rev. 178, 193 (1965) (even in areas of water abundance, conflicts over groundwater growing); *see also* Note, *Water Resources—Limitations on Consumption of Subterranean Water*, 24 La. L. Rev. 428, 432-33 (1964) (Louisiana needs legislative plan to resolve imminent water shortage problems). Water export bans in non-neighboring states can likewise have major repercussions for Texas. In the future, water will likely be used as a medium of transportation for bringing in coal slurried through pipelines from distant Western states. *See* Tarlock, *Western Water Law and Coal Development*, 51 Colo. L. Rev. 511, 538 (1980). Coal importation may be

tool to be used by energy-poor states possessing surplus water against energy-rich states which levy high severance taxes on mineral export.[164] Texas leads the nation in revenues collected from such taxes and is, therefore, a prime target in what some analysts label a new War Between the States.[165]

The dilemma Texas faces, simply put, is how to obtain water from other states and at the same time maintain its own supplies. The solution to the first part of this problem could call for an increased federal presence in state affairs. The majority in *Sporhase* concluded that "[g]round water overdraft is a national problem and Congress has the power to deal with it on that scale."[166] Ostensibly, the Supreme Court has given federal action a stamp of approval even before Congress has elected to act. In the past, the national government has chosen to wield its influence in resolving interstate disputes over the use of river water.[167] The power of Con-

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necessary because Texas' supplies of oil and gas continue to decline. *See* HOUSE JOINT INTERIM COMM., 66TH LEGISLATURE OF TEXAS, REPORT ON A STATE ENERGY PLAN 1 (1978). In fact, by the year 2000, Texas is predicted to import more energy than its exports. *See* San Antonio Express, Jan. 21, 1979, at 13A, col. 2. Coal slurry requires enormous amounts of water and water export bans could stymie such projects. *See* Tarlock, *Western Water Law and Coal Development*, 51 COLO. L. REV. 511, 538-39 (1980); *see also Water Availability for Energy Development in the West: Hearings Before the Subcomm. on Energy Production and Supply of the Senate Comm. on Energy and Natural Resources*, of the 95th Cong., 2d Sess. 1 (1978) (statement of Senator Clifford Hansen describing water as lifeblood of West and concomitant resistance to slurrying of coal). Montana and Oklahoma foreclose the possibility of using water as a medium of coal transportation by declaring such use non-beneficial and therefore unpermitted. *See* MONT. CODE ANN. § 85-2-104 (1981); OKLA. STAT. ANN. tit. 27, § 7.6 (West Supp. 1981).

164. *See* Houston Post, Aug. 29, 1982, at 7B, col. 4. At a meeting of the National Governors Association, it was revealed that to counteract a move by Western states to raise their tax revenues, the governors of eight Great Lake states were preparing a scheme to use water as a negotiating tool. *See id.* The Director of the Illinois Department of Transportation, Donald Vonnahme, commented on plans to use water from Lake Michigan to fill the arid Western states' water requirements: "We will flatly object to any diversion of water from the Great Lakes Basin. Why should we send water out of our state so that these states in the Sun Belt can lure our people away with jobs? Why should we export water to save somebody else?" *See id.* Statistics contained in a pamphlet distributed by the governor of Montana at this same governors' meeting may explain Illinois' and other states' hostility. Every Illinois resident contributes 15 cents per month to Montana's treasury for coal; each Wisconsin resident, 29 cents; every Michigan and Iowa resident, 6 cents. *See id.*

165. *See id.* Texas raised $1.5 billion in 1980 through severance taxes levied on oil and gas compared with a figure of $506 million brought in by Alaska using the same revenue-producing technique. *See id.* Texas severence tax revenues rose to $2.2 billion in 1982 based on a 4.6% rate on wellhead value of oil and 7.5% on natural gas. *See* TEXAS RESEARCH LEAGUE, ANALYSIS 2 (July 1982) (report on oil and gas taxes as source of state revenue).

166. Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3463, 73 L. Ed. 2d 1254, 1264 (1982).

167. *See* C. MEYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 364-66 (1971).

gress to apportion waters of interstate, navigable streams among states bordering such streams was confirmed in *Arizona v. California*.[168] Since there is little incentive for one state to transfer its water to another, congressional apportionment, in line with *Sporhase*'s mandate, could prove the most effective means of achieving interstate water transfers.[169] This apportionment could logically extend to allocation of groundwater which, as a result of *Sporhase*, is fully susceptible to federal control.[170]

Two other methods used to settle interstate river controversies, adjudication[171] and compact agreements,[172] seem less likely candidates for solving groundwater problems. The Supreme Court has only reluctantly adjudicated multi-state stream disputes although its jurisdiction has been invoked in cases dealing with several major rivers.[173] In addition to adjudication and as authorized by the Constitution,[174] states have entered into voluntary agreements, known as compacts, to resolve their differences.[175] Texas has engaged in six such arrangements.[176] Whether or not

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168. 373 U.S. 546, 565-66 (1963). This case focused on the Boulder Canyon Project Act of 1928 which authorized the construction of the Hoover Dam and gave the Secretary of the Interior power to apportion the waters of the Colorado River among Arizona, California, and Nevada. *See* The Boulder Canyon Project Act, 43 U.S.C. § 617 (1976), *construed in* Arizona v. California, 373 U.S. 546 (1963).

169. *See* Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 51-52 (1966).

170. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3463, 73 L. Ed. 2d 1254, 1264 (1982).

171. *See* C. MEYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 364-65 (1971). Adjudication takes place when the Supreme Court exercises its original jurisdiction over cases in which a state is a party and issues a decree settling an interstate dispute over the use of water. A special master is usually appointed to hear evidence and prepare findings of fact and conclusions of law. The Court then issues an opinion which may or may not go along with the master's recommendations. *See id.* at 364-65.

172. *See* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 694-95 (1925). Controversies affecting more than one state may be settled by an agreement, known as a compact, devised by the individual states and approved by Congress. *See id.* at 694-95.

173. *See* C. MEYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 365 (1971); Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 48-51 (1966). In *Colorado v. Kansas*, the majority stated that only in cases of "serious magnitude" should the Court step in to adjudicate the rights of states in river waters. *See* Colorado v. Kansas, 320 U.S. 383, 393 (1943). Professor Meyers contends that the Supreme Court is poorly equipped to handle the quantities of scientific data essential to allocation of water. This task, he argues, is better suited to the legislative branch which can take into account political, as well as economic conditions. *See* Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 48-51 (1966).

174. *See* U.S. CONST. art. I, § 10, cl. 3. In pertinent part, the passage from the Constitution reads: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ." *Id.*

175. *See* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 703 (1925).

176. *See* Rio Grande Compact, TEX. WATER CODE ANN. § 41.009 (Vernon 1972) (Colo-

the compact approach is a realistic solution in the future is questionable since the trend is toward each state zealously guarding its own supplies.[177]

Federal action, Supreme Court adjudication, and interstate compacts are all potential methods of allocating water supplies among needy regions. The *Sporhase* decision gives states additional weapons to use in obtaining required water sources from their neighbors. Using the guidelines established by this case, a state can attack each category of embargo statute, whether conditional, reciprocal, or total, on the ground that the requisite burden of proof has not been met.[178] The City of El Paso, Texas, using *Sporhase's* standards, successfully challenged the constitutionality of New Mexico's unqualified water export ban. [179] The suit went to trial before *Sporhase* was decided.[180] As a result, the district judge postponed his ruling to allow each party time to submit additional evidence in light of *Sporhase*.[181] Deprived of its public ownership shield,[182] New Mexico failed to meet the most demanding burden of proof established in the *Sporhase* hierarchy, the one pertaining to a total ban.[183]

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rado, New Mexico, and Texas signees); Pecos River Compact, TEX. WATER CODE ANN. § 42.010 (Vernon 1972) (New Mexico and Texas signees); Canadian River Compact, TEX. WATER CODE ANN. § 43.006 (Vernon 1972) (New Mexico, Oklahoma, and Texas signees); Sabine River Compact, TEX. WATER CODE ANN. § 44.010 (Vernon Supp. 1982-1983) (Louisiana and Texas signees); Red River Compact, TEX. WATER CODE ANN. § 46.013 (Vernon Supp. 1982-1983) (Arkansas, Louisiana, Oklahoma, and Texas signees); Caddo Lake Compact, TEX. WATER CODE ANN. § 47.011 (Vernon Supp. 1982-1983) (Louisiana and Texas signees).

177. *Cf.* C. MEYERS & A. TARLOCK, WATER RESOURCES MANAGEMENT 380 (1971) (state water compacts may simply be prelude to litigation).

178. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3465, 73 L. Ed. 2d 1254, 1267 (1982).

179. *See* City of El Paso v. Reynolds, No. 80-730, slip op. at 36 (D.N.M. Jan. 17, 1983).

180. *See* Plaintiffs' Post-Trial Brief at 4, City of El Paso v. Reynolds, No. 80-730 (D.N.M. Jan. 1982).

181. Telephone Interview with Harry M. Reasoner, Attorney of record in El Paso's suit against New Mexico, Vinson & Elkins, Houston, Texas (Sept. 15, 1982).

182. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3462, 73 L. Ed. 2d 1254, 1263 (1982). Nebraska and its amici curiae in *Sporhase* had vehemently argued that local regulation of water export in states claiming public ownership was immune from Commerce Clause review. *See* Brief for the Elephant Butte Irrigation District, Carlsbad Irrigation District, Archhurley Conservancy District, and Middle Rio Grande Conservancy District at 3, Sporhase v. Nebraska, ___ U.S. ___, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982); Brief for Appellee at 15, Sporhase v. Nebraska, ___ U.S. ___, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982); Brief for the State of New Mexico at 16-17, Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982); *cf.* Brief for Colorado, Wyoming, Utah, Nevada, Kansas, North Dakota, South Dakota, and Missouri at 10, Sporhase v. Nebraska, ___ U.S. ___, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982) (power to control water usage is essential element of state sovereignty).

183. *See* City of El Paso v. Reynolds, No. 80-730, slip op. at 26-36. (D.N.M. Jan. 17, 1983). While emphasizing the extreme importance of water due to New Mexico's aridity,

The other side of Texas' water problem is preserving its own in-state supplies. *Sporhase* made clear that a state's power to regulate water usage derives from its police powers, not from some legal fiction concept of state ownership.[184] Texas and other states adhering to private ownership of groundwaters, therefore, are free to regulate water export, within Commerce Clause limits, to foster public health and welfare. Which category of export statute could Texas then constitutionally impose? A total ban would fail since the state's climatic conditions are not arid throughout, but rather run the gamut from an average yearly rainfall rate in East Texas of over fifty inches to less than ten inches in West Texas.[185] Sustaining a reciprocity clause would require proof that intrastate exchange of water was feasible regardless of distance.[186] Such exchange might be technically possible, but is politically unrealistic given intense local resistance to such proposals.[187] Taking into account Texas' diverse climate and legitimate water needs, an export ban conditioned on administrative approval stands the best chance of surviving a Commerce Clause challenge.

If Texas attempts to draft such a statute, however, the current absence of intrastate controls would be a fatal flaw.[188] The primary reason behind

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Judge Bratton stated that supplies were more than adequate to meet human survival needs and beyond this, "water is an economic resource." *See id.* at 27-28. Viewing the purpose of the ban as economic protectionism rather than conservation, the court suggested:

> If El Paso were in New Mexico defendants probably would agree with plaintiffs that the most beneficial and economically productive use of the Hueco and Mesilla Bolson ground water is in El Paso for the simple reason that what is good for El Paso is good for the entire region, including southern New Mexico.

Id. at 34.

184. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3462, 3464, 73 L. Ed. 2d 1254, 1263, 1266 (1982). State police powers are broad and expand as society's needs change. *See* Firemen's Ins. Co. v. Washington, 483 F.2d 1323, 1328 (D.C. Cir. 1973) (state's police power can expand as public needs change and become more complex); Lamm v. Volpe, 449 F.2d 1202, 1203 (10th Cir. 1971) (state legislatures in exercise of police powers have wide discretion to further public health, safety, and morals), *cert. denied*, 405 U.S. 1075 (1972).

185. *See* W. POOL, A HISTORICAL ATLAS OF TEXAS 9 (1975).

186. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3465, 73 L. Ed. 2d 1254, 1267 (1982).

187. *See* Wall St. J., July 6, 1982, at 29, col. 1. In Texas, transferring water from one basin to another is as "popular as the plague." *Id.*

188. The threat of increased federal regulation of water resources may strengthen what support there is for instituting a state level groundwater management program. *See* Comment, *Ground Water Management: A Proposal for Texas*, 51 TEX. L. REV. 289, 291 (1973). Despite the urgency of water supply problems, opposition from users of groundwater has thus far blocked adoption of a groundwater code. *See id.* at 317. Even the amendment to provide for raising funds to finance water projects failed at the polls in November 1981. *See* San Antonio Express, Nov. 4, 1981, at 1A, col. 1. The amendment's supporters had argued

the *Sporhase* Court's finding of constitutionality regarding the first part of the Nebraska statute was that state's demonstrated willingness to impose stiff restrictions on its own citizens.[189] Controls placed on both intrastate and interstate users resulted in the evenhanded treatment exacted by the dormant Commerce Clause.[190] As the situation now stands in Texas, such evenhandedness would be missing since any export statute would not be offset by interior regulations.[191] Furthermore, the lack of a groundwater management program weakens any challenge Texas makes against other states which seek to prevent water export. This point is amply illustrated by New Mexico's telling assertion in its amicus curiae brief filed on behalf of Nebraska in *Sporhase*:

> To require the export of water needed in New Mexico would have the practical effect of forcing upon New Mexico the antiquated and extravagant

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that "Texas is running out of water" and that funds are needed to finance development of new sources, including "importation from other states." *Id.* at 11A, col. 7.

189. *See* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3463-64, 73 L. Ed. 2d 1254, 1265 (1982).

190. *See id.* at ___, 102 S. Ct. at 3463-64, 73 L. Ed. 2d at 1265.

191. Until Governor Clements appointed a Water Task Force to evaluate the state's water needs, Texas lacked even a mechanism for coordinating the activities of agencies with water planning responsibilities. *See* Exec. Order No. WPC-23A, 6 Tex. Reg. 4571 (Dec. 11, 1981). If Texas does institute groundwater controls, the lurking question of compensation arises for the taking of what is certainly an established property right. *See* Bartley v. Sone, 527 S.W.2d 754, 760 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (rules well settled regarding ownership of groundwater). Texas courts have so far refused to recognize the connection between groundwater and surface water. *See* Castleberry, *A Proposal for Adoption of a Legal Doctrine of Ground-Stream Water Interrelationship in Texas*, 7 ST. MARY'S L.J. 503, 514 (1975). Riparian rights and prior appropriation are the two water rights systems governing stream waters in Texas. *See In re* The Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 625 S.W.2d 353, 364 (Tex. Civ. App.—San Antonio 1981), *aff'd*, 642 S.W.2d 438 (1982); Note, *Water Law—Riparian Rights—Neither Conservation Amendment Nor Police Power Of State Justifies The Taking Of Vested Riparian Rights Without Compensation Under Texas Water Rights Adjudication Act of 1967*, 14 ST. MARY'S L.J. 127, 129 (1982). In 1955, the Texas Supreme Court had an opportunity to extend similar controls to groundwater but chose instead to adhere to the ancient doctrine of absolute ownership. *See* City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 292-94, 276 S.W.2d 798, 801-02 (1955). If Texas courts in the future were to switch from the English rule to the American rule of reasonable use, compensation would not be required since there are no vested rights in court decisions. *See* Baumann v. Smrha, 145 F. Supp. 617, 625 (D. Kan.), *aff'd*, 352 U.S. 863 (1956). A landowner's rights in the waters beneath his property are, however, recognized by statute, as well as by judicial decree. *See* TEX. WATER CODE ANN. § 52.002 (Vernon 1972). Any legislative enactment altering this provision would undoubtedly produce an outcry for compensation similar to that expressed by riparian owners confronted with changes in their stream rights. *See* Schero v. Texas Dep't of Water Resources, 630 S.W.2d 516, 519 (Tex. Ct. App.—Waco 1982), *rev'd sub nom. In re* The Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438 (1982).

> water laws of the State of Texas. Because Texans can drain their own aquifers dry is no reason to usurp the public controls established in New Mexico.[192]

Thus, both to strengthen its arguments against bans in other states and to sustain a conditional export statute of its own, Texas must take action to regulate groundwater usage at home.

VII. CONCLUSION

Sporhase v. Nebraska brings to the forefront the currently inescapable question of how best to allocate vital water supplies to meet present demands and future needs. Just as our "economic unit is the nation,"[193] so too must states be able to depend on one another for equitable exchanges of their natural resources, including water. Since underground supplies are now in the same class as their surface counterparts, navigable waters, federal authority to regulate clearly exists and even when unexercised can serve as a check on state imposed controls. Nevertheless, *Sporhase* represents a departure from the Supreme Court's anti-embargo position in other natural resource cases insofar as states are left with ample powers to regulate water export for conservation purposes, even to the point of total prohibition.[194]

As the process begins of measuring existing export statutes against the guidelines set forth in *Sporhase*, the words of Justice Holmes in *Hudson Water Co. v. McCarter* come to mind: "The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line . . . are fixed by decisions that this or that concrete case falls on the nearer or farther side."[195] El Paso's suit against New Mexico was the first "concrete case" to employ *Sporhase*'s criteria and thus marked a point on Justice Holmes' line. Using *Sporhase*'s standards, states like Texas, currently lacking groundwater controls, can formulate regulations of their own fully mindful not only of local needs and climatic conditions but also of their neighbors' plight.

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192. Brief for State of New Mexico at 5, Sporhase v. Nebraska, ___ U.S. ___, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

193. H. P. Hood & Sons v. DuMond, 336 U.S. 525, 537 (1949).

194. *Compare* Pennsylvania v. State of West Virginia, 262 U.S. 553, 598 (1923) (although natural gas supplies waning, conservation motive insufficient to justify state regulation impinging upon interstate commerce) *with* Sporhase v. Nebraska, ___ U.S. ___, ___, 102 S. Ct. 3456, 3464, 73 L. Ed. 2d 1254, 1266 (1982) (confronted with water shortages, states may favor own citizens).

195. *See* Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908).