2013

Escaping the *Sporhase* Maze: Protecting State Waters within the Commerce Clause

Mark S. Davis

Michael Pappas
University of Maryland Francis King Carey School of Law, mpappas@law.umaryland.edu

Escaping the *Sporhase* Maze: Protecting State Waters Within the Commerce Clause

Mark S. Davis[*]

Michael Pappas[**]

ABSTRACT

Eastern states, though they have enjoyed a history of relatively abundant water, increasingly face the need to conserve water, particularly to protect water-dependent ecosystems. At the same time, growing water demands, climate change, and an emerging water-oriented economy have intensified pressure for interstate water transfers. Thus, even traditionally wet states are seeking to protect or secure their water supplies. However, restrictions on water sales and exports risk running afoul of the Dormant Commerce Clause. This Article offers guidance for states, particularly eastern states concerned with maintaining and improving water-dependent ecosystems, in seeking to restrict water exports while staying within the confines of the Dormant Commerce Clause.

TABLE OF CONTENTS

---

* Senior Research Fellow, Tulane University Law School, and Director of the Tulane Institute on Water Resources Law and Policy.

** Assistant Professor of Law, University of Maryland Francis King Carey School of Law. Many thanks to Brigham Daniels, Kati Kovacs, Amanda Leiter, Jessie Owley, Justin Pidot, and Noah Sachs for generous and helpful comments. Thanks also to Alice Johnson, Max Siegel, and Sue McCarty for research and editorial assistance.

I. INTRODUCTION

Water is the stuff of conflict. Essential to both life and commerce, but too often insufficient for all to have their fill, water makes enemies of landowners, irrigators, energy developers, environmentalists, ecosystems, industries, individuals, companies, flora, and fauna. So often, water places neighbors at odds.[1]

Such struggles over water have played a defining role in the story of the western United States, and increasingly the wave of conflict washes east as newfound scarcity breeds concern and conflict. Recently, water disputes have arisen between North Carolina and South Carolina,[2] between Mississippi and Tennessee,[3] as well as among Georgia, Alabama, and Florida.[4] Moreover, droughts in the southern and southeastern United States have forced Texas to endure the driest seven-month span on record[5] and have led football stadiums in Georgia to limit fans' freedom to flush during major sporting events.[6]

---

1. As often quoted in water law articles, "[W]hiskey is for drinking and water is for fighting over." *See, e.g.*, Mark Davis & James Wilkins, *A Defining Resource: Louisiana's Place in the Emerging Water Economy*, 57 LOY. L. REV. 273, 285 (2011).

2. South Carolina v. North Carolina, 130 S. Ct. 854, 858 (2010).

3. Hood *ex rel.* Mississippi v. City of Memphis, 570 F.3d 625, 627 (5th Cir. 2009).

4. *In re* Tri-State Water Rights Litig., 639 F. Supp. 2d 1308, 1355 (M.D. Fla. 2009).

5. *See, e.g.*, Betsy Blaney, *Texas Drought 2011: State Endures Driest 7-Month Span on Record*, HUFFPOST GREEN (May 9, 2011, 7:00 PM), http://www.huffingtonpost.com/2011/05/10/texas-drought-2011-record_n_859902.html.

6. *See Drinking Water Basics*, NAT'L ACADS. WATER INFO. CTR., http://water.nationalacademies.org/basics.shtml (last visited July 31, 2012) ("In

As water concerns grow in the national consciousness, a new challenge continues to place neighbors (this time states) in a difficult position regarding competing interests in water. This challenge is interstate water markets and their demand to export water from states where it is relatively abundant to drier environs. Concerned about climate change, drought, environmental conservation and enhancement, new in-state water needs, and a growing awareness that one state's water may be very much coveted by its neighbors,[7] states are seeking to find ways to hold on to their water, maintain and improve ecosystems, and turn water into a strategic asset.

Louisiana and Texas offer a current example of this neighborly challenge. Louisiana, positioned at the terminus of major rivers and built by the alluvial action of those rivers, is a relatively water-rich state. In fact, water concerns in Louisiana are more frequently perceived as stemming from overabundance (i.e., flooding) rather than from shortage.[8] However, Louisiana is increasingly experiencing droughts and requires a copious outpouring of freshwater to maintain, much less restore, its vanishing coastline.[9] Texas, on the other hand, is not known for its abundant freshwater and has long recognized that its water resources are not sufficient to support its water use.[10] In fact, Texas began eyeing Louisiana's

---

Athens, Georgia, fans at the University of Georgia's homecoming football game were asked not to flush the toilets: stadium attendants were even hired to moderate flushing in a desperate effort to save water.").

7. Support for this statement is too extensive to document here. However, by way of example, see Amy Joi O'Donoghue, *The Fight for Water: Can the Mighty Mississippi Save the West?*, DESERET NEWS (May 13, 2012, 6:21 P.M.), http://www.deseretnews.com/article/865555735/The-fight-for-water-Can-the-mighty-Mississippi-save-the-West.html?pg=all.

8. *See* Oliver A. Houck, *Rising Water: The National Flood Insurance Program and Louisiana,* 60 TUL. L. REV. 61, 63 (1985) (observing that "[n]o state in America is more familiar with flood losses than Louisiana, which sits on the Gulf of Mexico at the receiving end of waters draining the entire Central United States" and that "development of New Orleans and much of South Louisiana is a study in the very defiance of water").

9. See COASTAL PROT. & RESTORATION AUTH. OF LA., LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST (2012), *available at* http://www.lacpra.org/assets/docs/2012%20Master%20Plan/Final%20Plan/2012%20Coastal%20Master%20Plan.pdf [hereinafter 2012 LOUISIANA COASTAL MASTER PLAN], for a detailed examination highly reliant on river flows.

10. *See* Joe Patranella, Note, *Love Thy Neighbor as Thyself: An Analysis of the 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, 298 (2010) (explaining that "Texas is at an alarming crossroads in regard to its water supply" and that "[o]ne can hardly drive down

Mississippi River water as long ago as 1968.[11] This water disparity between neighbors came to a head during the crippling record drought that in 2011 left Texas desperate for water.[12] During that time, a private water-marketing company based in Texas proposed to buy up to 600,000 acre-feet of water per year from Louisiana's Sabine River Authority.[13] The idea of sending this water out of state found broad opposition in Louisiana, a state dependent on abundant water for everything from navigation to coastal restoration.[14] So the question arose: What can be done to restrict such an export?

Such a question about what a state might do to ensure that its waters do not become merely a well for wealthy neighbors is not unique to Louisiana. In fact, states have attempted to protect their water supplies from export for years.[15] Given the rise of the new "water economy,"[16] states' escalating desires to take tighter hold of their water resources is perfectly reasonable.[17] Further, it seems in keeping with our nation's long tradition of leaving the nature and definition of water rights to the states.[18]

---

the ever-crowded lanes of Interstate 35 without noticing a smattering of billboards encouraging, if not begging, the citizens of the Metroplex to curtail their water usage").

11. *See* TEX. WATER DEV. BD., CONCLUSIONS AND RECOMMENDATIONS (1968), *available at* http://www.twdb.state.tx.us/publications/State_Water_Plan/1968/1968%20Plan5.pdf.

12. *See* SUSAN COMBS, TEX. COMPTROLLER OF PUB. ACCOUNTS, THE IMPACT OF THE 2011 DROUGHT AND BEYOND (2011), *available at* http://www.window.state.tx.us/specialrpt/drought/pdf/96-1704-Drought.pdf (stating that 2011 was "the driest year Texas has seen since modern recordkeeping began in 1895").

13. *See* Tom Aswell, *Jindal in Need of Deniability in Toledo Bend Water Sale Issue; À La John Kerry, He Was for the Sale Before He Was Against It*, LA. VOICE (Feb. 1, 2012), http://louisianavoice.com/2012/02/01/jindal-in-need-of-deniability-in-toledo-bend-water-sale-issue-a-la-john-kerry-he-was-for-the-sale-before-he-was-against-it/.

14. *See id.*

15. *See, e.g.*, Robert F. Durant & Michelle Deany Holmes, *Thou Shalt Not Covet Thy Neighbor's Water: The Rio Grande Basin Regulatory Experience*, 45 PUB. ADMIN. REV. 821, 821–22 (1985) (analyzing "New Mexico's experience as it sought first to deny and later to place severe limits on the export of groundwater to the city of El Paso, Texas").

16. *See, e.g.*, Davis & Wilkins, *supra* note 1.

17. *See* Durant & Holmes, *supra* note 15, at 821 (explaining that, in light of a burgeoning water demand across the country, as well as water-deficient states increasingly coveting the supplies of their neighbors, "those states that are vulnerable seek to impose or preserve statutory barriers to water export").

18. *See* Stephen F. Williams, *Free Trade in Water Resources:* Sporhase v. Nebraska *ex rel.* Douglas, 2 SUP. CT. ECON. REV. 89, 92 (1983) (stating that

It was just such an inclination that led Nebraska to limit the export of its groundwater. But when the United States Supreme Court struck down part of that restriction on Dormant Commerce Clause grounds in *Sporhase v. Nebraska* in 1982,[19] a new chapter in American water law began. Since *Sporhase*, questions have lingered about the balance between state authority over water resources and the limits of the Dormant Commerce Clause.[20]

Now, mounting pressure for water exports has increasingly placed the issue on state water-planning agendas and before the courts.[21] However, much has changed in America's water-scape since *Sporhase*, and water stewardship has become an urgent issue not only in dry western states, but also in traditionally wet eastern states. The prospects of rising seas and climate change are increasing the importance of states' abilities to protect the water supplies necessary to secure their futures.[22] Moreover, rolled into these concerns are the challenges presented by water-based ecosystems in the traditionally wetter eastern states. With efforts not only to conserve and maintain but also to enhance and replenish water-dependent wetlands, estuaries, and coastlines, a state's ability to control its water resources becomes all the more important.[23]

---

exemptions for resources subject to fictional state ownership arose in 1896 and, soon afterward, the Court applied the doctrine to water).

19. 458 U.S. 941 (1982).

20. *See generally* Williams, *supra* note 18, at 93–94 (contending that the Supreme Court's decision in *Sporhase* failed to define a judicial test for scrutinizing water-export barriers and introduced ambiguous terms to guide the court's future analyses).

21. The Supreme Court may even be in a position to reconsider the issue. *See* Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222 (10th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3453 (U.S. Jan. 19, 2012).

22. *See, e.g.*, Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 785–86 (2010) (discussing climate change impacts on water resources); A. Dan Tarlock, *How California Local Governments Became Both Water Suppliers and Planners*, 4 GOLDEN GATE U. ENVTL. L.J. 7, 10 (2010) ("A cascade of climate change studies continue to predict that arid and semiarid areas such as the American West face the risk of permanently decreased water budgets as precipitation declines and temperatures increase.").

23. *See, e.g.*, Davis & Wilkins, *supra* note 1, at 273 (explaining that water in Louisiana "will be a scarce resource that will demand a well-thought-out and integrated approach to its stewardship" balancing "navigation, flood control, environmental, agricultural, industrial, and drinking water supplies," and, "[a]s if things are not complicated enough, regional and interstate water needs are also growing, as are energy-driven water uses").

Neither case law nor scholarly analysis has addressed the impact of *Sporhase* in eastern states or its particular impact on environmental conservation and restoration served by keeping water in place. Further, the cases that have followed *Sporhase* fundamentally misapply it, distorting the state–federal balance.[24] In response, this Article offers guidance for states, particularly eastern states concerned with maintaining and improving water-dependent ecosystems, in seeking to restrict water exports while staying within the confines of the Dormant Commerce Clause. Accordingly, in Part II, we begin by documenting some of the environmental concerns that may particularly impact the wetter eastern states and animate state efforts to limit the export of water. Then, in Part III, we revisit *Sporhase* and the line of cases leading up to it to provide a proper background and understanding of the balance between states' powers to regulate water and the Dormant Commerce Clause's limitations. Following that, in Part IV, we highlight the important considerations that *Sporhase* and its surrounding cases leave for states to contemplate in shaping their water restrictions, and drawing on the example of Louisiana, we offer guidance for how eastern states might navigate the *Sporhase* Doctrine to protect environmental water uses.

II. WET STATES AND WATER NEEDS

The logic is so simple as to be obvious: water-based environments require water to survive. Thus, unsurprisingly, "[w]hen rivers and streams are deprived of adequate supplies of flowing water, the effects on wildlife are often devastating."[25] In fact, the effects are devastating on the entire ecosystem, as entire coastal estuaries, which are vital breeding grounds for plant and animal species, suffer with insufficient freshwater flows.[26] There is no substitute for water flowing in its natural place.

The western United States offers numerous examples of the struggles to maintain water supplies for ecosystems and the environmental harms resulting from inadequate water. Sufficient water flowing instream is essential for the trout and salmon populations of the Northwest, which would suffer greatly without state efforts to ensure these water supplies.[27] Similarly, in the

24. *See infra* notes 127–156 and accompanying text.

25. Jack Sterne, *Instream Rights & Invisible Hands: Prospects for Private Instream Water Rights in the Northwest*, 27 ENVTL. L. 203, 203 (1997).

26. *See, e.g.*, *Why Restore Estuaries?*, RESTORE AMERICA'S ESTUARIES, http://www.estuaries.org/why-restore-estuaries/ (last visited Aug. 1, 2012).

27. Sterne, *supra* note 25, at 204.

Southwest, the riparian and wetland habitats, home to myriad plant and animal species that once flourished in the Colorado River Delta, were dependent on sufficient water flowing from the Colorado River into the Sea of Cortez.[28] Without the water flows, those habitats and species are dwindling, if not gone altogether.[29]

Obviously, eastern ecosystems require water as well, but because the wetter eastern states have historically not faced the water-supply challenges of the West, there has been less difficulty in maintaining sufficient water to sustain the environment. However, this does not diminish the need for water in place to maintain these environments. Abundant flowing freshwater supplies are crucial to ecosystems throughout the eastern United States, including the Everglades[30] and the Chesapeake Bay.[31] In fact, because these eastern ecosystems have evolved around a greater abundance of water, they frequently require a greater quantity of water than do those in the West. For example, enormous flows of sediment-laden freshwater[32] are essential to the continued existence and productivity[33] of Louisiana's coast, which has experienced a crisis of land loss since at least the 1930s.[34] This environment requires abundant freshwater just to maintain the current, depleted coastline.

Moreover, these freshwater supplies are necessary for mere maintenance of the status quo, but environmental restoration and

---

28. *See* Sean T. Olson, *Saving a Dying Oasis: Utilizing the United Nations Convention on Non-Navigational Uses of International Watercourses to Preserve and Restore the Colorado River Delta*, 9 U. DENV. WATER L. REV. 159, 159–60 (2005).

29. *Id.*

30. *See* Fla. Dep't of Envtl. Prot., *Learn About Your Watershed: Everglades Watershed*, FLORIDA'S WATER, http://www.protectingourwater.org/watersheds/map/everglades/ (last visited Aug. 13, 2012).

31. "Within the Chesapeake Bay watershed, five major rivers—the Susquehanna, Potomac, Rappahannock, York and James—provide almost 90 percent of the fresh water to the Bay." *Rivers and Streams*, CHESAPEAKE BAY PROGRAM, http://www.chesapeakebay.net/issues/issue/rivers_and_streams (last visited Aug. 1, 2012).

32. LA. GROUND WATER RES. COMM'N, MANAGING LOUISIANA'S GROUNDWATER RESOURCES 9 (2012), *available at* http://dnr.louisiana.gov/assets/docs/conservation/groundwater/12.Final.GW.Report.pdf ("A reliable supply of fresh water is critically important to the long-term success of the [Louisiana Master Plan for Coastal Restoration and Protection].").

33. *See* 2012 LOUISIANA COASTAL MASTER PLAN, *supra* note 9, at 20 (noting that a healthy Louisiana coast provides, among other benefits, 26% of continental U.S. commercial fisheries production and habitat for 5 million migratory waterfowl).

34. *Id.* at 14; Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3, 9–10 (1983).

enhancement will require even greater freshwater supplies. For example, restoration efforts in Louisiana's 2012 Coastal Master Plan are premised on increased freshwater uses.[35] Across the coast of Louisiana, the plan's restoration agendas call for projects that "[m]aintain and increase, where possible, the input of freshwater to maintain a balance among saline and fresh wetlands," "increas[e] the use of Atchafalaya River sediment and water . . . to sustain the coastal ecosystem," and "[u]se sediment and water from the Mississippi River to sustain and rebuild land."[36] Additionally, the plan further focuses on freshwater, calling for "restor[ing] natural hydrologic patterns by conveying fresh water to areas that have been cut off by man-made features or by preventing the intrusion of salt water into fresh areas through man-made channels and eroded wetlands," as well as diverting sediment using freshwater.[37] These plans are built on assumptions about environmental scenarios that include river discharge of between 509,000 and 534,000 cubic feet per second.[38] As this makes clear, Louisiana's coast needs a lot of freshwater, sometimes in large doses, to maintain itself, much less rebuild.

Beyond Louisiana, there is a national demand for freshwater to support restoration, enhancement, and even creation of wetland ecosystems. In fact, as a condition for any Clean Water Act Section 404(b) permit for dredging or filling a wetland, the EPA and Army Corps require compensatory mitigation for losses of aquatic resources, which includes "restoration, enhancement, establishment, and in certain circumstances preservation" of aquatic resource functions.[39] Such projects, which may involve greater than one-to-one acreage compensation,[40] will likely require freshwater supplies greater than those currently allocated to environmental uses, and water in place will be essential to meeting these demands.

Sufficient freshwater flow is essential for maintaining aquatic environments, and having a reliable water source in place is necessary for improving and restoring them. To ensure that such water is available and in place, "wet" states, which are likely to be

35. *See* 2012 LOUISIANA COASTAL MASTER PLAN, *supra* note 9, at 46.
36. *Id.* at 31, 118, 124, 130.
37. *Id.* at 68–69.
38. *Id.* at 83. To give these flow numbers some context, the average annual flow of the Colorado River measured at Lees Ferry is 15 million acre-feet per year or 20,719 cubic feet per second. *See* U.S. DEP'T OF INTERIOR BUREAU OF RECLAMATION, INTERIM REPORT NO. 1: COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY (STATUS REPORT) 18 (2011).
39. *See* 40 C.F.R. § 230.93 (2011).
40. *See id*.

targeted as sources for interstate water markets, may wish to limit water exports.

III. A HISTORY OF STATE WATER REGULATION AND THE DORMANT COMMERCE CLAUSE

While state police power provides a basis for regulating the use and export of water, the Dormant Commerce Clause limits state power in this area. Thus, to successfully protect water in place, states must navigate the *Sporhase* Doctrine to create water restrictions that do not run afoul of the Dormant Commerce Clause. This Part offers the background context for understanding the *Sporhase* Doctrine. First, it gives a broad overview of state water regulations. Next, it turns to an outline of the Dormant Commerce Clause in general. Finally, it considers the line of cases where these two intersect, culminating in the leading case on the issue, *Sporhase*.

A. State Water Regulation

Water has historically been a natural resource controlled by the states as part of their police power, and the regulation, allocation, and administration of water resources has, with little exception, been an aspect of state law.[41] Thus, there are 50 different sets of water laws in the United States.[42] Each state has developed its own water-law regimes for surface water and groundwater (which are often treated separately),[43] and states' treatment of water ranges from a fully-held private property interest to a mere usufruct right. Though each state employs its own distinct water provisions, multiple states certainly embrace common doctrines.[44] While most

41. *See* DAVID H. GETCHES, WATER LAW IN A NUTSHELL 315 (3d ed. 1997) ("The federal government has long deferred to state law in the allocation of water, even on public lands.").

42. *See, e.g.*, R. Timothy Weston, *Harmonizing Management of Ground and Surface Water Use Under Eastern Water Law Regimes*, 11 U. DENV. WATER L. REV. 239, 246 (2008) (discussing the eastern states' embrace of the riparian rights doctrine but remarking that "[t]he details of riparian doctrine vary somewhat from jurisdiction to jurisdiction; while the jurisdictions share many fundamental principles, subtle but important nuances exist within the laws of the eastern states" (citation omitted)).

43. For further discussion of the law of groundwater and diffused surface water, see GETCHES, *supra* note 41, at 8–11.

44. For example, "[t]he eight most arid states (Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming) constitutionally or statutorily repudiated riparian rights very early and adopted prior appropriation

states have replaced the pure common law doctrines with "statutory," "regulated," or "permit-based" variations,[45] the traditional structures described below remain descriptive enough to offer a broad overview.

In the case of surface water, western states generally favor the prior appropriation doctrine; whereas, eastern states generally take a riparian approach.[46] The prior appropriation states of the West traditionally recognize water rights only when water is diverted from its natural course and put to beneficial use, so severing water from its watercourse is essential to the right.[47] The other key attribute of prior-appropriation schemes is the "first-in-time, first-in-right" approach to shortage, whereby an earlier ("senior") water user has right to his entire appropriation before a more recent ("junior") appropriator has any right to water.[48]

Eastern riparian regimes, on the other hand, focus on maintaining water in watercourses and sharing in times of shortage. Riparian water rights stem not from diversion, but rather from ownership of a tract of land that abuts or contains a

---

as the sole method of acquiring rights to the use of water for all beneficial purposes." *Id*. at 81.

45. *See, e.g.*, *id.* at 5 (observing that "[r]iparian rules have been altered by statute and case law so that today there are no riparian doctrine states governed simply by common law" and that, "[t]ypically, riparians must obtain permits from a state agency in order to use water").

46. *See id.* at 21–22 (explaining that as the United States expanded, the preexisting "riparian doctrine was thought to be impractical for the arid region beyond the one-hundredth meridian" because it was "[a] system that limited rights to owners of land bordering a stream," leading to the West's embrace of the prior appropriation doctrine to allow settlers to "make a diversion that did not deprive 'prior appropriators' of the quantity of water already being diverted by them").

47. *Id.* While some jurisdictions require the physical diversion of water from a stream, others do not require actual removal of the water as long as there is some use of it, including instream use. *Id.* at 92–93. *See also, e.g.*, Bountiful City v. De Luca, 292 P. 194 (Utah 1930) (requiring a diversion of water even for use as a water supply for livestock). *But see In re* Dearborn Drainage Area, 766 P.2d 228, 233 (Mont. 1988) ("A completed appropriation meant an actual diversion of the water which served any of several purposes. Diversion proved an intent to appropriate the water, as did the capacity of the works." (citations omitted)), *overruled by In re* Adjudication of the Existing Rights to the Use of All of the Water, 55 P.3d 396 (Mont. 2002) (holding that a diversion is not required when water can be used beneficially without a diversion).

48. *Id.* at 101 ("When there is not enough water for both senior and junior appropriators, the doctrine of priority allows the full senior right to be exercised before the junior can use any water.").

watercourse (i.e., a riparian tract).[49] A riparian landowner traditionally has the right to make reasonable use of water on the riparian tract or within a prescribed distance from the watercourse so that return flows will ensure sufficient water for downstream users.[50] In times of drought, all riparians share the burden of shortage; earlier users receive no favored status.[51]

States also vary in their legal treatment of groundwater, which is usually managed and regulated differently than surface water despite being chemically fungible (as well as, in some cases, hydrologically connected). This disparity is undoubtedly rooted in the physical obviousness of surface water and the hidden nature of groundwater aquifers that, until the 1930s, were beyond our technical capacity to tap to any great degree.[52] Over the past hundred years, great advances have been made in our understanding of hydrology and our ability to access, transport, and treat water to make it usable, but for the most part the laws governing groundwater continue to treat it as a resource legally distinct from surface water. Groundwater management schemes fall into five predominant regimes that are often statutorily modified within states.[53] However, unlike surface-water laws, state groundwater doctrines do not fall into as predictable of a pattern in the eastern as in the western United States; in fact, individual states may contain multiple groundwater management districts with differing regulations.[54]

States also vary in the legal status they give to water rights. In some states, water rights are merely usufruct interests; in other states they are closer to private property. For example, in Louisiana, running waters and naturally navigable waters are "public things" owned by the State in its capacity as a public

---

49. *Id.* at 59 ("Because parties generally intend to transfer water rights along with the land, the courts have held that a conveyance of riparian land carries with it all of the riparian rights appurtenant to that land even if not expressly conveyed by the deed.").

50. *Id*. at 48–49 ("A riparian proprietor is subject to liability for making an unreasonable use of the water of a watercourse or lake that causes harm to another riparian proprietor's reasonable use of the water or his land.").

51. *See* Tyler v. Wilkinson, 24 F. Cas. 472, 475 (C.C.D.R.I. 1827) (explaining that all riparian proprietors have equal right to use the balance of water flowing in a shared waterway).

52. *See, e.g.*, Michael Pappas, *Unnatural Resource Law: Situating Desalination in Coastal Resource and Water Law Doctrines*, 86 TUL. L. REV. 81, 97 (2011).

53. *See* JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 345 (3d ed. 2000).

54. *Id.*

person;[55] all water rights are merely usufruct.[56] A number of other state laws also contain declarations that surface water is publicly owned and that water rights permit only certain uses.[57] On the other hand, in some jurisdictions "a water right is a legally recognized and freely alienable property right."[58]

These differences in the property status of water rights can exist not only between states, but also within the same state. For example, some states, like Texas and Louisiana, recognize greater private property rights in groundwater than in surface water.[59] Again, this stems from groundwater's long treatment as something completely apart from surface water and so difficult to understand as to put it beyond public control and oversight.[60]

All of this variation underscores that treatment, characterization, and management of water resources are functions of state law.

B. The Dormant Commerce Clause

Far from being a creature of state law, the Dormant Commerce Clause is thoroughly federal in nature. It grows out of the Commerce Clause in the United States Constitution, which gives the federal government the power to regulate interstate

---

55. *See* LA. REV. STAT. ANN. § 9:1107 (2011). The high seas are a *common thing* under article 449 and are not owned, in the property sense, by anyone. LA. CIV. CODE ANN. art. 449 (2010).

56. *See* GETCHES, *supra* note 41, at 213 (explaining that Louisiana has various statutorily created types of water districts that supply customers with use, but not ownership, of water).

57. *See id.* at 304 (noting that "a few states attempt to regulate or restrict a landowner's use of diffused surface water").

58. *See* Robert E. Beck & Owen L. Anderson, *Reallocations, Transfers, and Changes*, *in* 1 WATERS AND WATER RIGHTS § 14.01(b)(1) (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2012).

59. *See, e.g.*, *Texas Water Law*, TEX. A&M UNIV., http://texaswater.tamu.edu/water-law (last visited Aug. 13, 2012) (discussing the difference in Texas surface versus groundwater law).

60. This view is at the heart of the "rule of capture" approach to groundwater use and management, which is the law in Texas and is effectively the law in Louisiana. In justifying this "it's yours if you take it" approach, the Texas Supreme Court has noted that groundwater is "so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to [it] would be involved in hopeless uncertainty, and would, therefore, be practically impossible." *See* Sipriano v. Great Spring Waters of Am., 1 S.W.3d 75, 76 (Tex. 1999) (citation omitted). Most states have gravitated away from this capture rule, but recently Texas not only affirmed the rule, but went further to hold that restrictions on future withdrawals by owners of overlying parcels may give rise to compensable takings claims against the state. *See* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 838 (Tex. 2012).

commerce.[61] The "flip side" of this grant of power to the federal government is the Dormant (or Negative) Commerce Clause, a doctrine built on the reasoning that if the federal government has the exclusive power to regulate interstate commerce, then states necessarily cannot legislate to interfere with interstate commerce.[62] The fundamental inquiry in Dormant Commerce Clause cases, then, is whether states are interfering with interstate commerce, and the challenge courts face is distinguishing between impermissible interference and economic protectionism, on the one hand, and permissible exercise of state police power to regulate health and safety, on the other.[63]

In making these determinations in the water context, the court first distinguishes between "evenhanded" regulations and "explicit barriers to commerce."[64] If a restriction "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," the court will apply the balancing test set forth in *Pike v. Bruce Church* and will uphold the restriction "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[65] However, if a regulation facially or intentionally discriminates against commerce, it is an "explicit barrier to commerce" subject to strict scrutiny; for such a measure to survive, the state must demonstrate that it is narrowly tailored to a legitimate local purpose.[66]

C. Striking the Balance: Sporhase *in Context*

Since the founding of the Union, state water regulations and the Dormant Commerce Clause have found themselves at odds in only a handful of cases.[67] Though countless legal disputes have arisen over water as a highway for commerce (leading to tomes of jurisprudence and commentary relating to navigation and

---

61. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . .").

62. *See* Christine A. Klein, *The Dormant Commerce Clause and Water Export: Toward a New Analytical Program*, 35 HARV. ENVTL. L. REV. 131, 134 (2011).

63. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 956 (1982).

64. *See id.* at 954–58.

65. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

66. *See Sporhase*, 458 U.S. at 957.

67. *See, e.g.*, WILLIAM GOLDFARB, WATER LAW 58 (2d ed. 1988) ("Until 1982, the U.S. Supreme Court had not considered the constitutionality of antiexportation statutes in light of the so-called 'negative Commerce Clause' . . . .").

navigability),[68] rarely has interstate controversy arisen over water as an article of commerce itself.[69] That, however, is changing rapidly. As noted above, with increasing water demands, overexploited water resources, and climate change destabilizing water supplies, interstate water markets are on the rise.[70] These markets increase demand and pressure for the export of water from one state to another, building the tension between state powers to regulate waters and federal limits on these powers. As these concerns amplify and creep east, as "dry" states eye their "wet" neighbors, and as the options for preserving and restoring water-based ecosystems decrease, this area of law needs to come into much sharper focus. This process begins with properly understanding the handful of cases on the subject: the Supreme Court's decisions in *Hudson County*, *Altus*, and *Sporhase*, and the subsequent lower court cases *El Paso I*, *El Paso II*, and *Tarrant*.

In 1908, the Supreme Court first addressed the balance between state water restrictions and the Dormant Commerce Clause in *Hudson County Water Co. v. McCarter*,[71] holding that New Jersey's characterization of water as a state-owned resource insulated its water-use restrictions from Dormant Commerce Clause review.[72] As a result, the Court concluded that New Jersey's "ownership" of its water resources was sufficient to justify its prohibition on interstate transfer of surface water.[73]

The New Jersey statute at issue in *Hudson County* sought to conserve freshwater "for the health and prosperity of [its] citizens" by making it illegal for any person or corporation to transport New Jersey surface water for use in any other state.[74] A water company, which, despite that statute, had contracted to provide water from a

68. *See id.* at 73–74 (explaining that the Supreme Court of the United States decided in 1865 that commerce includes transportation, "which in turn includes 'navigation,' and that the power to regulate navigation includes the control of navigable waters," and the Court provided for a broad interpretation of the navigation power).

69. There certainly have been numerous disputes between states over claims to certain water sources, such as the Colorado River or the Great Lakes, but these disputes have focused on the right to withdraw or the allocation of water rather than water as an article of commerce. *See generally* Robert W. Adler, *Revisiting the Colorado River Compact: Time for a Change?*, 28 J. LAND RESOURCES & ENVTL. L. 19 (2008).

70. *See supra* notes 1–7 and accompanying text.

71. 209 U.S. 349 (1908).

72. *Id.* at 356–57.

73. *Id.* at 354.

74. *Id.* at 353 ("[I]t shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this state into any other state, for use therein.").

New Jersey River for use in New York City, then challenged the statute, asserting that it violated the Dormant Commerce Clause.[75]

In evaluating the challenge, the Court emphasized that New Jersey, as part of its police power, had the power to define property rights and, consequently, had the power to reserve certain resources in the public rather than private or commercial spheres.[76] The Court explained that "the state, as quasi-sovereign and representative of the interests of the public" has the power to protect its natural resources and define the limits of property interests that may be held in those resources.[77] Moreover, the Court particularly stressed the extent of state power to define the property interests available in water resources, noting:

> [F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.[78]

The Court further reasoned that New Jersey had exercised its police power authority to keep its water resources outside of commerce and to maintain a "residuum of public ownership" in all waters.[79] So, while New Jersey law permitted riparian usage of water, allowing riparian proprietors to divert limited amounts of water within prescribed distances and for certain ordinary uses,[80]

---

75. The water company brought a host of other claims as well. *Id*. at 353–54 ("The defendant sets up that the statute, if applicable to it, is contrary to the Constitution of the United States, that it impairs the obligation of contracts, takes property without due process of law, interferes with commerce between New Jersey and New York, denies the privileges of citizens of New Jersey to citizens of other States, and denies to them the equal protection of the laws.").

76. *See id*. at 355 ("The limits set to property by other public interests present themselves as a branch of what is called the police power of the State.").

77. *Id*.

78. *Id*. at 355–56.

79. *Id.* at 354–55. The statute and controversy at issue in this case dealt only with surface water, and the Court specifically addressed "rivers" in much of its reasoning. However, periodically, the Court shifted its language from "surface water" or "rivers" to "water." *See id.* at 355 ("[T]he state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory . . . ."). This does not change the narrow subject of the case from just surface water, and the failure to differentiate may be because the opinion predated the boom of groundwater usage beginning in the 1930s.

80. *Id*. ("The private right to appropriate is subject . . . to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.").

these riparian rights did not include grants of title in the corpus of the water.[81] The Court stressed that New Jersey riparian proprietors did not own the body of the stream, which remained property of the state; rather the riparian merely had the right "to have the flow continue."[82] In reaching its conclusion, the Court focused its inquiry on the extent of state police power and the announced New Jersey law; it did not make a practical inquiry into how New Jersey water was treated *de facto* (i.e., whether water was actually transferred commercially or for payment in New Jersey). In sum, the Court held that water in New Jersey was publicly owned and managed by the state, and while riparians had some right to use the water, the water itself was not, and under New Jersey law could not be,[83] privately owned or commoditized.[84]

Hudson County stood as the sole Supreme Court precedent regarding Dormant Commerce Clause challenges to a water restriction until 1966,[85] when the Court summarily affirmed that a Texas water regulation violated the Dormant Commerce Clause.[86] This case, *City of Altus v. Carr*, involved a suit by an Oklahoma city challenging, as a violation of the Dormant Commerce Clause, a Texas law forbidding the interstate export of groundwater without approval by the Texas legislature.[87] The suit proceeded before a three-judge district court panel,[88] which struck down the statute.[89] In reaching this conclusion, the district court held that groundwater was an article of commerce under Texas law, which allowed for private ownership and sale of groundwater once it was pumped from the ground.[90] The district court based this ruling on a specific examination of Texas water law, ultimately concluding that "[t]here is no question of state ownership of captured

81. *Id.* at 354–55 ("[A]s against the rights of riparian owners merely as such, the state was warranted in prohibiting the acquisition of the title to water on a larger scale.").

82. *Id.*

83. *Id.* at 357 ("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.").

84. *Id.* at 354–56.

85. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 947 (1982).

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

87. *Id.* at 830.

88. This was pursuant to the now-repealed 28 U.S.C. § 2281, which provided that "an interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute on grounds of unconstitutionality should not be granted unless the application has been heard and determined by a three-judge district court." 28 U.S.C. § 2281 (repealed 1976).

89. *City of Altus*, 255 F. Supp. at 830–31.

90. *Id.* at 839.

underground water, for the law of Texas[91] is well settled that the landowner has the right to drill wells and appropriate the water beneath his land."[92] Accordingly, the court held that the statute, which restricted only interstate export and not in-state transfer of Texas groundwater, was an undue burden on interstate commerce.[93]

Texas appealed the ruling directly to the Supreme Court,[94] which summarily affirmed the result without necessarily embracing the reasoning of the court below and without supplying its own discussion or reasoning.[95] Thus, after *Altus*, which turned on the intricacies of Texas's particular groundwater regime,[96] *Hudson County* remained the Court's sole written opinion on the intersection of state water regulation and the Dormant Commerce Clause.

It was against this background that in 1982 the Court considered *Sporhase* and invalidated part of a Nebraska water statute for inconsistency with the Dormant Commerce Clause.[97] The statute at issue required a permit for the withdrawal of Nebraska groundwater that was to be transported for use in another state.[98] To qualify for such a permit, the withdrawal had to meet four conditions.[99] The first three conditions required that the withdrawal must be reasonable, not contrary to the conservation and use of groundwater, and not otherwise detrimental to the public welfare.[100] Finally, the fourth condition was a reciprocity requirement, demanding that "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."[101] A water

---

91. The Texas law on this matter is unique; Texas is the only state that has the absolute capture doctrine for groundwater. *See* Deborah Clarke Trejo, *Identifying and Valuing Groundwater Withdrawal Rights in the Context of Takings Claims—A Texas Case Study*, 23 TUL. ENVTL. L.J. 409, 413 (2010) ("Indeed, Texas is the only state in the country that has not fully abandoned the Rule of Capture."). As previously noted, the Texas Supreme Court went even further in 2012, holding that the owner of an overlying tract had a compensable property interest in unpumped and uncaptured groundwater. *See supra* note 60.

92. *City of Altus*, 255 F. Supp. at 833.

93. *Id.* at 839.

94. *See* 28 U.S.C. § 1253 (2006) (allowing for direct appeal to the Supreme Court from a district court of three judges).

95. Carr v. City of Altus, 385 U.S. 35 (1966).

96. Texas groundwater law is an abnormality in the United States because it follows a strict rule of capture. *See supra* note 91.

97. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 958 (1982).

98. *Id.* at 941, 943–44.

99. *Id.*

100. *Id*.

101. *Id.* at 944.

user wishing to export Nebraska groundwater to Colorado challenged the statute as a violation of the Dormant Commerce Clause.[102]

In evaluating the case, the Court considered three issues: (1) whether the water was an article of commerce subject to the Dormant Commerce Clause; (2) whether Nebraska's restrictions imposed an impermissible burden on commerce; and (3) whether Congress had granted to the states permission to regulate commerce in this area.[103] First, as a threshold matter, the Court held that Nebraska's groundwater was an article of commerce and, thus, subject to Dormant Commerce Clause inquiry.[104] Second, it held that Nebraska's first three restrictions were constitutionally valid but that the fourth condition, the reciprocity requirement, was an impermissible burden on commerce.[105] Finally, the Court determined that Congress had not granted the states authority to regulate commerce in this area.[106]

The Court first concluded that Nebraska's groundwater was an article of commerce,[107] which meant that it was subject to both federal Commerce Clause jurisdiction and Dormant Commerce Clause limitations.[108] In reaching this conclusion, the Court rejected Nebraska's contention that, like the surface water at issue in *Hudson County*, its groundwater was state-owned and therefore outside of commerce.[109] Rather, the Court characterized Nebraska's state ownership argument as "a legal fiction" because utilities in Nebraska withdrew and distributed groundwater for municipal water supplies.[110] Because the utilities charged a fee for providing this water, the Court concluded that groundwater was in fact commoditized in Nebraska.[111] Dismissing Nebraska's

---

102. *Id*.
103. *Id*. at 941, 943–44.
104. *Id.* at 953–54.
105. *Id.* at 955, 958.
106. *Id*. at 941, 943–44.
107. The opinion addressed only Nebraska groundwater and offered no comment on surface water. *Id.* at 953–54 ("But appellee's claim that Nebraska ground water is not an article of commerce goes too far: it would not only exempt Nebraska *ground water* regulation from burden-on-commerce analysis, it would also curtail the affirmative power of Congress to implement its own policies concerning such regulation. If Congress chooses to legislate in this area under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws." (emphasis added) (citing Philadelphia v. New Jersey, 437 U.S. 617, 621–23 (1978))).
108. *Id.*
109. *Id.* at 950.
110. *Id.* at 952.
111. *Id.*

argument that these fees were paid merely for distribution and not for the water itself, the Court concluded that the characterization of the payment was unimportant; rather, the fact that the water was distributed in exchange for value made it an article of commerce regardless of the formalities of the rate structure.[112] Thus, the Court grounded its conclusion in a functionalist assessment of how Nebraska treated water *de facto*, holding that Nebraska groundwater was an article of commerce despite the Nebraska Supreme Court's ruling that "under Nebraska law, ground water is not 'a market item freely transferable for value among private parties, and therefore [is] not an article of commerce.'"[113] The Court also stressed hydrological factors that made the water at issue in *Sporhase* an article of interstate commerce, particularly emphasizing the interstate nature of the Ogallala Aquifer, which was the source of the water at issue.[114]

Having held Nebraska's groundwater to be an article of commerce, the Court next analyzed whether Nebraska's regulations ran afoul of the Dormant Commerce Clause. The Court held that although the first three conditions were valid, the fourth was an impermissible burden on interstate commerce.[115] In this analysis, the Court first considered whether Nebraska's permit conditions were evenhanded regulations or explicit barriers to commerce, determining that the first three requirements—that the withdrawal must be reasonable, not contrary to the conservation and use of groundwater, and not otherwise detrimental to the public welfare—were evenhanded restrictions because Nebraska also imposed restrictions on intrastate water transfers. Thus, these conditions received and survived the *Pike* balancing test.[116] However, the Court found the fourth restriction—the reciprocity requirement—to be an explicit barrier to commerce and therefore subject to strict scrutiny review, which it ultimately failed because it was not narrowly tailored.[117] Finally, the Court considered

112. *Id.*
113. *Id.* at 944.
114. *Id.* at 953.
115. *Id.* at 954–58.
116. *Id.* at 954–55. In *Pike*, the Court stated that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)).
117. *Sporhase*, 458 U.S. at 957.

whether Congress had permitted the states to regulate commerce in this area and determined that it had not.[118]

As the first Supreme Court case to offer a written opinion invalidating a state water restriction on Dormant Commerce Clause grounds, *Sporhase* created a great amount of uncertainty.[119] Particularly, *Sporhase* led to questions about the continued validity of *Hudson County*,[120] the validity of other states' water restrictions, and even states' power to continue regulating their water sources.[121] The opinion led to a wave of questions and commentary;[122] however, few cases have since arisen to flesh out the *Sporhase* Doctrine. In fact, the only cases directly applying *Sporhase* followed within a few years of that decision and were confined to a district court in New Mexico.

The first of these cases, *El Paso v. Reynolds* ("*El Paso I*"), considered New Mexico's prohibition on the out-of-state export of groundwater and ultimately held the provision unconstitutional.[123] Giving rise to the case, the City of El Paso, Texas, attempted to meet growing water demands by appropriating groundwater from New Mexico.[124] However, a New Mexico statute banned the export of groundwater from New Mexico for use in another state,[125] and on these grounds New Mexico denied El Paso an

---

118. *Id.* at 958–60.

119. *See* Arthur H. Chan, *Policy Impacts of* Sporhase v. Nebraska, 22 J. ECON. ISSUES 1153, 1153 (1988) (explaining that *Sporhase* marked the first time that the Court set forth a national policy governing interstate groundwater allocation when previously states largely regulated groundwater resources and claiming that the implications of the decision continued to require careful study).

120. *See, e.g.*, Edward B. Schwartz, *Water as an Article of Commerce: State Embargoes Spring a Leak Under* Sporhase v. Nebraska, 12 B.C. ENVTL. AFF. L. REV. 103, 117 (1985) (claiming that "[i]n *Sporhase*, the Court completed the reversal of *Hudson County* which it had begun in *City of Altus*").

121. *See generally* Chan, *supra* note 119.

122. *See* Douglas L. Grant & Bret C. Birdsong, *State Regulation of Interstate Water Export*, *in* 3 WATERS AND WATER RIGHTS § 48.03 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2012).

123. City of El Paso v. Reynolds, 563 F. Supp. 379, 380, 392 (D.N.M. 1983) [hereinafter *El Paso I*].

124. *Id.* at 381.

125. *Id.* at 381 n.2 ("No person shall withdraw water from any underground source in New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state or by drilling a well outside the boundaries of New Mexico and pumping water from under lands lying within the boundaries of New Mexico; provided that nothing in this act prohibits the transportation of water by tank truck from an underground source in New Mexico to any other state where the water is used for exploration and drilling for oil or gas . . . . The amount of water withdrawn from any one well for such exportation shall never exceed three acre-feet.").

appropriation permit.[126] El Paso then challenged the New Mexico statute as a violation of the Dormant Commerce Clause.[127] In evaluating the claim, the district court applied a broad reading of *Sporhase* to conclude that the water was categorically an article of commerce.[128] Rather than inquire into the specifics of New Mexico's water law, the district court read *Sporhase* as an expansive declaration that all water is an article of commerce and that all state ownership claims are legal fictions, regardless of the particularities of state law or practice.[129] The district court then held New Mexico's restrictions completely banning export to be explicit barriers to commerce subject to strict scrutiny.[130] Again reading *Sporhase* broadly, the district court reasoned that "a state may discriminate in favor of its citizens only to the extent that water is *essential to human survival*. Outside of fulfilling human survival needs, water is an economic resource."[131] Thus, the district court found that the regulations were economic protectionism because "there is no present or imminent shortage of water in New Mexico for health and safety needs."[132] The court dismissed as irrelevant New Mexico's predictions of future shortages for "'public welfare' needs, including water requirements for municipalities, industry, irrigated agriculture, energy production, fish and wildlife, and recreation."[133]

However, this decision did not end the water struggle between El Paso and New Mexico. In the wake of *El Paso I*, the New Mexico Legislature amended the restrictions at issue, but the state appealed the *El Paso I* decision to the Tenth Circuit.[134] In light of the change of law, the Tenth Circuit vacated *El Paso I* and remanded the matter for the district court to reconsider El Paso's renewed challenge to the amended restrictions.[135] Thus, in *El Paso II*, the same district court considered a new set of water

126. *Id.* at 381.
127. *Id*.
128. *Id.* at 388.
129. *Id.* (stating that "water is an article of commerce" and "a state's asserted ownership of public waters within the state is only a legal fiction" (internal citations omitted)). The district court reached this conclusion without examining New Mexico's characterization of water, despite later in the opinion recognizing New Mexico as a "pioneer in ground water management" and as a state in which, by law, all groundwaters "are public waters." *Id.* at 389.
130. *Id.* at 388.
131. *Id.* at 389 (emphasis added).
132. *Id.* at 390.
133. *Id.*
134. City of El Paso v. Reynolds, 597 F. Supp. 694, 696 (D.N.M. 1984) [hereinafter *El Paso II*].
135. *Id.* at 696–97.

restrictions, finding some valid and others unconstitutional in light of the Dormant Commerce Clause.[136]

The new statutory scheme at issue in *El Paso II* imposed restrictions on some appropriations for in-state groundwater use, as well as appropriations for out-of-state groundwater use. Permit conditions for *in-state* groundwater use applied only to *new* appropriations from certain "declared" basins[137] and required a finding that appropriation was "not contrary to conservation of water within the state" and "not detrimental to the public welfare of the state."[138] Permit conditions for *out-of-state* groundwater use applied more broadly, affecting "all interstate uses of ground water—new appropriations from declared and undeclared basins, new surface water appropriations, transfers of water rights, and supplemental and domestic wells."[139] These conditions required that out-of-state uses "would not impair existing water rights, [are] not contrary to the conservation of water within the state and [are] not otherwise detrimental to the public welfare of the citizens of New Mexico."[140] Further, the New Mexico law also required the state engineer to consider six additional factors in applications for water export.[141] Finally, New Mexico regulations imposed a two-year moratorium on new groundwater wells in the two basins that El Paso had targeted for appropriation.[142]

In considering El Paso's renewed challenge, the court upheld New Mexico's more evenhanded restrictions. It ruled that requiring that exports not be "contrary to the conservation of water within the state" and "not otherwise detrimental to the public welfare of the citizens of New Mexico" could withstand a facial Dormant Commerce Clause challenge.[143] Similarly, the court held that requiring the state engineer to consider the six factors did not violate the Commerce Clause when applied to "*new appropriations* of water to be used outside New Mexico."[144] Key to this holding was the court's conclusion that these export restrictions were evenhanded because they mirrored the burdens on new

136. *Id.* at 708.
137. *Id.* at 703.
138. *Id.* at 697.
139. *Id.* at 703.
140. *Id.* at 697.
141. These included analyses of "the effect of the proposed export on in-state shortages," "the applicant's water supply and demand," and "the alternate sources of water supply available to the applicant in the state of import." *Id.*
142. *Id.* at 705–06.
143. *Id.* at 708. Other aspects of New Mexico's approach to regulating water were, however, found to violate the Commerce Clause. *Id.* Those aspects are beyond the scope of this Article.
144. *Id.* (emphasis added).

appropriations for *in-state* water use.[145] However, the court also struck down two portions of New Mexico's amended water restrictions as undue burdens on commerce. First, the court held that restrictions applying only to export applications and not to in-state transfers were facially discriminatory and not narrowly tailored.[146] Second, the court invalidated New Mexico's limited moratorium on new appropriations, finding that though it applied evenhandedly to both in-state and out-of-state appropriators, it served the discriminatory purpose of blocking El Paso's attempts to access groundwater.[147] Finally, the *El Paso II* court retreated from its previous hardline that only "human survival" could justify in-state water preference; rather, the court reasoned that "health and safety, recreational, aesthetic, environmental and economic interests" could be sufficient "public welfare" concerns to justify some in-state preference.[148]

After *El Paso I* and *II*, no case directly confronted the *Sporhase* issue of whether water restrictions run afoul of the Dormant Commerce Clause until *Tarrant Regional Water District v. Herrmann.*[149] The *Tarrant* case involved a Dormant Commerce Clause challenge to Oklahoma's laws restricting water exports, with the additional wrinkle that some of those waters were covered by the multistate Red River Compact.[150] The case arose when the Tarrant Regional Water District, a Texas state agency, sought to appropriate water in Oklahoma for use in Texas.[151] In conjunction with its application for an appropriation permit, Tarrant sought declaratory judgment to invalidate and enjoin enforcement of Oklahoma statutes that limited export or out-of-state water use.[152]

---

145. *Id.* at 698.

146. *Id.* at 703–04, 708 (concluding that application of "the conservation and public welfare criteria and the six factors . . . to . . . domestic wells and transfers of existing rights where the water is to be used outside the State creates an unconstitutional burden on interstate commerce" because these restrictions applied only to "applications to export water from domestic and transfer wells but not [to] in-state transfers and domestic wells").

147. *Id.* at 706–07 ("The only factor that distinguishes the Hueco and Mesilla Bolsons which would explain their special treatment is that El Paso has filed applications for export from those aquifers.").

148. *Id.* at 700.

149. 656 F.3d 1222 (10th Cir. 2011).

150. *Id.* at 1227. Multistate compacts are creatures of the Compact Clause of the United States Constitution and have the effect of federal law. *See generally* Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741 (2010).

151. *Tarrant*, 656 F.3d at 1227.

152. *Id.*

Relying on *Sporhase*, Tarrant claimed that these Oklahoma statutes violated the Dormant Commerce Clause.[153]

However, both the district court and the Tenth Circuit ruled that *Sporhase* was distinguishable and that Dormant Commerce Clause limitations were inapplicable because the Red River waters at issue were subject to an interstate compact ratified by Congress.[154] The district court and Tenth Circuit agreed that because the congressionally ratified Red River Compact divided the water between states and specifically allocated certain portions to Oklahoma, then Oklahoma's restrictions pursuant to that allocation could not offend the Dormant Commerce Clause.[155] Thus, in a decision rendered in September 2011, the Tenth Circuit concluded that "[t]he broad language of key Compact provisions inoculates the Oklahoma statutes challenged here from Dormant Commerce Clause attack" because the compact contained clear statements authorizing state regulation.[156] Tarrant has sought certiorari from the United States Supreme Court on this issue, and the petition was still pending at the time of this writing.[157]

IV. STATE PRACTICE IN LIGHT OF A CORRECT READING OF *SPORHASE*

As interstate water markets come online, states need to carefully consider any restrictions on water export or preferences for in-state water use. *Sporhase* and its surrounding cases (collectively, the "*Sporhase* Doctrine") leave states with four important considerations to assess the compatibility of state water regulations with the Dormant Commerce Clause. First, both state characterizations of water resources and state water practice will determine whether waters are articles of commerce and water regulations are subject to Dormant Commerce Clause review. Second, generally applicable water restrictions are more likely to survive Dormant Commerce Clause scrutiny. Third, states gain more freedom to regulate when they define and document water "shortage."[158] Finally, water compacts can remove state water

153. *Id.*
154. *Id.* at 1231, 1239.
155. *Id.*
156. *Id.* at 1237.
157. *See* Tarrant Regional Water District v. Herrmann *Pending Petition*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/tarrant-regional-water-district-v-herrmann/ (last visited Aug. 13, 2012).
158. As discussed later, the authors argue that the term *shortage*, as used by the Court, actually stands in for water *need*, as opposed to *drought*. *See* discussion *infra* Part IV.C.

restrictions from Dormant Commerce Clause review. Understanding the *Sporhase* Doctrine and properly accounting for these considerations is essential to states' abilities to shape their water futures, particularly when it comes to environmental water concerns. This Part discusses each consideration in turn and uses Louisiana as an example of how states might navigate the *Sporhase* Doctrine.

A. State Characterization and Treatment of Water Resources

1. Determining Whether Water Is an Article of Commerce

The threshold question for whether state water restrictions are subject to Dormant Commerce Clause inquiry is whether the state's water is an article of commerce.[159] If so, then the water falls under federal Commerce Clause jurisdiction and restrictions must pass Dormant Commerce Clause muster.[160] If not, then state water restrictions are immune from Dormant Commerce Clause review.[161] Importantly and fortunately, the *Sporhase* Doctrine demonstrates that whether water is under federal Commerce Clause–Dormant Commerce Clause jurisdiction requires no inquiry into the historically confusing[162] and continuingly contentious[163] concept of navigability.[164] The question centers solely on whether water is an article of commerce.[165]

In turn, whether water is an article of commerce depends on how states treat water, both in law and in practice. In reviewing this issue, a court performs a three-step inquiry, with the third step likely to be most important. First, the court determines whether

---

159. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 943 (1982); *see also* Klein, *supra* note 62, at 137 ("Instead of considering whether the challenged Nebraska statute posed an impermissible burden on interstate commerce, *Sporhase* first evaluated whether groundwater itself is an article of commerce.").

160. *Sporhase*, 458 U.S. at 954.

161. *Id.*

162. *See generally* PPL Mont., LLC v. Montana, 132 S. Ct. 1215 (2012) (analyzing historic navigability).

163. *See, e.g.*, Rapanos v. United States, 547 U.S. 715 (2006) (determining that navigable waters within the purview of the Clean Water Act include waters that are relatively permanent and not simply intermittent or ephemeral).

164. The concern for navigability involved with Clean Water Act jurisdictional inquiries stems from the Clean Water Act's use of the statutory term "navigable waters." *See id.* at 723. Because no such statutory language governs the question of whether water is an article of commerce, the navigability issue is inapposite in this instance.

165. *See Sporhase*, 458 U.S. at 954.

states have the power to characterize water such that it does not enter commerce. Because the U.S. Supreme Court has answered this question affirmatively and has not revisited it, this step becomes essentially a background principle.[166] Second, the Court inquires whether the state has exercised this power and declared water to be outside of commerce. If state law treats water as an article of commerce, the inquiry is over and the Dormant Commerce Clause balancing can begin.[167] If, however, state law declares water to be publicly owned or reserved outside of commerce, the court takes a third step and examines the practice within the state to see if the *de facto* treatment of water resembles commerce. As opposed to the first two inquiries, which tend toward formalism, this third, functionalist inquiry is fact-intensive and focuses on state practice rather than on written law. This third inquiry is also the ultimate determiner of whether water is an article of commerce. As such, one might approach the third inquiry as a shorthand, single-step determination of whether water is an article of commerce, but both a thorough, precise analysis of state authority and a complete synthesis of the Supreme Court's treatment of the issue involve all three steps.

Regarding the first question, the court determines whether the states have the power to define property rights in natural resources, particularly water-use rights, in such a way that they do not enter interstate commerce. The U.S. Supreme Court answered this question affirmatively in *Hudson County* and has not since reexamined this fundamental question.[168] In *Hudson County*, the Court recognized that states' police power includes the authority to designate certain resources, especially water, as public things that cannot be held as private property and thus cannot be bought and sold.[169] No case since has directly disputed or overruled this conclusion.[170] Rather, in *Altus*, Texas merely declined to exercise this power and, instead, legally treated its groundwater as private

166. *See* Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 356–57 (1908).
167. *See Sporhase*, 458 U.S. at 954.
168. *Hudson Cnty.*, 209 U.S. at 356–57.
169. *See supra* notes 76–78 and accompanying text.
170. While *Hudson County* relied in part on *Geer v. Connecticut*, 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979), as precedent for expansive state authority in this area, and while *Geer* was subsequently overruled by *Hughes*, this case dealt with federal regulatory authority rather than with limiting states' authority to define property in resources. *Hudson Cnty.*, 209 U.S. at 356. Additionally, *Hughes* offers another example of state practice (the sale of minnows), reflecting that the state did not actually remove the item from commerce *de facto*. *Hughes*, 441 U.S. at 323.

property,[171] and in *Sporhase* Nebraska's groundwater was an article of commerce not because Nebraska lacked the authority to reserve it outside of commerce, but because Nebraska *de facto* treated its groundwater as a marketable item.[172] Thus, the Supreme Court has continually recognized state authority to classify water as publicly owned and outside of commerce. So, the first question essentially becomes a background legal principle about the extent of state power, leaving for the second and third inquiries the question of whether states have actually, in law and in fact, exercised this power and treated water as a resource outside of commerce.

This leads to the second inquiry, where a court examines whether state law classifies water resources as private property—and thus articles of commerce—or as public resources outside of commerce. The Supreme Court in *Hudson County* went this far,[173] concluding that New Jersey's riparian scheme maintained a public ownership of surface water and thus legally reserved it outside of commerce.[174] The *Altus* decision[175] also concluded at this second inquiry because Texas law treated groundwater as private property in commerce, so no further examination was necessary before beginning Dormant Commerce Clause review.[176] Finally, in *Sporhase* the Court examined Nebraska's legal treatment of its water, recognizing that Nebraska law and the Nebraska Supreme Court considered water not to be "a market item freely transferable for value among private parties, and therefore . . . not an article of commerce."[177] Thus, the Court in *Sporhase* moved to the

171. There was no written Supreme Court opinion in *Altus*, but in *Sporhase* the Court briefly discussed the interplay between *Altus* and *Hudson County*. *Sporhase*, 458 U.S. at 950. The Court noted that *Altus* "is inconsistent with *Hudson County*" based on the district court's analysis of the Texas statute at issue in *Altus*, which it found unconstitutional because it prevented water that was personal property, and, thus in commerce, from being transported interstate. *Id.* at 950 & n.12.

172. *Id.* at 951. In fact, *Sporhase* recognized that state ownership of resources is not "without significance" and "may not be irrelevant to Commerce Clause analysis"; it just moved to the second and third inquiries to resolve the issue. *Id.* at 951–53.

173. 209 U.S. 349 (1908). In *Hudson County*, the Court stopped its inquiry at this step because it had not yet developed the functionalist third inquiry used in *Sporhase*.

174. *See supra* notes 71–84 and accompanying text.

175. Though in *Altus* the Supreme Court did not necessarily adopt the reasoning of the lower court, the Court's subsequent discussion of *Altus* in *Sporhase* shows that it fits within this analysis.

176. *See supra* notes 86–96 and accompanying text.

177. *Sporhase*, 458 U.S. at 944.

functionalist third inquiry, asking how the state actually treats water *de facto*.

In the third inquiry, the court moves from examining announced legal treatment of water to investigating state practice. Here, the court determines whether the state actually treats water as a public good outside of commerce or whether the assertions of public ownership merely mask commoditized water that is transferred for value.[178] The bulk of the Court's analysis in *Sporhase* centered on this third inquiry,[179] and it ultimately found Nebraska's claimed public ownership of water to be a "legal fiction" because it was inconsistent with the water marketing occurring within Nebraska.[180] Looking past legalistic characterizations, the Court asked simply whether water was exchanged for value in Nebraska.[181] The Court found that it was because Municipal Utility Districts in Nebraska distributed water in exchange for payment.[182] Thus, the Court concluded that the exchange of payment for water made it a market commodity and article of commerce, regardless of the formal characterizations or rate structures.[183]

---

178. This is another example of water rights distinguishing between formal "paper rights" and functional realities at play.

179. When *Hudson County* was decided, the Court did not yet use this functionalist third inquiry. If it had, *Hudson* might have come out differently if water was distributed for a price within New Jersey, as was the plan for the water exported out of New Jersey.

180. *Id.* at 951–52. *Sporhase* proves that a court will give a hard look to whether water is an article of commerce based on state practice, not just state declaration. As much is clear in the *Sporhase* opinion where, despite the Nebraska Supreme Court's declaration that Nebraska groundwater was not a market item, *id.* at 944, the Supreme Court looked beyond that to the Nebraska practice of allowing the transfer of some groundwater for a fee. *See id.* at 951 (citing Nebraska's permitting of arrangements transferring water from rural to urban areas). This differs greatly from the deference to New Jersey's practice found in *Hudson County*. *See, e.g.*, Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908) ("The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.").

181. *Sporhase*, 458 U.S. at 951–52.

182. *Id.*

183. *See id.* at 951–52 ("The fiction is illustrated by municipal water supply arrangements pursuant to which ground water is withdrawn from rural areas and transferred to urban areas. Such arrangements are permitted in Nebraska, but the Nebraska Supreme Court distinguished them on the ground that the transferor was only permitted to charge as a price for the water his costs of distribution and not the value of the water itself. Unless demand is greater than supply, however,

The state-specific nature of these three inquiries illustrates that the *Sporhase* Doctrine contains no categorical conclusion that all water is necessarily an article of commerce. Rather, all of these cases look at the particularities of state law and practice to determine, on a state-by-state basis, whether water is an article of commerce in a given state.[184] Further, while the functionalist third inquiry may ultimately reveal that water is an article of commerce in most, if not all, states, due regard for state sovereignty and police power in defining property requires the entire three-step inquiry for an informed look at state law and practice. Anything less than a thorough state-by-state approach would essentially strip states of their fundamental police-power authority to define (or redefine) property.[185]

In this regard, *El Paso I* and *II* exhibited a common misreading of *Sporhase* and erred in failing to follow the three-step state-by-state inquiry. These cases failed to recognize that state sovereignty includes the potential authority, whether exercised or not, to reserve water outside of commerce, failed to analyze whether state law purported to hold water outside of commerce, and failed to inquire whether New Mexico actually treated water as a commodity. Instead, *El Paso I* and *II* applied *Sporhase*'s "legal fiction" analysis as absolute and, in doing so, fostered

---

this reasoning does not distinguish minnows, the price of which presumably is derived from the costs of seining and of transporting the catch to market. Even in cases of shortage, in which the seller of the natural resource can demand a price that exceeds his costs, the State's rate structure that requires the price to be cost-justified is economically comparable to price regulation. A State's power to regulate prices or rates has never been thought to depend on public ownership of the controlled commodity. It would be anomalous if federal power to regulate economic transactions in natural resources depended on the characterization of the payment as compensation for distribution services, on the one hand, or as the price of goods, on the other." (citations omitted)).

184. The *Sporhase* opinion emphasizes the state-by-state nature of this inquiry, noting that "[i]f Congress chooses to legislate [to regulate groundwater] under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws." *Id.* at 953. The Court did not say that Congress will have equal Commerce Clause power to regulate water in all states; rather, the Court focused on states with property regimes that commoditize water: Nebraska, Texas, and "[s]tates with similar property laws." *Id.* Thus, the Court emphasized that the proper inquiry for whether water is an article of commerce will turn on examination of the particular property law of each state.

185. For example, if a state declared water to be publicly owned and had no municipal utility arrangements transferring water for value, or if it eliminated such arrangements, its water could be considered outside of commerce.

misunderstanding and confusion about the proper application of *Sporhase*, as well as the extent of state police power.[186]

While the *Sporhase* Doctrine is not categorical and involves state-by-state inquiries, most states have municipal utilities that distribute water for a fee,[187] so they will likely find that their waters are articles of commerce. Thus, in designing or amending water restrictions, states with these utilities arrangements should assume that they will be subject to Dormant Commerce Clause review. As discussed above, if water is exchanged for value, it will be an article of commerce.[188] However, this functional inquiry draws no apparent distinction between groundwater versus surface water. So, even though *Sporhase* addressed only groundwater and most state laws distinguish between ground and surface water,[189] attempts to distinguish *Sporhase* on this basis are likely to fail in the presence of a fee-based water utility. Similarly, while it may be tempting for eastern states to argue that *Sporhase* is the rule for prior appropriation jurisdictions whereas *Hudson County* governs riparian schemes, that distinction also fades in light of the importance that *Sporhase* placed on water utilities.[190]

In Louisiana, for example, water is an article of commerce under the functionalist third inquiry even though that state follows a riparian approach,[191] distinguishes between surface and groundwater, and has a strong legal tradition characterizing water

---

186. In the end, the *El Paso* cases may have reached the correct conclusion about New Mexico water being an article of commerce because water is municipally supplied in that state. However, this does not ameliorate application of the incorrect test and reasoning.

187. *See generally* Scott E. Masten, *Public Utility Ownership in 19th-Century America: The "Aberrant" Case of Water*, 27 J.L. ECON. & ORG. 604 (2011).

188. *See supra* notes 181–183 and accompanying text.

189. *See, e.g.*, Sharon Megdal et al., *The Forgotten Sector: Arizona Water Law and the Environment*, 1 ARIZ. J. ENVTL. L. & POL'Y 243, 276 (2011) ("Arizona law regulates groundwater and surface water differently."); Travis Witherspoon, *Into the Well: Desired Future Conditions and the Emergence of Groundwater as the New Senior Water Right*, 5 ENVTL. & ENERGY L. & POL'Y J. 166, 169 (2010) (explaining that in Texas, "[g]roundwater is not state owned and controlled like surface water" and describing the laws governing each); *see also* Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 VT. J. ENVTL. L. 189, 204 (2008) ("Though groundwater aquifers know no political bounds and are often interconnected to surface waters, groundwater law traditionally was adopted on a state-by-state basis separate from laws governing surface water.").

190. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 951–52 (1982).

191. LA. CIV. CODE ANN. art. 657 (2008) ("The owner of an estate bordering on running water may use it as it runs for the purpose of watering his estate or for other purposes.").

as publicly owned. Working through the three-pronged *Sporhase* inquiry, first, Louisiana, like all states, has the police power authority to define property as falling outside of commerce. Second, Louisiana law appears to exercise this authority, at least when it comes to surface water. The Louisiana Constitution recognizes public responsibilities in water[192] and prevents alienation of state-owned, water-related resources.[193] Additionally, Louisiana law declares surface waters to be public things,[194] even limiting riparian uses of surface water,[195] though it has recently loosened these limitations.[196] However, with respect to the third factor, Louisiana treats groundwater as private property,[197] so a court is likely to find that Louisiana has not legally withdrawn groundwater from commerce. Regardless, because Louisiana municipal utilities distribute both surface water[198] and groundwater[199] for a fee, the public ownership characterization, even for surface water, is a legal fiction in this case. Thus,

---

192. *See* LA. CONST. art. IX, § 1 ("The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy."). The Louisiana Supreme Court has read article IX, section 1 to impose a "public trust" duty of environmental protection on all state agencies and officials. Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1156 (La. 1984).

193. *See* LA. CONST. art. VII, § 14 (prohibiting donations of state property); *Id.* art. IX, § 3 (prohibiting alienation of the beds of navigable waters except for reclamation of eroded lands).

194. *See* LA. CIV. CODE ANN. art. 450 (2010) (declaring such things as running waters, waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore to be public things); *see also* LA. REV. STAT. ANN. § 9:1101 (2008) (declaring the water and beds of bayous, rivers, lakes, streams, lagoons, lakes, and bays not privately owned on August 12, 1910, to be owned by the State).

195. *See* LA. CIV. CODE ANN. arts. 657, 658 (2008).

196. *See* Act of May 25, 2012, No. 261, 2012 La. Sess. Law Serv. 261 (H.B. 532) (West) (allowing the State of Louisiana to enter into cooperative endeavor agreements for use of running surface waters for nonriparian and consumptive use).

197. *See* LA. CIV. CODE ANN. art. 490 (2010); *see also* Adams v. Grigsby, 152 So. 2d 619, 622 (La. Ct. App. 1963) (treating groundwater as a fugitive resource subject to the laws of capture and placing restrictions on location or purpose of use).

198. *See The Water Purification Process at the Carrollton Plant*, SEWERAGE & WATER BD. OF NEW ORLEANS, http://www.swbno.org/history_water_purification.asp (last visited Aug. 13, 2012) (describing the Mississippi River as the water source for New Orleans, Louisiana utilities).

199. *See City of Ruston: Water Utilities,* RUSTON.ORG, http://www.ruston.org/waterfaq/#q3783 (last visited Aug. 9, 2012) (describing the Sparta Aquifer as the source of municipal water for the city of Ruston, Louisiana).

Louisiana water is an article of commerce under the third inquiry because, functionally, Louisiana has water provision arrangements similar to those at issue in *Sporhase*.

As the Louisiana example demonstrates, while states retain the power to characterize water resources and public ownership of water is not necessarily always a legal fiction, the functionalist third inquiry in the *Sporhase* test means that the water in most states, including most riparian jurisdictions, will be considered an article of commerce. Thus, states should shape water restrictions with a mind toward Dormant Commerce Clause review.

2. The Importance of State Characterization in Dormant Commerce Clause Balancing

While, as a practical matter, most states' water will be an article of commerce, state characterization of water resources is far from irrelevant. Even when a state's asserted ownership of its water resources is a legal fiction insufficient to avoid Dormant Commerce Clause review, it can still impact the Dormant Commerce Clause analysis and trigger greater deference from courts. As the Court observed in *Sporhase*, "Nor is appellee's claim to public ownership without significance. Like Congress' deference to state water law, these factors inform the determination whether the burdens on commerce imposed by state ground water regulation are reasonable or unreasonable."[200] Even when water is an article of commerce, the state's treatment and characterization of its water resources remain relevant. Thus, returning again to the example of Louisiana, while the strong declarations of public ownership[201] of water will not immunize Louisiana water restrictions from Dormant Commerce Clause review, they will likely give Louisiana more latitude in shaping water regulations because they make such regulations more likely to be reasonable.

B. Generally Applicable Water Restrictions

The second major consideration under *Sporhase* is whether a water restriction is generally applicable because the scope of a water restriction greatly impacts its likelihood of surviving a Dormant Commerce Clause challenge. As noted, courts evaluate "evenhanded" restrictions with the *Pike* test, balancing the burden imposed on commerce against the benefits to the regulating

200. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 953 (1982).
201. *See supra* notes 192–196 and accompanying text.

state.[202] In the water context, this amounts to a review for reasonableness, with the Court offering deference to states' expertise in managing water resources.[203] Alternatively, restrictions that are not considered evenhanded face a low likelihood of surviving a Dormant Commerce Clause challenge. Such restrictions, dubbed "explicit barrier[s] to commerce," receive strict scrutiny analysis, requiring that the restriction be narrowly tailored to the state's legitimate interest.[204] While not impossible to survive,[205] this standard of review usually leads to invalidation of a restriction.

Because the evenhanded versus explicit-barrier-to-commerce distinction is so crucial to determining the constitutionality of a regulation, the differences between the two are critical, though not necessarily intuitive. For example, to qualify as an evenhanded regulation, a water restriction need not actually treat interstate and intrastate transfers of water the same way. Rather, an evenhanded regulation can burden interstate transfers differently than intrastate transfers so long as the regulation *also restricts intrastate transfers*. Thus, the requirement for evenhandedness is not one of uniformity; rather, it is one of comparability. For example, in *Sporhase* the Court found Nebraska's requirements "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" to be an evenhanded and ultimately constitutional restriction because Nebraska also imposed restrictions on intrastate transfers.[206] The fact that the interstate restrictions were not the same as those on intrastate transfers did not concern the Court. In fact, the Court offered no discussion of the relative stringency or restrictiveness of the intrastate versus interstate restrictions. Rather, in determining that the restrictions were evenhanded, the Court focused on the fact that there were corollary, though not identical, intrastate regulations.[207]

The Court went so far as to say that a regulation could apply only to out-of-state transfers and still qualify as evenhanded and

---

202. *See supra* note 65 and accompanying text.
203. *See Sporhase*, 458 U.S. at 954–57.
204. *See id.* at 957–58.
205. For an example of surviving strict scrutiny in the Dormant Commerce Clause context, see Maine v. Taylor, 477 U.S. 131 (1986) (upholding a Maine statute banning import of live baitfish after subjecting the statute to strict scrutiny because Maine documented that there was no less discriminatory means of avoiding the import of parasites harmful to wild fish).
206. *Sporhase*, 458 U.S. at 955–56.
207. *Id.*

constitutional, again showing that *evenhanded* does not mean *uniform*. For example, in *Sporhase* the Court noted that

> [a]lthough Commerce Clause concerns are implicated by the fact that [Nebraska's water restriction] applies to interstate transfers but not to intrastate transfers, there are legitimate reasons for the special treatment accorded requests to transport ground water across state lines. Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State.[208]

Thus, the mere existence of other, separate intrastate restrictions satisfied the Court that the interstate restrictions were evenhanded. Essentially, this means that courts will require states to have their own resource restrictions in order before imposing restrictions on other states. Put another way, a state's entire water restriction or conservation program cannot focus solely on restricting interstate use or transport; it must restrict its own citizens as well, at least to some degree.

As for "explicit barriers" to interstate commerce, the Court did not offer a list or test to identify this suspect category of restrictions. However, the Court indicated that the following will constitute explicit barriers: a complete ban on export of water, a condition making export of water practically impossible,[209] a restriction without an intrastate corollary, a regulation with discriminatory effect and purpose, and a regulation effecting pure economic protectionism.[210]

Because evenhanded restrictions have a much greater likelihood of surviving a Dormant Commerce Clause challenge, states should strive to ensure that their restrictions are evenhanded. The easiest way to achieve evenhandedness is by ensuring that any interstate restrictions have intrastate corollaries, even if they are not completely uniform. Though the Court has indicated that regulations can be evenhanded even when intrastate restrictions do

---

208. *Id.*

209. This was the situation in *Sporhase*. The Nebraska law contained a reciprocity requirement that allowed export of water to only those states that would also export water to Nebraska. *Id.* at 957–58. This requirement made it impossible to export water from Nebraska to Colorado because Colorado banned all export of water. *Id.* Ironically, then, it was Colorado's hardline restriction that led to the invalidation of Nebraska's lesser restriction as an explicit barrier to commerce.

210. *Id.* at 956–58.

not exactly match interstate restrictions,[211] there is little precedent to guide how disparate the treatment can be while still remaining evenhanded. The closer the match between interstate and intrastate restrictions, the more likely a restriction will be evenhanded, so states should err on the side of treating interstate and intrastate uses equally.

Fortunately for many states, water restrictions that are rooted in traditional water regimes (such as riparianism) or tied to factors other than state lines are evenhanded because they apply also to intrastate use. So, for example, traditional riparian principles that restrict the use of water to riparian tracts or to a reasonable distance from a stream are evenhanded because they affect both in-state and out-of-state use equally. Similarly, prior appropriation doctrines like the "no harm" doctrine, which disallows water transfers that injure junior appropriators,[212] are evenhanded, as are watershed-based or basin-based transfer restrictions and in-stream flow requirements for ecology or navigation. All of these restrictions apply to both intrastate and interstate uses and can supply a starting point for states seeking to restrict water use.

Returning to the example of Louisiana, the state's traditional riparian restrictions requiring that surface water be used on a riparian estate and be returned to its original channel[213] are certainly evenhanded restrictions. However, the state's recent law relaxing these restrictions and allowing the state to enter into cooperative endeavor agreements for consumptive use of surface water or use on nonriparian tracts[214] withdraws the evenhanded place-based limitations on surface water use. If Louisiana were to try to introduce additional limitations on the use of surface water, it must be careful not to restrict out-of-state users without imposing some in-state restrictions. Similarly, Louisiana's groundwater use is not currently restricted in terms of place or purpose of use,[215] so

211. *Id.* at 955–56 (explaining that "a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce" and applying this principle because the first three standards at issue "may" have been less strict in application than the limitations placed on intrastate transfers).

212. *See* Johanna Hamburger, *Improving Efficiency and Overcoming Obstacles to Water Transfers in Utah*, 15 U. DENV. WATER L. REV. 69, 78 (2011) (explaining that the no harm rule, "a doctrine that all Western states follow," disallows a change of use of water from impairing vested rights).

213. *See* LA. CIV. CODE ANN. arts. 657, 658 (2008).

214. *See* Act of May 25, 2012, No. 261, 2012 La. Sess. Law Serv. 261 (H.B. 532) (West).

215. *See* LA. CIV. CODE ANN. art. 490 (2010); *see also* Adams v. Grigsby, 152 So. 2d 619, 623−24 (La. Ct. App. 1963).

any restriction placed on out-of-state groundwater use would likely be an explicit barrier to commerce without an in-state corollary.

C. Documentation of Water Shortages

Another major consideration arising from *Sporhase* is the importance of state documentation of water "shortages" to justify water restrictions. A documented record of water shortage makes a state's water restrictions more likely to survive a Dormant Commerce Clause challenge because such a record builds the case that water restrictions are valid health and safety regulations, as opposed to impermissible economic protectionism. This Section discusses the evolution of this documentation requirement and considers what evidence of "shortage" will help in surviving Dormant Commerce Clause review of water restrictions, particularly for wetter eastern states.

Just as *Sporhase* expanded the *Hudson County* inquiry into whether water was an article of commerce by investigating how states actually treat water in addition to how they legally classify it,[216] *Sporhase* also deepened the *Hudson* inquiry into the purpose of state water restrictions, examining documentation of shortage to justify state regulations. In *Hudson County*, the Court explicitly declined to inquire into evidence of shortage as a basis for state water restrictions; rather, the Court held that New Jersey's police power provided sufficient authority for its water restrictions and that a state need not offer explanation for its resource management decisions.[217] However, in *Sporhase*, the Court showed no such deference to unexplained state management decisions[218] and instead required states to articulate reasoning to justify their water

---

216. *See supra* notes 112–114 and accompanying text.

217. *See* Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 356–57 (1908). In fact, the Court emphatically stated that the states need offer no justification. *Id.* ("We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . . [A state] finds itself in possession of what all admit to be a great public good, and what it has it may keep and *give no one a reason for its will*." (emphasis added)).

218. It is possible that the different inquiries in the two cases explain the difference. In *Hudson*, the Court found that the Dormant Commerce Clause inquiry was inapplicable because the water was not an article of commerce. *Id.* In *Sporhase*, however, the water was an article of commerce, and the Court required documentation so that it could evaluate the Dormant Commerce Clause issue. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 953–54 (1982).

restrictions,[219] stressing the importance of documenting shortage and of closely examining the evidence proffered to justify Nebraska's restrictions.[220]

For example, in upholding Nebraska's evenhanded restrictions, the Court in *Sporhase* emphasized the evidence of shortage necessitating those restrictions. The Court noted its reluctance "to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of *severe shortage*."[221] The Court also identified as evidence of shortage Nebraska's designation of groundwater control areas, its declarations of water shortage, and its restrictions and monitoring of in-state water use and transfers.[222] In light of this documented need, the Court had little trouble finding Nebraska's evenhanded restrictions reasonable.[223]

Conversely, in holding that Nebraska's reciprocity requirement was not narrowly tailored, the Court emphasized a lack of documentation to justify that measure. Specifically, the Court highlighted a lack of evidence that

> the State as a whole suffers a water shortage, . . . the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, . . .

---

219. *Id.* at 954–55. This shift in the Court's expectation of documentation is not unique to reviewing state actions, though. Rather, it fits with the Court's requirements of Congress in exercise of its Commerce Clause power. For example, the record-keeping requirement in *Sporhase* provides a corollary to the requirements the Court placed on Congress in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). Those cases collectively stand for the proposition that when Congress wishes to push the limits of its Commerce Clause authority and regulate in areas that may infringe on state police power, Congress must make a clear statement of its intention to do so and must create a record documenting the links to interstate commerce that justify the federal authority to act in the area. The documentation requirement in *Sporhase* is the converse of the same concept. *See generally* Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 23–29 (2003) (charting the history of the Commerce Clause and discussing *Lopez*, *Morrison*, and *Solid Waste Agency* in detail). Under *Sporhase*, when states wish to push the limits of their police power and regulate in areas that may infringe on Congress's authority to regulate interstate commerce, then states must clearly document the justification for doing so. *Sporhase*, 458 U.S. at 954–55. According to the Court, when state or federal entities wish to push the limits of their regulatory authority, they must explain their basis for doing so.

220. *Sporhase*, 458 U.S. at 957–58.

221. *Id.* at 956 (emphasis added).

222. *Id.* at 955.

223. *Id.* at 955−56.

> [or] the importation of water from adjoining States would roughly compensate for any exportation to those States.[224]

With a record to justify the reciprocity requirement, the Court held that the restriction was not narrowly tailored.[225] However, the Court indicated that had there been proper documentation, even Nebraska's explicit barrier to commerce might have survived strict scrutiny because a "demonstrably arid" state may be able to marshal evidence that a total ban on exports is narrowly tailored.[226]

The Court's emphasis on "severe shortage" and "demonstrably arid" states raises the question of what constitutes sufficient shortage or aridity to influence the Dormant Commerce Clause analysis. While there is little precedent, *Sporhase* and its subsequent interpretations in *El Paso I* and *II* indicate that economic concerns will be insufficient to demonstrate meaningful shortage.[227] Rather, relevant shortage must trigger health, safety, environmental, recreational, or aesthetic concerns.[228] Further, while states need not wait for imminent threats to human survival before restricting water use, the more concretely a state can link restrictions to human necessity, the more likely it is to survive Dormant Commerce Clause review. For example, the Court in *Sporhase* held that a state legitimately restricts water when "protecting the health of its citizens—and not simply the health of its economy."[229] *El Paso I* took this concept to its extreme, allowing that "a state may discriminate in favor of its citizens only to the extent that *water is essential to human survival*."[230] However, the *El Paso II* court subsequently recognized that as long as economic concerns were not the primary motivating factor, a state could invoke a limited preference for public welfare concerns affecting health, safety, recreational, aesthetic, and environmental interests.[231]

Moreover, states should also expect probing, substantive review of justifications given for water restrictions. Courts require more than a procedural cataloging of reasons; they closely examine the rationale for restrictions.[232] For example, in *El Paso II* the court closely examined the justifications for a moratorium on

224. *Id.* at 958.
225. *Id.*
226. *Id.*
227. *See supra* notes 123–148 and accompanying text.
228. *El Paso II*, 597 F. Supp. 694, 700 (D.N.M. 1984).
229. *Sporhase*, 458 U.S. at 956.
230. *El Paso I*, 563 F. Supp. 379, 389 (D.N.M. 1983) (emphasis added).
231. *El Paso II*, 597 F. Supp. at 700.
232. *Id.* at 705 ("It is the duty of the court to look behind the legislative recitals of purpose to discover the true purpose of a challenged statute.").

appropriations from two basins, ultimately finding them illusory and striking down the moratorium.[233] In one instance of this close review, the court dismissed the asserted deficiency of hydrological information about the basins because the same was true of other basins not subject to moratoria and because a proposed study of the basins would not be complete until after the moratorium expired.[234] This hard look at the underlying documentation and reasoning for the moratorium shows that a court will probe into the substance of documentation, even for evenhanded regulations.

Beyond the basic principles that purely economic concerns will not constitute acceptable shortage and that the court will take a hard look at evidence of shortage, questions still abound as to the circumstances that will demonstrate sufficient shortage to impact Dormant Commerce Clause balancing. For example, what must the timescale be for the shortage, and how bad must things get before restrictions are justified? Additionally, relatively water-rich states may wonder against which baseline courts will measure shortage; will a wet state ever be able to demonstrate shortage sufficient to satisfy the court?

El Paso II noted these important questions but offered little concrete guidance beyond indicating that the inquiry will require balancing of specific circumstances. The court indicated that a state must offer a sense of the time, place, certainty, and severity of projected shortages, but it need not await disaster or drought before restricting water use.[235] In the end, this will involve a balancing

---

233. *Id.* at 705–07.

234. *Id.* at 705–06.

235. *Id.* at 701. The court observed that

> [a] state may favor its own citizens in times and places of shortage. Of course, this does not mean that a state may limit or bar exports simply because it anticipates that one day there will not be enough water to meet all future uses. Even some of the most water-abundant states predict shortages at some future date. The preference envisioned by the Supreme Court must be limited to the times and places where its exercise would not place unreasonable burdens on interstate commerce relative to the local benefits it produces.
>
> On the other hand, it would be unreasonable to require a state to wait until it is in the midst of a dire shortage before it can prefer its own citizens' use of the available water over out-of-state usage. A limited preference which could not be exercised until water resources were almost depleted would be no preference at all. If the limited preference is to be meaningful the states must be permitted to prefer local usage while there is still water to conserve. The proximity in time of a projected shortage, the certainty that it will occur, its predicted severity, and whether alternative measures could prevent or alleviate the shortage are all factors which must be weighed when balancing the

inquiry, but the more information that a state can marshal to justify its position and show the need for water restrictions, the more likely the restrictions are to survive Dormant Commerce Clause review.

As for "wet" states documenting shortage, they cannot be categorically excluded from enacting water restrictions simply because of their relative abundance of water. With water demand growing and climate change threatening to decrease supplies throughout the country, shortage is not just an issue in the drier West. Further, "wet" states have environmental and ecological water demands based on relative abundance of water. Thus, while a drought year in Louisiana might still see more water than a wet year in Arizona,[236] this does not diminish the problems (environmental and otherwise) that shortage poses in the wetter state. The court's inquiry into shortage must proceed state-by-state and consider the broader context in evaluating water restrictions. In these instances, "shortage" or "arid[ity]" must function more as a term of art, synonymous with "demonstrated water need." The cases show that it is the responsibility of the individual states to document these water shortages and to educate the court on these water needs, and this is particularly important in wetter states where needs may not be as obvious. Additionally, because of historically and relatively more abundant water supplies, wetter states may face greater challenges in demonstrating that their restrictions are not protectionist, so documentation of shortage must focus particularly on health and safety concerns.

States may draw upon a number of sources to demonstrate such shortage. Documentation of a drought or historical scarcity is the

---

> local interests served by the exercise of a preference against the burdens it places on interstate commerce.
>
> New Mexico need not wait until the appropriate time and place of shortage arises to enact a statute limiting exports. The State may enact a law to provide for future contingencies. If facially valid, any constitutional attack on such a statute for violation of the Commerce Clause must await its application.

Id.

236. The year 1988 is often used as benchmark year for low flows on the Mississippi River, a year in which flows at Vicksburg, Mississippi were 439,000 cubic feet per second, which compares to the record-high flows on the Colorado of 35,222 cubic feet per second (25.5 million acre feet per year). *See* U.S. DEP'T OF INTERIOR BUREAU OF RECLAMATION, INTERIM REPORT NO. 1: COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY (STATUS REPORT) 18 (2011); Edwin P. Maurer & Dennis P. Lettenmaier, *Calculation of Undepleted Runoff for the GCIP Region, 1988–2000,* UNIV. OF WASH. (Oct. 2001), http://www.ce.washington.edu/~edm/WEBS_runoff/.

obvious approach. Documentation of increased consumption levels or projections of water supply may also suffice when tied to human health rather than economic uses. Even preexisting regulation of intrastate water resources helps demonstrate scarcity, as the Supreme Court recognized in *Sporhase*.[237] Beyond these sources, states may also attempt to rely on projections of climate change destabilizing water supplies, documented environmental water needs such as ecosystem demands on freshwater, and even hydrological or geophysical characteristics of particular water sources such as recharge rates for particular aquifers. The ultimate guiding principle is that a record of shortage must be focused on health and safety rather than economic concerns and must be sufficiently concrete.

Louisiana can again serve as the example for approaches and challenges that wetter eastern states face in documenting shortage. To its benefit, Louisiana has, to some extent, documented its coastal freshwater needs. For example, the 2012 Louisiana Coastal Master Plan demonstrates the need for ample freshwater flows to nourish and sustain Louisiana's coastal environment.[238] This is a start, and to build on it, Louisiana might attempt to quantify coastal freshwater needs along with the water needs of upland wetlands. In most other regards, however, Louisiana has not sufficiently documented water needs to positively influence a Dormant Commerce Clause analysis. In the case of groundwater, Louisiana has neither inventoried its supply nor imposed any restriction on groundwater use. For surface water, Louisiana fares little better. Again, Louisiana has no comprehensive surface water inventory, budget, or management plan. Although Louisiana's riparian system imposes some limitations on water use and requires return flows back into the watercourse, Louisiana has statutorily relaxed them in order to facilitate development. Essentially, Louisiana currently treats its water as if there is no shortage or need to conserve, and this free-spending attitude toward in-state water use will severely disadvantage any attempt to restrict out-of-state use. In requiring that states document water shortages to justify restrictions, the Supreme Court requires states to have their in-state management in order before burdening other states. States must form a record to

237. *See, e.g.*, Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 941, 957 (1982) (holding that state conservation efforts are not without import because they show that "the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage").

238. *See* 2012 LOUISIANA COASTAL MASTER PLAN, *supra* note 9.

educate courts on particular water needs that justify regulations, as well as on state efforts to share the burden of water restriction.

D. Water Compact Language

Though *Sporhase* represents the heart of the Court's Dormant Commerce Clause inquiry for water restrictions, also important is when *Sporhase* does not apply. This is the case when waters are subject to an interstate compact.[239] Water compacts can insulate restrictions from Dormant Commerce Clause challenges because Congress must approve a compact.[240] Thus, water restrictions pursuant to compacts effectively bear Congress's blessing and therefore cannot interfere with federal regulation of interstate commerce. When a water restriction involves compact waters, the initial inquiry turns to whether the compact authorizes the restriction through clear delegation of authority to the states. If there has been such delegation, then the restriction is immune from Dormant Commerce Clause challenge; if not, then the restriction receives Dormant Commerce Clause review under *Sporhase*. Thus, prior to conducting its Dormant Commerce Clause analysis, *El Paso I* extensively analyzed a potentially relevant water compact to ensure that it did not remove the issue from Dormant Commerce Clause concern.[241]

Because so much turns on whether the compact clearly delegates to states the authority to regulate waters as commerce, the particulars of compact language take on vital importance. Courts have found such delegation when compact language divides water between states. In such instances, Congress has essentially allocated water to the states, and states can restrict that water without worrying about interfering with interstate commerce.

In *Tarrant*, for example, the Tenth Circuit concluded that the Red River Compact contained a sufficiently clear congressional grant of authority to allow Oklahoma to regulate certain Red River

239. The Interstate Compact Clause of the United States Constitution provides, in relevant part, that no state may, "without the Consent of Congress, . . . enter into any Agreement or Compact with another State." U.S. CONST. art. I, § 10, cl. 3.

240. *See* Steven Ferrey, *Threading the Constitutional Needle with Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 TEX. J. OIL GAS & ENERGY L. 59, 90 (2011) ("Since the federal government can discriminate against particular states through federal legislation, an interstate compact as federal law is immunized against dormant Commerce Clause violations.").

241. *See El Paso I*, 563 F. Supp. 379, 383–88 (D.N.M. 1983).

water without regard to the Dormant Commerce Clause.[242] Particularly, the court focused on the compact provisions that allowed states to "freely administer" water apportioned to them "in any manner" that seemed beneficial.[243] The court also noted that the compact explicitly stated that it was not meant to "interfere" with state "appropriation, use, and control of water" and that the state retained "unrestricted use" of waters in basins covered by the compact.[244] The Tenth Circuit concluded that "[t]aken together, the Compact provisions using words and phrases such as 'unrestricted use,' 'control,' 'in any manner,' 'freely administer,' and 'nothing shall be deemed to interfere' give the Oklahoma Legislature wide latitude to regulate interstate commerce in its state's apportioned water."[245] As a result, the court decided that Oklahoma's restrictions were immune from the *Sporhase* Dormant Commerce Clause analysis.[246]

Thus, states can find more flexibility by shaping water restrictions pursuant to compact terms because such restrictions would be immune to Dormant Commerce Clause review. So, for example, since Louisiana is a party to the Red River Compact,[247] it could restrict water subject to that compact without worry of Dormant Commerce Clause invalidation, even if the restrictions were not evenhanded or were lacking justification in water shortage.

V. CONCLUSION

Water may be an article of commerce, but it is also a resource that must, at least to some extent, remain in its natural place. Otherwise, environments, ecosystems, and even entire coastal landmasses unravel. Thus, there is a vital state interest in keeping water where it naturally occurs. The Dormant Commerce Clause does not run counter to such critical health and safety interests; it merely seeks to ferret out economic protectionism. Therefore, the *Sporhase* Doctrine does and must allow states to regulate water in favor of keeping it in its natural place, even if this means keeping wet states wet. To conclude otherwise would turn *Sporhase* on its head by allowing the economic wants of dry, importing states to trump the environmental needs for water in wetter origin states. It

242. *See* Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222, 1237 (10th Cir. 2011).
243. *Id.*
244. *Id.* at 1237−38.
245. *Id.* at 1239.
246. *Id.*
247. *See* Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305 (1980).

would allow importing states to practice just the sort of economic protectionism that the Dormant Commerce Clause prohibits.

A correct reading of *Sporhase* shows that it does not create a great shift in control of water resources. The states, through law and practice, still determine whether water is an article in commerce. When water restrictions are subject to Dormant Commerce Clause review, they are likely to survive if evenhanded and justified by documentation of shortage. Thus, states retain substantial control over their water resources and, following the proper guidance from *Sporhase*, may act to protect them without running afoul of the Dormant Commerce Clause.

Not only does *Sporhase* preserve states' abilities to maintain water in place, but it also encourages better water practices within states by decoupling federal jurisdiction over water from the clumsy question of navigability, by discarding the prevalent but hydrologically dubious tendency to treat groundwater and surface water as distinct resources, and by forcing states to better study, document, and manage their water supplies.