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# Blocking the Flow: Texas Faces New Challenges in Its Water Crisis after an Unfavorable Ruling in *Tarrant*

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# BLOCKING THE FLOW: TEXAS FACES NEW CHALLENGES IN ITS WATER CRISIS AFTER AN UNFAVORABLE RULING IN *TARRANT*

AMAL BALA\*

**Abstract:** As Texas's population continues growing, the state is struggling to forestall a looming water crisis. Tarrant Regional Water District, a Texas state agency, sought to purchase some of Oklahoma's water from the Red River, which forms a boundary between the states. Tarrant's efforts failed because Oklahoma's water permit laws disfavor out-of-state purchasers. Tarrant sued the Oklahoma Water Resources Board and claimed in part that Oklahoma's laws create an unconstitutional restriction on interstate commerce. In *Tarrant Regional Water District v. Herrmann*, the Supreme Court affirmed the Court of Appeals for the Tenth Circuit and dismissed Tarrant's Commerce Clause claim as meritless. This Comment argues that the Supreme Court's holding could hinder interstate cooperation in solving water shortages.

## INTRODUCTION

As populations grow in cities and towns across the United States, state governments are scrambling for solutions to their current and projected shortages of fresh water.<sup>1</sup> The effects of global warming also pose a threat to water supplies through rising sea levels, loss of land, and a disruption of the balance between fresh water and salt water.<sup>2</sup> Furthermore, scientists expect global climate change to put seventy percent of the approximately 3100 counties in the United States at risk of water shortages by the middle of this century.<sup>3</sup> State governments are attempting to combat water scarcity before the problem worsens through conservation, planning, water transportation, and defining

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\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2012–2013.

<sup>1</sup> See Cynthia Gordy, *Water Shortage: 6 Things to Know*, ROOT (Aug. 15, 2011), <http://www.theroot.com/views/america-s-water-shortage>; *Water Supply in the U.S.*, EPA, <http://www.epa.gov/WaterSense/pubs/supply.html> (last visited May 7, 2013).

<sup>2</sup> A. Dan Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 LOY. L.A. L. REV. 979, 979 (1991).

<sup>3</sup> *U.S. Water Shortages Loom*, HOMELAND SEC. NEWS WIRE (Feb. 24, 2012), <http://www.homelandsecuritynewswire.com/dr20120224-u-s-water-shortages-loom>.

water rights.<sup>4</sup> Texas, the second most populous state in the nation,<sup>5</sup> faces a looming water crisis and is struggling to ensure that its booming population has access to fresh water in coming years.<sup>6</sup>

As a natural resource, water does not remain inside national or state boundaries permanently but instead travels through the Earth's hydrologic cycle by changing location and physical form as a solid, liquid, and gas.<sup>7</sup> Earth's hydrologic cycle functions independently of political considerations,<sup>8</sup> but humans create rules of natural resources allocation that have a potential to give one geopolitical group greater access than another.<sup>9</sup> In the United States, these rules often appear as state regulations of water appropriation.<sup>10</sup>

Texas, with a population of more than twenty-five million in 2010, grew at a rate of 20.6% from 2000 to 2010, which was more than twice the 9.7% national growth rate.<sup>11</sup> In particular, the Dallas-Fort Worth area recently ranked fourth in the nation by total population.<sup>12</sup> In response to an increasing need for water in this area, Texas attempted to import water belonging to Oklahoma from the Red River, a major source of water shared by the states.<sup>13</sup> Oklahoma's water permit laws dis-

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<sup>4</sup> E.g., Tarlock, *supra* note 2, at 982–83; *Water Information*, ASS'N OF CAL. WATER AGENCIES, <http://www.acwa.com/content/water-information> (last visited May 7, 2013) (discussing California's response to its dwindling water supply).

<sup>5</sup> PAUL MACKUN ET AL., U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 2 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

<sup>6</sup> TEX. WATER DEV. BD., WATER FOR TEXAS 2012 STATE WATER PLAN, at III (2012), available at [http://www.twdb.state.tx.us/publications/state\\_water\\_plan/2012/00.pdf](http://www.twdb.state.tx.us/publications/state_water_plan/2012/00.pdf).

<sup>7</sup> See Richard S. Harnsberger et al., *Interstate Transfers of Water: State Options After Sporhase*, 70 NEB. L. REV. 754, 777–78 (1991).

<sup>8</sup> See Joseph A. Kishiyama, Note, *The Prophecy of Poor Dick: The Nebraska Supreme Court Recognizes a Surface Water Appropriator's Claim Against a Hydrologically Connected Ground Water User in Spear T Ranch, Inc. v. Knaub*, 85 NEB. L. REV. 284, 290 (2006) (discussing Earth's hydrologic cycle as a “continuous movement of water from the oceans to the atmosphere and back to the sea”).

<sup>9</sup> See Montgomery F. Simus & James G. Workman, *The Water Ethic: The Inexorable Birth of a Certain Alienable Right*, 23 TUL. ENVTL. L.J. 439, 442 (2010).

<sup>10</sup> See Harnsberger, *supra* note 7, at 758.

<sup>11</sup> *State & County QuickFacts: Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48000.html> (last updated Mar. 14, 2013); see Ross Ramsey et al., *Minorities Drove Texas Growth, Census Figures Show*, TEX. TRIB., Feb. 18, 2011, <http://www.texastribune.org/texas-counties-and-demographics/census/minorities-drove-texas-growth-census-figures-show>.

<sup>12</sup> Lance Murray, *Dallas-Fort Worth's Population Ranks 4th Nationally*, DALLAS BUS. J. (Jan. 18, 2012, 1:05 PM), <http://www.bizjournals.com/dallas/blog/2012/01/dallas-fort-worths-population-ranks.html>.

<sup>13</sup> Wes Strickland, *Back to the Whiteboard*, AM. WATER INTELLIGENCE, Oct. 2011, available at <http://www.americanwaterintel.com/archive/2/10/analysis/back-whiteboard.html>.

favor out-of-state purchasers, however, and blocked Texas's efforts.<sup>14</sup> These water allocation issues were at the heart of *Tarrant Regional Water District v. Herrmann*, in which the Supreme Court addressed the constitutionality of Oklahoma's permit laws.<sup>15</sup> This Comment argues that Congress did not consent to Oklahoma's water permit laws despite sanctioning an interstate agreement known as the Red River Compact.<sup>16</sup> This Comment also argues that the Court's holding could increase water scarcity and hinder cooperation between states because it encourages economic isolation.<sup>17</sup>

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Red River is a large channel of water separating southeastern Oklahoma from northeastern Texas.<sup>18</sup> In 1955, Arkansas, Louisiana, Oklahoma, and Texas received permission from Congress to negotiate a pact apportioning water in the Red River Basin.<sup>19</sup> Each state signed the agreement, known as the Red River Compact (the "Compact"), in 1978, and Congress ratified it in 1980.<sup>20</sup> As part of the Compact, each state can control the allocation of its share of water with a common goal of resolving disputes and avoiding litigation.<sup>21</sup>

Tarrant Regional Water District ("Tarrant") is a Texas state agency that tried to satisfy an increasing demand for water in north central Texas by attempting to purchase portions of Oklahoma's Red River water subject to the Compact.<sup>22</sup> Oklahoma, which requires purchasers to

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<sup>14</sup> *Id.*

<sup>15</sup> See *Tarrant Reg'l Water Dist. v. Herrmann*, No. 11-889, slip op. at 1 (U.S. Jun. 13, 2013).

<sup>16</sup> See *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) (noting that Congress must express an "unambiguous intent" to allow state violations of the Commerce Clause); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (noting that Congress's intentions must be "unmistakably clear" if it intends to alter the balance of power between the federal government and the states).

<sup>17</sup> See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1977) (discussing the problematic cumulative effect of protectionist state laws that discriminate against interstate commerce in trash disposal).

<sup>18</sup> *Tarrant Reg'l Water Dist. v. Herrmann (Tarrant III)*, 656 F.3d 1222, 1228 (10th Cir. 2011).

<sup>19</sup> *Red River Compact Commission*, OKLA. WATER RESOURCES BOARD, <http://www.owrb.ok.gov/rrccommission/rrccommission.html> (last visited May 7, 2013).

<sup>20</sup> *Tarrant III*, 656 F.3d at 1228 (citing Pub. L. No. 96-564, 94 Stat. 3305 (1980)).

<sup>21</sup> *Red River Compact Commission*, *supra* note 19.

<sup>22</sup> *Tarrant Reg'l Water Dist. v. Herrmann (Tarrant I)*, No. CIV-07-0045-IHE, 2009 WL 3922803, at \*1 (W.D. Okla. 2009); Petition for Writ of Certiorari at 3, *Tarrant III*, 656 F.3d 1222 (No. 11-889); see Joe Patranella, Note, *Love Thy Neighbor As Thyself: An Analysis of the*

obtain permits to appropriate water from within its borders, created the Oklahoma Water Resources Board (“OWRB”) to process applications.<sup>23</sup> The Oklahoma Legislature created criteria to guide OWRB permitting decisions, including a requirement that out-of-state applications be treated less favorably than in-state applications.<sup>24</sup> Tarrant applied to the OWRB for permits to take water from Beaver Creek, Cache Creek, and the Kiamichi River, all Oklahoma tributaries of the Red River.<sup>25</sup>

This dispute involves four stages of litigation.<sup>26</sup> In *Tarrant I*, filed on November 1, 2007 in the U.S. District Court for the Western District of Oklahoma, Tarrant sought an injunction and a declaratory judgment that the statutes controlling the OWRB’s application process were unconstitutional.<sup>27</sup> In 2009, while litigation was pending, the Oklahoma Legislature modified the application process but still commanded the OWRB to disfavor out-of-state purchasers.<sup>28</sup> Tarrant revised its complaint to challenge the amended statutes.<sup>29</sup> On November 18, 2009, the district court granted summary judgment to the OWRB.<sup>30</sup>

In *Tarrant II*, Tarrant returned to court and resurrected its earlier arguments against the statutes as applied to two alternative deals with Oklahoma entities for water not subject to the Compact.<sup>31</sup> One agreement was with owners of groundwater rights in Stephens County, and the other was a memorandum of understanding with the Apache Tribe where the parties agreed to work together to ascertain the tribe’s water

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*Texas Water Shortage*, Tarrant Regional Water District v. Herrmann, and *Why Oklahoma Should Be Mandated to Allow Texas to Purchase Water*, 52 S. TEX. L. REV. 297, 299 (2010).

<sup>23</sup> OKLA. STAT. ANN. tit. 82, § 105.9 (West 2013); *Tarrant III*, 656 F.3d at 1228.

<sup>24</sup> See *Tarrant III*, 656 F.3d at 1228.

<sup>25</sup> *Id.*; *Tarrant I*, 2009 WL 3922803, at \*1.

<sup>26</sup> *Tarrant*, slip op. at 7–9; *Tarrant III*, 656 F.3d at 1227; Tarrant Reg’l Water Dist. v. Herrmann (*Tarrant II*), No. CIV-07-0045-HE, 2010 WL 2817220, at \*1, \*2 (W.D. Okla. 2010); *Tarrant I*, 2009 WL 3922803, at \*1.

<sup>27</sup> *Tarrant III*, 656 F.3d at 1228; Complaint at 1, *Tarrant I*, 2009 WL 3922803 (No. CIV-07-00045-HE).

<sup>28</sup> *Tarrant III*, 656 F.3d at 1230. The new criteria included requiring the OWRB to consider whether the water that the applicant desired could be used in Oklahoma instead of out-of-state. OKLA. STAT. ANN. tit. 82, § 105.12(A)(5) (West 2013). Another new restriction on the OWRB prohibits it from granting a permit if doing so would impair Oklahoma’s ability “to meet its obligations under any interstate stream compact.” *Id.* § 105.12A(B)(1).

<sup>29</sup> *Tarrant III*, 656 F.3d at 1230; Amended Complaint at 9–10, *Tarrant II*, 2010 WL 2817220 (No. CIV-07-0045-HE).

<sup>30</sup> *Tarrant I*, 2009 WL 3922803, at \*8.

<sup>31</sup> *Tarrant II*, 2010 WL 2817220, at \*1.

rights.<sup>32</sup> On July 16, 2010, the district court ruled that neither of these new agreements created a justiciable controversy.<sup>33</sup>

Tarrant appealed the district court's decisions from *Tarrant I* and *Tarrant II* to the Court of Appeals for the Tenth Circuit.<sup>34</sup> In reviewing the entire litigation up to that point, the Tenth Circuit considered whether the Compact preempted the Oklahoma statutes, the justiciability of Tarrant's claim based on the two new agreements, and whether the Oklahoma water permit statutes violate the Commerce Clause of the U.S. Constitution.<sup>35</sup> The Tenth Circuit found in favor of the OWRB, and Tarrant appealed to the Supreme Court.<sup>36</sup> On June 13, 2013, the Supreme Court affirmed unanimously and held that the Compact did not preempt Oklahoma's water permit laws and that the laws do not violate the Commerce Clause.<sup>37</sup>

## II. LEGAL BACKGROUND

The Commerce Clause in the U.S. Constitution grants Congress power “[t]o regulate Commerce . . . among the several States.”<sup>38</sup> Congress's power to regulate interstate commerce has no limit other than the words of the Constitution.<sup>39</sup> Congress can regulate the channels of interstate commerce, common instrumentalities of interstate commerce, and activities having a substantial relation to interstate commerce.<sup>40</sup> Water is an article of commerce susceptible to regulation under the Commerce Clause.<sup>41</sup>

The Supreme Court interprets the Commerce Clause as an exclusive grant of power to Congress that implicitly restricts state regulation

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<sup>32</sup> *Id.* Tarrant and the Apache Tribe agreed to determine the tribe's water rights so that Tarrant could purchase water from the tribe to meet the needs of Texas residents. *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Tarrant III*, 656 F.3d at 1227–28.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1250; Petition for Writ of Certiorari, *Tarrant III*, *supra* note 22, at 2.

<sup>37</sup> *Tarrant*, slip op. at 24.

<sup>38</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>39</sup> *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824).

<sup>40</sup> *See, e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 256 (1964) (citing *Caminetti v. United States*, 242 U.S. 470, 491 (1917)) (channels of interstate commerce); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (substantial relation to interstate commerce); *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342, 353 (1914) (common instrumentalities of interstate commerce).

<sup>41</sup> *See Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982) (noting that “water is an article of commerce”).

of interstate commerce.<sup>42</sup> Under this interpretation, known as the dormant Commerce Clause, state laws are unconstitutional if they impede interstate commerce because Congress has exclusive regulatory power on this subject.<sup>43</sup> The policy behind this doctrine is to prevent states from attempting to protect their economic interests through laws that burden other states.<sup>44</sup> In 1978, in *City of Philadelphia v. New Jersey*, the Supreme Court held that protectionist state laws burden interstate commerce and violate the Commerce Clause, absent a strong showing of legitimate public benefit.<sup>45</sup> Without this restriction on state laws, states might exacerbate their shared economic problems through ever-increasing attempts at isolation and retaliation.<sup>46</sup> This danger led the Court to declare in *City of Philadelphia* that a New Jersey law that prohibited trash from outside the state was unconstitutional.<sup>47</sup>

Based on these policy concerns, courts interpret the Commerce Clause in a manner that preserves the vertical federalist structure of government that the Constitution carefully establishes.<sup>48</sup> The dormant Commerce Clause also allows courts to preserve the Constitution's plan of horizontal unity among the states by preventing them from engaging in retaliatory economic activity.<sup>49</sup> Justice Benjamin N. Cardozo, writing

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<sup>42</sup> Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008). The Supreme Court has “sensed a negative implication” in the Commerce Clause that Congress’s exclusive power to regulate interstate commerce restricts states from engaging in such regulation. *Id.*

<sup>43</sup> See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 401–02 (1994) (O'Connor, J., concurring). A state law violates the Constitution if it “discriminates against interstate commerce on its face or in practical effect.” *Id.*

<sup>44</sup> *Davis*, 553 U.S. at 337–38; see also *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995) (noting the dormant Commerce Clause prevents states “from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole”); *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923) (noting the purpose of the dormant Commerce Clause is “to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation”), *aff'd* *Pennsylvania v. West Virginia*, 263 U.S. 350 (1923).

<sup>45</sup> 437 U.S. 617, 623–24 (1978).

<sup>46</sup> See *id.* at 629.

<sup>47</sup> *Id.*

<sup>48</sup> See *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (noting that courts have a role in preserving the Constitution's federalist structure). The Constitution establishes a vertical federalist structure by granting certain powers to the federal government and reserving all other powers to the states or the people. See U.S. CONST. art. VI (declaring that the U.S. Constitution and federal law are “the supreme Law of the Land”); U.S. CONST. amend. X (reserving powers not granted to the federal government to the states or the people); *M'Culloch v. Maryland*, 17 U.S. (1 Wheat) 316, 405 (1819) (noting that the federal government is “one of enumerated powers”).

<sup>49</sup> See Daniel M. Forman, Comment, *The Dormant Commerce Clause and the Massachusetts Landfill Moratorium: Are National Market Principles Adequately Served?*, 24 B.C. ENVTL. AFF. L. REV. 425, 430–31 (1997) (discussing the goals of the dormant Commerce Clause as pro-

about state protectionism for the Court in *Baldwin v. G.A.F. Seelig, Inc.*, explained that the Constitution “was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”<sup>50</sup>

States can avoid the restrictions of the dormant Commerce Clause if Congress consents to protectionist state laws.<sup>51</sup> Because congressional consent can obviate the unconstitutionality of state protectionism, courts considering a dormant Commerce Clause challenge must ask first whether Congress consented to the state law.<sup>52</sup> The standard for consent includes express statements and any other statements that indicate congressional deliberation and intent.<sup>53</sup>

In *Gregory v. Ashcroft*, the Supreme Court held that if Congress’s purpose is to permit a protectionist state law—changing the default constitutional balance between the states and the federal government—Congress must make its intent “unmistakably clear” through statutory language.<sup>54</sup> The Court has held that “Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve” violations of the Commerce Clause.<sup>55</sup> The policy behind requiring clear congressional consent is to ensure that the national legislature truly acted collectively, thus minimizing the risk that restraints on commerce will harm unrepresented interests.<sup>56</sup>

In contexts where the Court’s jurisprudence requires clear statements from Congress that demonstrate congressional consent, the

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tecting national economic development and ensuring “the integrity of the national political union”). The Constitution’s plan of horizontal unity involves investing Congress with the power to regulate interstate commerce, which will curtail retaliation among the states and preserve national unity. *See id.*

<sup>50</sup> 294 U.S. 511, 523 (1935). The lack of federal commerce power under the Articles of Confederation was a major problem creating the need for the Constitution in the first place. *Gonzales v. Raich*, 545 U.S. 1, 16 (2005); *see* THE FEDERALIST NOS. 6, 22 (Alexander Hamilton).

<sup>51</sup> *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945).

<sup>52</sup> *See* S.–Cent. Timber Dev. Inc. v. Wunnicke, 467 U.S. 82, 91–92 (1984) (discussing how the policy behind the dormant Commerce Clause requires courts to find an “unmistakably clear” manifestation of congressional consent to state protectionism).

<sup>53</sup> *See, e.g., Wunnicke*, 467 U.S. at 91–92 (congressional intent can come in multiple ways but “must be unmistakably clear”); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 430–31 (1946) (congressional consent is evident when the intent to consent is “expressly stated”).

<sup>54</sup> 501 U.S. 452, 460–61 (1991) (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989)).

<sup>55</sup> *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) (citing *Maine v. Taylor*, 477 U.S. 131, 139 (1986)); *Wunnicke*, 467 U.S. at 91.

<sup>56</sup> *Wunnicke*, 467 U.S. at 92.



Court disfavors consulting legislative history.<sup>57</sup> In 1989, in *Dellmuth v. Muth*, the Supreme Court considered whether a federal statute abrogated Pennsylvania's sovereign immunity from lawsuits under the Eleventh Amendment.<sup>58</sup> The Court found that Congress's alleged intent to abrogate sovereign immunity was not "unmistakably clear" in the statute, and that consulting legislative history was irrelevant because congressional intent requires a clear statement within the statutory text.<sup>59</sup> The Court in *Dellmuth* reasoned that if Congress's intent is unmistakably clear in the statutory text, legislative history is unnecessary, and if Congress's intent is not unmistakably clear, consulting legislative history merely confirms that the standard remains unmet.<sup>60</sup> When considering challenges to state laws under the dormant Commerce Clause, courts treat federal statutes and congressionally approved interstate compacts equally.<sup>61</sup>

The standard for Congress's intent to consent to state protectionism remains high.<sup>62</sup> Even broad language that signifies extreme deference to state laws can fail to indicate consent.<sup>63</sup> For example, in 1982, in *Sporhase v. Nebraska ex rel. Douglas* the Supreme Court held that a Nebraska groundwater statute's reciprocity requirement for out-of-state purchasers violated the dormant Commerce Clause despite the presence of extremely deferential language in a federal statute.<sup>64</sup> Nebraska relied on the Reclamation Act of 1902, which stated that "nothing in this Act shall be construed as affecting . . . the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation."<sup>65</sup> The Court found that this language fell short of

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<sup>57</sup> *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (discouraging the use of legislative history within the context of congressional consent to abrogate Eleventh Amendment sovereign immunity); see also *C & A Carbone*, 511 U.S. at 410 (O'Connor, J., concurring) (reasoning that "isolated references [in legislative history] do not satisfy our requirement of an explicit statutory authorization" from Congress in the dormant Commerce Clause context); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 342 (1982) (noting that within the dormant Commerce Clause context, relying on "isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards").

<sup>58</sup> *Dellmuth*, 491 U.S. at 226–27.

<sup>59</sup> *Id.* at 230.

<sup>60</sup> *Id.*

<sup>61</sup> See *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (citing *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)).

<sup>62</sup> See *Gregory*, 501 U.S. at 460–61 (quoting *Will*, 491 U.S. at 65). Congress must make its intent to consent to state protectionism "unmistakably clear." *Id.*

<sup>63</sup> See *Sporhase*, 458 U.S. at 959–60.

<sup>64</sup> See *id.* at 958–60.

<sup>65</sup> 43 U.S.C. § 383 (2006); *Sporhase*, 458 U.S. at 959.

an unmistakably clear expression of congressional consent to state protectionism.<sup>66</sup>

In cases where Congress's intent to consent to state protectionist laws is clear from the federal statute itself, the Court has found that such state laws do not violate the dormant Commerce Clause.<sup>67</sup> For example, in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System* the Court upheld state laws passed by Massachusetts and Connecticut that allowed bank holding companies within New England to acquire banks located in those two states, even though the laws did not extend this ability to similar companies outside of New England.<sup>68</sup> The Court held that the text of the Bank Holding Company Act of 1956, as revised by an amendment, clearly demonstrated Congress's intent to allow protectionist state laws pursuant to the purpose of the statute.<sup>69</sup> The clear showing of consent in the statutory text protected the laws from challenges under the dormant Commerce Clause.<sup>70</sup>

Consent from Congress is not the only way that a state can create laws that do not violate the dormant Commerce Clause.<sup>71</sup> The courts can still uphold a protectionist state law that lacks congressional approval if the state law's effects on interstate commerce are merely incidental and the burden on interstate commerce is not excessive relative to the state benefits.<sup>72</sup>

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<sup>66</sup> *Sporhase*, 458 U.S. at 959–60; see also *New Eng. Power*, 455 U.S. at 341 (determining that seemingly deferential language in the Federal Power Act did not grant to New Hampshire authority to create protectionist state law on export of hydroelectric power).

<sup>67</sup> See, e.g., *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174, 178 (1985) (stating that the Bank Holding Company Act's text showed Congress's intent to consent to protectionist state laws); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 155 (1982) (discussing how the Indian Reorganization Act's text showed Congress's intent to consent to protectionist Native American tribal taxes).

<sup>68</sup> 472 U.S. at 164, 178.

<sup>69</sup> Bank Holding Company Act of 1956, 12 U.S.C. § 1842(d) (1982); *Ne. Bancorp*, 472 U.S. at 174–75 (citing *W. & So. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653–54 (1981)). The Act stated that “no application . . . shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any . . . interest in . . . any additional bank located outside [the company's state of operations],” but then allowed such a scenario to occur only if “the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.” 12 U.S.C. § 1842(d).

<sup>70</sup> *Ne. Bancorp*, 472 U.S. at 174–75 (citing *W. & So. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653–54 (1981)).

<sup>71</sup> See *City of Philadelphia*, 437 U.S. at 624 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The Court takes “a much more flexible approach” to state laws that promote local interests while having only incidental effects on interstate commerce. *Id.*

<sup>72</sup> See *id.*

## III. ANALYSIS

The Supreme Court held unanimously in *Tarrant Regional Water District v. Herrmann* that the Red River Compact (the “Compact”) does not preempt Oklahoma’s water permit statutes.<sup>73</sup> The Court held that the Red River water that Tarrant sought to appropriate properly remains under Oklahoma’s control through the Compact’s terms, and therefore preemption is nonexistent.<sup>74</sup> The Court also unanimously denied Tarrant’s dormant Commerce Clause argument by framing Tarrant’s claim as pertaining to unallocated water only.<sup>75</sup> The Court then concluded that because the Compact does not leave any Red River water unallocated, Tarrant’s claim is therefore meritless.<sup>76</sup>

The Court’s holding pertaining to the dormant Commerce Clause deserves careful analysis because the Compact’s language does not satisfy the standard for Congress’s consent to state protectionism.<sup>77</sup> The Court also did not determine whether Oklahoma’s laws might discriminate against interstate Commerce but only with marginal effects, which could make the laws permissible under the Court’s precedent.<sup>78</sup> The Court’s focus on unallocated water allowed the Court to avoid the deeper issues in this case, namely the possibility of impermissible restrictions on interstate commerce.<sup>79</sup> Finally, the Court’s holding could hinder interstate cooperation in solving water shortages in the future.<sup>80</sup>

Examining the Court’s holding in light of its own precedent reveals that the Compact’s language fails to satisfy the “unmistakably clear” and “unambiguous” standard for Congress’s consent to protectionist state laws that discriminate against interstate commerce.<sup>81</sup> In *Sporhase v. Ne-*

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<sup>73</sup> *Tarrant Reg’l Water Dist. v. Herrmann*, No. 11–889, slip op. at 24 (U.S. Jun. 13, 2013).

<sup>74</sup> *Id.* at 22.

<sup>75</sup> *Id.* at 23–24.

<sup>76</sup> *Id.*

<sup>77</sup> See *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) (citing *Maine v. Taylor*, 477 U.S. 131, 139 (1986)); *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989)); *S.-Cent. Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)).

<sup>78</sup> See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1977) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The Court takes a “flexible approach” to state statutes that promote local interests while creating effects on interstate commerce that are merely incidental. *Id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *id.* at 629 (discussing the cumulative effect of protectionist state laws that discriminate against interstate commerce in garbage disposal).

<sup>81</sup> See *Wyoming v. Oklahoma*, 502 U.S. at 458 (citing *Taylor*, 477 U.S. at 139); *Gregory*, 501 U.S. at 460–61 (quoting *Will*, 491 U.S. at 65); *S.-Cent. Timber Dev. Inc.*, 467 U.S. at 91. The Compact includes deferential language that is open to interpretation. See, e.g., Red River

*braska* ex rel. *Douglas*, language similar to the Compact language was insufficient to prove consent.<sup>82</sup> In *Sporhase*, the Court held that language in the Reclamation Act of 1902—“nothing in this Act shall be construed as affecting . . . the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation”—did not support Nebraska’s argument that Congress consented to its protectionist water laws.<sup>83</sup> Nothing in the Act’s language indicated Congress’s intent to legislate away its Commerce Clause power.<sup>84</sup>

The language in the Red River Compact is remarkably similar to the language in the Reclamation Act of 1902 and does not demonstrate that Congress intended to consent to state protectionism when agreeing to allow Oklahoma, Texas, Arkansas, and Louisiana to enter into an agreement to define each state’s water rights.<sup>85</sup> In fact, language in the Compact suggests the exact opposite, namely that Congress contemplated preserving its Commerce Clause power over Red River water as an article of interstate commerce: “Nothing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority, in, over and to water of the Red River Basin.”<sup>86</sup> This language suggests that Congress intended not to disturb its Commerce Clause authority over Red River water, which is an article of commerce.<sup>87</sup>

Because the standard for congressional intent to consent to state protectionism is high, the Supreme Court could have distinguished this case from *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve*

Compact, Pub. L. No. 96-564, 94 Stat. 3305 § 2.01 (1980). Examples includes “unrestricted use” (§ 4.02(b)), “[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state” (§ 2.01), “[e]ach state may freely administer water rights and uses in accordance with the laws of that state” (§ 2.01), and “[n]othing in this Compact shall be deemed to . . . [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water.” (§ 2.10(a)).

<sup>82</sup> See 458 U.S. 941, 959 (1982).

<sup>83</sup> *Id.* at 959 (quoting 43 U.S.C. § 383).

<sup>84</sup> *Id.* at 959–60.

<sup>85</sup> Compare Reclamation Act of 1902, 43 U.S.C. § 383 (2006) (“Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation . . .”), with Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 § 2.10(a) (Nothing in this Compact shall be deemed to: Interfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water.”); see *Sporhase*, 458 U.S. at 959–60.

<sup>86</sup> See Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 § 2.07.

<sup>87</sup> See *id.*; *Sporhase*, 458 U.S. at 954 (noting that water is an article of commerce for purposes of Congress’s Commerce Clause power).

*System*.<sup>88</sup> In *Northeast Bancorp*, the Court found unmistakably clear proof of Congress's intent in the text of the Bank Holding Company Act.<sup>89</sup> The statutory text showed that Congress contemplated the types of protectionist state laws that Massachusetts and Connecticut enacted, which favored New England bank holding companies over outside companies.<sup>90</sup> In *Tarrant*, however, the deferential Compact language does not demonstrate an unmistakably clear congressional intent to consent to protectionism because some of the key provisions are ambiguous.<sup>91</sup> For example, the language in section 4.02(b) instructs that Oklahoma shall have "free and unrestricted use" of portions of the Red River water,<sup>92</sup> but this does not sufficiently demonstrate that Congress intended to allow Oklahoma to create protectionist laws.<sup>93</sup>

Congress's supposed intent to consent to protectionism in *Tarrant* is not unmistakably clear or unambiguous because ambiguity remains.<sup>94</sup> As *Tarrant* argued in its petition for certiorari to the Supreme Court, the Court of Appeals for the Tenth Circuit stated that certain language in the Compact "might suggest no more than preservation of existing state laws without protecting them from dormant Commerce Clause attack."<sup>95</sup> This suggestion that at least a portion of the Compact is sus-

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<sup>88</sup> See 472 U.S. 159, 174–75 (1985) (holding that statutory text of the Bank Holding Company Act satisfied the standard for congressional intent to consent to state protectionist laws); *Gregory*, 501 U.S. at 460–61 (quoting *Will*, 491 U.S. at 65) (holding that if Congress intends to alter the structure of power between the federal government and the states, it must make its intent "unmistakably clear").

<sup>89</sup> 472 U.S. at 174–75.

<sup>90</sup> *Id.*; see Bank Holding Company Act of 1956, 12 U.S.C. § 1842(d) (1982) (stating that "no application . . . shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any . . . interest in . . . any additional bank located outside [the company's state of operations], unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication").

<sup>91</sup> See Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 §§ 2.01, 2.10(a), 4.02(b) (1980).

<sup>92</sup> See *id.* § 4.02(b).

<sup>93</sup> See *id.* § 2.07. Other portions of the Compact suggest that Congress intended to retain its Commerce Clause power. See *id.*

<sup>94</sup> See *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (stating that Congress's deference to state laws in federal legislation can merely "leave standing whatever valid state laws then existed"); Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 § 2.10(a).

<sup>95</sup> *Tarrant Reg'l Water Dist. v. Herrmann (Tarrant III)*, 656 F.3d 1222, 1238 (10th Cir. 2011); Petition for Writ of Certiorari, *Tarrant III*, *supra* note 22, at 21.

ceptible to multiple interpretations indicates that the unmistakably clear standard for Congress's intent might remain unmet.<sup>96</sup>

The Supreme Court also did not address the Tenth Circuit's use of legislative history—the Compact's Interpretive Comments—to discern Congress's intentions when it approved the Compact.<sup>97</sup> Consulting such comments seems unnecessary if congressional consent to state protectionism was unmistakably clear in the Compact language itself.<sup>98</sup> In *Dellmuth v. Muth*, the Supreme Court discouraged reliance on legislative history when examining Congress's supposed intent to consent to abrogation of Pennsylvania's sovereign immunity under the Eleventh Amendment.<sup>99</sup> *Tarrant* is similar to *Dellmuth* because this case also requires a clear statement from Congress to demonstrate consent, and reliance on material beyond the Compact's text suggests that Congress's intent was neither unmistakably clear nor unambiguous in the text itself.<sup>100</sup>

If the Supreme Court would have conducted a more thorough analysis, it might have found that Congress did not consent to Oklahoma's protectionist laws.<sup>101</sup> In such an instance, the Court could have also considered whether Oklahoma's water permit laws have only an incidental effect on interstate commerce.<sup>102</sup> If the effect of the state laws is only marginal, the Court could have upheld them on such grounds.<sup>103</sup> Such an analysis and conclusion could have provided more guidance than the relatively light treatment of the important Commerce Clause issues in *Tarrant*.<sup>104</sup>

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<sup>96</sup> See *Gregory*, 501 U.S. at 460–61, 470 (quoting *Will*, 491 U.S. at 65) (noting multiple interpretations under the Age Discrimination in Employment Act of 1967 indicated that “unmistakably clear” standard was unmet); *Tarrant III*, 656 F.3d at 1238.

<sup>97</sup> See *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (discouraging the use of legislative history when searching for Congress's intent to consent to abrogation of Eleventh Amendment sovereign immunity); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 410 (1994) (O'Connor, J., concurring) (discussing that legislative history was insufficient to satisfy requirement of “explicit statutory authorization” from Congress); *New Eng. Power*, 455 U.S. at 342 (finding “isolated fragments of legislative history” insufficient to determine Congress's intent); *Tarrant III*, 656 F.3d at 1238.

<sup>98</sup> See *Dellmuth*, 491 U.S. at 230.

<sup>99</sup> See *id.* at 230–32.

<sup>100</sup> See *id.* at 230; *Will*, 491 U.S. at 65 (noting that the Supreme Court has applied an “unmistakably clear” standard for determining Congress's intent in the context of the Eleventh Amendment, “but a similar approach is applied in other contexts”).

<sup>101</sup> See *Sporhase*, 458 U.S. at 959.

<sup>102</sup> See *City of Philadelphia*, 437 U.S. at 624 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

The Commerce Clause exists to preserve national unity, but Oklahoma's water permit laws defy the purpose of the Constitution's exclusive grant to Congress.<sup>105</sup> The Framers wanted to stop state protectionism from jeopardizing interstate cooperation, but these water laws will have the opposite effect.<sup>106</sup> Protecting Oklahoma's special interests in the short term will lead to larger problems in the long run because no state can divorce itself from the national enterprise.<sup>107</sup> Allowing such protectionist laws could foster enmity between states over the growing problem of water scarcity in America and threatens to complicate efforts to solve local water shortages that will worsen in coming years.<sup>108</sup>

Texas estimates that the population of the Dallas-Fort Worth metropolitan area, the fourth largest in the nation, will swell to twice its size in about fifty years.<sup>109</sup> Preventing Texas from purchasing unused Red River water from Oklahoma will weaken Texas's ability to face an impending water crisis through its increasing fresh water use for human consumption, livestock, sanitation, and irrigation.<sup>110</sup> Global warming also is on a steady pace to intensify water scarcity by evaporating more of the Earth's fresh water supply, including water available in Texas.<sup>111</sup> The convergence of these problems will challenge the federal government as well as the states to adapt to new water use patterns with creative solutions,<sup>112</sup> and preserving Oklahoma's protectionist water laws

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<sup>105</sup> See *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979). One of the “central concern[s] of the Framers” when drafting the Constitution was preventing the economic isolationism that threatened the states under the Articles of Confederation. *Id.* For this reason, the Supreme Court interprets the Commerce Clause as imposing a restriction on state regulation of interstate commerce even in the absence of congressional action. *Id.*

<sup>106</sup> See *Gonzales v. Raich*, 545 U.S. 1, 16 (2005); THE FEDERALIST NOS. 6, 22 (Alexander Hamilton).

<sup>107</sup> See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (explaining that the Constitution was founded on the theory that in the long run and prosperity will come through unity among the several states, not protectionism and isolationism).

<sup>108</sup> See Josh Clemons, *Interstate Water Disputes: A Road Map for States*, 12 SOUTHEASTERN ENVTL. L.J. 115, 115 (2004) (providing a compendium of different approaches to solving interstate water disputes). The increasing demand for fresh water calls for state planning that considers resources shared across state lines. *Id.*

<sup>109</sup> Petition for Writ of Certiorari, *Tarrant III*, *supra* note 22, at 3.

<sup>110</sup> Patranella, *supra* note 22, at 326–27; see *Water Use in the United States*, NAT'L ATLAS, [http://www.nationalatlas.gov/articles/water/a\\_wateruse.html](http://www.nationalatlas.gov/articles/water/a_wateruse.html) (last modified Jan. 14, 2013) (illustrating that water use is diverse and includes a variety of common purposes).

<sup>111</sup> See Tarlock, *supra* note 2; Ramon Alvarez et al., *Fair Warning—Global Warming and the Lone Star State*, ENVTL. DEF., 5, 11–12, 14–17 (May 2006), <http://www.edf.org/content/fair-warning-global-warming-and-lone-star-state>.

<sup>112</sup> See Tarlock, *supra* note 2, at 1012–13.

might only complicate matters by obstructing interstate cooperation.<sup>113</sup> Taking the long view, as Justice Cardozo wrote decades ago in *Baldwin v. G.A.F. Seelig, Inc.*, the people of Oklahoma and Texas “must sink or swim together.”<sup>114</sup>

#### CONCLUSION

The Supreme Court's holding in *Tarrant Regional Water District v. Herrmann* does not address whether the language of the Red River Compact, which apportions water between Texas and Oklahoma, meets the Court's own standards for congressional consent to state protectionism. The Court also did not address whether Oklahoma's water permit laws have only a marginal effect on interstate commerce, which would provide a more solid ground for upholding them. Allowing protectionist water laws could have negative long-term consequences for Texas and could exacerbate water shortages in other parts of the nation by fostering economic isolationism.

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<sup>113</sup> See *City of Philadelphia*, 437 U.S. at 623 (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949)) (noting that the Commerce Clause exists to prevent the states from refusing to cooperate with each other by treating themselves as “separable economic units”).

<sup>114</sup> See 294 U.S. at 523.



