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## Water Transfer: Shall We Sink or Swim Together?

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# Water Transfer: Shall We Sink or Swim Together?

Gary S. Betensky

## **Abstract**

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In much of its functioning it is commonplace.

But commonplace things often are the least appreciated and the hardest to understand . . . . In considering its uses and abundance and properties, however, we must keep in mind this main fact: Water is needed for life.

**KEYWORDS:** water, sink, swim

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But commonplace things often are the least appreciated and the hardest to understand . . . . In considering its uses and abundance and properties, however, we must keep in mind this main fact: Water is needed for life.<sup>1</sup>

These words are especially meaningful today in light of recurrent water shortages across the United States. There is an honest realization that to sustain an ample supply of water, sensible planning, control, and fairness is required. Recurrent shortages are triggered by various conditions: supply and demand imbalance; population shifts to the sun-belt states resulting in locally and regionally concentrated consumptive increases in areas with scant water resources; pollution of lakes, streams, and ground water; acid rain pollution; and industrial or agricultural demand.<sup>2</sup> It has been said that “[t]he water crisis of the 1980s and 1990s will rival the oil crisis of the 1970s.”<sup>3</sup> The demands for human survival, for economic stability and growth, and for achieving the goal of energy self-sufficiency — which overtax the water supply — have naturally given rise to friction between those who have and those who do not have.

The United States Supreme Court, in the landmark case of *Sporhase v. Nebraska*,<sup>4</sup> furnishes present-day guidelines whereby confrontations may be avoided between those who need water and those who control its distribution. The opinion specifically addresses the sensitive issue of interstate transfer of ground water.<sup>5</sup> The Court declared

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1. R. CLARK, *WATERS AND WATER RIGHTS* § 2.1 (1967 & Supp. 1978).

2. GENERAL ACCOUNTING OFFICE, *WATER ISSUES FACING THE NATION: AN OVERVIEW* (May 6, 1982). See also Canby, *Our Most Precious Resource: Water*, 158-2 NATIONAL GEOGRAPHIC 144 (August, 1980).

3. Quade, *Water Wars Predicted in a Thirsty Nation*, 68 A.B.A. J. 1066 (1982).

4. 102 S. Ct. 3456 (1982).

5. Water is generally categorized as follows: 1) “Lakes and streams on the sur-

face”: bodies of water on beds within well defined boundaries; 2) “Surface water”: water “from rains, springs and melting snow and ice, and which follows the contours of the land and has not yet reached a well defined water course or basin . . . . Surface waters have not yet reached a stream or lake.”; 3) “Underground or percolating water”: “below surface [water which] seeps, oozes or filters into the earth from the surface and moves, drips or flows among the interstices of the earth.” R. BOYER, SURVEY OF THE LAW OF PROPERTY 276-77 (3d ed. 1981). This note will refer to underground or percolating water as ground water.

The legal aspects of *interstate ground* water transfer are to be distinguished from the devices governing *interstate surface* water transfer and diversion (surface water used to encompass those waters within or without well defined boundaries). The two major devices employed in the area of *interstate surface* water transfer and diversion are as follows:

1) *Equitable Apportionment Doctrine*: “Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream.” *Colorado v. New Mexico*, 102 S. Ct. 539, 545 (1982) (Colorado sought equitable apportionment of the Vermejo River in order to divert river’s waters for future uses; case remanded to Special Master for additional fact finding to enable Supreme Court to apply equitable apportionment doctrine). The doctrine attempts to assure an equitable allocation of water among the states appurtenant to the interstate body of surface water.

2) *Interstate Compacts*: U.S. CONST. art. I, § 10, cl. 3 is the constitutional basis authorizing states to negotiate compacts: “No State shall, without the consent of Congress . . . enter into any agreement or compact with another State, or with a foreign Power . . . .” The interstate compact is preceded by negotiations between the states involved. Frequently, there is a federal representative present to assist in the negotiations. Finally, the negotiation process will generally be followed by Congress’ imprimatur, known as Congressional consenting legislation, with or without modification. See generally 2 R. CLARK, WATERS AND WATER RIGHTS §§ 133.1-133.4 (1967 & Supp. 1978).

Congressional consent, when required, may be inferred from a statute or pattern of enactments, may take the form of prior authorization as well as that of subsequent approval, and may be conditioned on state acceptance of congressionally mandated modifications. Whether or not the United States chooses to become one of the compacting parties, a valid compact is binding on the citizens of the signatory states, may be enforced by federal statute, and itself operates as federal law in the sense that construction of its terms is a federal question for purposes of Supreme Court review of a state court decision and in the further sense that signatory states cannot plead state law, even state constitutional law, as a defense to compliance with the compact’s terms as construed by the Supreme Court.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-31, at 402 (1978 & Supp. 1979) (footnotes omitted).

For examples of an interstate compact, see Susquehanna River Basin Compact,

water an article of commerce,<sup>6</sup> thereby bringing water within the purview of the Constitution's Commerce Clause,<sup>7</sup> and furthermore, proscribed as unconstitutional a provision in a Nebraska "embargo" statute regulating the interstate transfer of ground water.<sup>8</sup> The *Sporhase* decision promulgates new water law and policy, and represents a step toward moderating the controversy regarding the interstate transfer of ground water.

This note will examine the history of attempted interstate transfer of natural resources, culminating in an analysis of the *Sporhase* decision and its implications, both present and future. It will also review selected cases of current litigation and policy in the area of water transfer, primarily focusing on the interstate transfer of ground water, considering the state interest weighed against both private need and the national interest. In order to effectively implement the *Sporhase* decision, this note proposes the elimination of all absolute and reciprocal water embargo statutes as facially discriminatory legislation, and consequently unconstitutional. Moreover, this note supports the employment of the *Pike v. Bruce Church*<sup>9</sup> Commerce Clause balancing test by

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Pub. L. No. 91-575, 84 Stat. 1509 (1970) and the Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968).

6. *Sporhase*, 102 S. Ct. 3456.

7. U.S. CONST. art. I, § 8, provides in part: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

8. *Sporhase*, 102 S. Ct. at 3465, 3467 (invalidating reciprocity provision of NEB. REV. STAT. § 46-613.01 (1978)). The water "embargo" statutes are classified as absolute, reciprocal, or discretionary and seek to prohibit or control the flow of water out-of-state. The *Sporhase* Nebraska statute was a discretionary-reciprocal-absolute statute. It was discretionary in that authorization by the Nebraska Director of Water Resources was required prior to withdrawal of *intrastate* ground water for transport and ultimate use *interstate*. The statute was reciprocal because unless the state to which water was to be transferred from Nebraska provided for reciprocal transfer rights, no water was to be removed from Nebraska. The statute was absolute because Colorado, the state to which appellants *Sporhase* and *Moss* needed to transfer water from their Nebraska property, did not provide for reciprocal transfer rights. Consequently, *Sporhase* and *Moss* were absolutely prohibited from transferring water to Colorado, regardless of their application to the Nebraska Director of Water Resources. It was the reciprocity provision, discussed *supra* text accompanying notes 112-116, of the Nebraska statute which was declared unconstitutional.

9. 397 U.S. 137, 142 (1970).

which to scrutinize state regulation of the interstate transfer of ground water by a state's use of discretionary water embargo statutes. Lastly, this note recommends the use of interstate compacts<sup>10</sup> to terminate the interstate rivalries concomitant with interstate ground water transfer. The application of the interstate compact device and the Commerce Clause doctrine are necessary tools to govern in an area which requires and will continue to require the equitable distribution of a precious and rapidly vanishing natural resource, and as of recent, article of commerce.

### Natural Resources and the Commerce Clause

The Commerce Clause has been the primary vehicle by which complainants have challenged a state's attempted sheltering of its natural resources. The cases employing this approach demonstrate a gradual erosion of the concept of state ownership in natural resources. Although considered natural treasures, these resources were also recognized as objects of commerce and, ultimately, objects of profit. The Commerce Clause proscribes state regulation which impedes the free flow of commerce across state lines. Consequently, regulations that attempt to hinder divestment of a state's natural resources destined for interstate commerce repeatedly have been struck down as an unconstitutional interference with interstate commercial undertakings.

Almost a century ago, the case of *Geer v. Connecticut*<sup>11</sup> addressed the issue of whether a Connecticut statute regulating the transportation of animals *ferae naturae*<sup>12</sup> out-of-state, after being lawfully killed within this state, violated the Commerce Clause of the Constitution. Edgar M. Geer was charged with and convicted of "unlawfully receiving and having in his possession . . . with the unlawful intent to procure the transportation beyond the limits of this state, certain woodcock, ruffled grouse and quail killed within this state . . . ." <sup>13</sup>

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10. See *supra* note 5 for a discussion on interstate compacts.

11. 161 U.S. 519 (1896), *overruled*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

12. "Animals which are by nature wild are so designated, by way of distinction from such as are naturally tame. . . ." BLACK'S LAW DICTIONARY 558 (5th ed. 1979).

13. *State v. Geer*, 61 Conn. 144, 148-49, 22 A. 1012, 1012 (1891).

Relying primarily on English and French common law<sup>14</sup> authorizing the regulation of hunting animals *ferae naturae* based upon the principle of common ownership,<sup>15</sup> the right of a state to govern for the benefit of its people,<sup>16</sup> and the concept that the game never entered the stream of interstate commerce, the Supreme Court affirmed Geer's conviction. The Court, in referencing *Gibbons v. Ogden*<sup>17</sup> and *The*

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14. Blackstone, interpreting English common law, wrote: "[I]t follows from the very end and constitution of society that this natural right [of man to pursue and take for his own use animals *ferae naturae*] . . . may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community." *Geer v. Connecticut*, 161 U.S. 519, 527 (1896) (quoting 2 W. BLACKSTONE, COMMENTARIES 410). The Napoleonic Code, symbolizing French common law, noted the implications of the common ownership doctrine: "There are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed." *Geer*, 161 U.S. at 526 (quoting NAPOLEANIC CODE arts. 714, 715).

15. The common ownership doctrine stipulates that natural resources: are the common property of all citizens of the governmental unit and that the government, as a sort of trustee, exercises this 'ownership' for the benefit of its citizens . . . Each government may . . . regulate the corpus of the trust in the way best suited to the interests of the beneficial owners, its citizens, and may discriminate as it sees fit against persons lacking any beneficial interest.

*Toomer v. Witsell*, 334 U.S. 385, 399-400 (1948). *See also Geer*, 161 U.S. 519.

16. The sole consequence of the provision forbidding the transportation of game, killed within the State, beyond the State, is to confine the use of such game to those who own it, the people of that State. The proposition that the State may not forbid carrying it beyond their limits involves, therefore, the contention that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own . . . The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose.

*Geer*, 161 U.S. at 529-30.

The Court, quoting from *Ex parte Maier*, reinforced its position:

The wild game within a state belongs to the people in their collective, sovereign capacity; It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic and commerce in it, if deemed necessary for its protection or preservation, or the public good.

*Id.* at 529 (quoting *Ex parte Maier*, 103 Cal. 476, 483, 37 P. 402, 404 (1894).

17. 22 U.S. (9 Wheat.) 1 (1824) (state grant of authority to operate steamboat

*Daniel Ball*,<sup>18</sup> stated that the statute regulated Connecticut's internal commerce and had no effect on external commerce with other states. Therefore, there was no violation of the Commerce Clause which regulated commerce "among the several states."<sup>19</sup>

An early case which specifically addressed the interstate diversion of water was *Hudson County Water Co. v. McCarter*.<sup>20</sup> Justice Holmes, writing for the majority, affirmed the state court's issuance of an injunction against Hudson County Water Company's anticipated diversion of water from New Jersey to Staten Island, New York. Hudson County Water Company, a New Jersey corporation, had contracted with the City of New York to supply the borough of Staten Island with a minimum 3,000,000 gallons of water a day, which were to be diverted from the Passiac River in New Jersey through water mains across state lines to New York. New Jersey sued to enjoin performance of the contract which it saw as a clear violation of state law.<sup>21</sup> Hudson argued the statute violated the Constitution in that it impaired the obligation of contracts, took property without due process of law, interfered with commerce between the states, denied the privileges of New Jersey citizens to citizens of other states, and denied citizens of other states equal protection of the law.<sup>22</sup> Justice Holmes dismissed these contentions briefly with partial reliance on *Geer*.<sup>23</sup>

The state courts had identified Hudson County Water Company as a "riparian proprietor,"<sup>24</sup> and as such, had "no right to divert waters

monopoly on New York waters declared unconstitutional as conflicting with Congressional power to regulate navigation).

18. 77 U.S. (10 Wall.) 557 (1871) (ships operating solely on *intrastate* waters could be regulated by Congress if those ships were transporting goods *interstate*).

19. U.S. CONST. art. I, § 8.

20. 209 U.S. 349 (1908).

21. The challenged New Jersey statute read: "It 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." 1905 N.J. Laws 461. For the current statute on the subject of water diversion, see N.J. STAT. ANN. § 58:1A-5 (West 1982).

22. *Hudson*, 209 U.S. at 354.

23. 161 U.S. 519.

24. *Hudson*, 209 U.S. at 354. The riparian doctrine is a system of water law mainly followed in Great Britain and the eastern United States. It permits owners of land appurtenant to water to make reasonable use of the water and provides for a



for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount.”<sup>25</sup> Justice Holmes broadened the justification for the injunction, attributing its employment to the state’s police power: “The limits set to property by other public interests present themselves as a branch of what is called the police power of the State.”<sup>26</sup> The public interests cited by Justice Holmes included maintaining an undiminished river flow to protect the public health and welfare. “This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots.”<sup>27</sup> In emphasizing the sovereign’s

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“correlative right protecting against unreasonable use by others that substantially diminishes the quantity or quality of water.” 7 R. CLARK, *WATERS AND WATER RIGHTS* 310 (1967 & Supp. 1978). The “water right is regarded as ‘usufructuary,’ a right of use and not an interest in the corpus of the water supply . . . [R]iparian rights originate from landownership and are dependent upon physical location, i.e., contiguity of land to a body of water . . . . Riparian rights . . . remain ‘vested’ though unexercised.” 1 R. CLARK, *WATERS AND WATER RIGHTS* § 51.9 (1967 & Supp. 1978).

25. *Hudson*, 209 U.S. at 354.

26. *Id.* at 355.

27. *Id.* at 356. Furthermore, Justice Holmes added that “it is recognized that the 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, irrespective of the assent or dissent of the private owners of the land most immediately concerned.” *Id.* at 355, citing three cases:

(1) *Kansas v. Colorado*, 185 U.S. 125 (1902). This controversy between two states triggered the original jurisdiction of the United States Supreme Court. Kansas sought injunctive relief to bar Colorado from diverting waters from the Arkansas River which originated in Colorado but flowed through both Kansas and Colorado. The Supreme Court recognized the complexity of the issues and questions raised, overruled a demurrer by Colorado, and requested a factual presentation by both parties in order to rule effectively.

(2) *Kansas v. Colorado*, 206 U.S. 46 (1907). Facts were compiled and presented to the Supreme Court in this proceeding five years after the litigation was initiated. The Court dismissed Kansas’ complaint in a lengthy opinion which concluded that Kansas suffered minimally from Colorado’s water diversions resulting in diminution of river flow through Kansas. The Court felt that Colorado diverted water for a reasonable use — irrigation — and that there was an equitable apportionment of the Arkansas River waters between the two states.

(3) *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). This case involved an

independent authority, Justice Holmes claimed that the state need not justify its protective stance. “[The 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.”<sup>28</sup>

Despite Justice Holmes’ views, however, the Court in *West v. Kansas Natural Gas Co.*<sup>29</sup> began to dismantle the state police power theory of control and ownership of natural resources. Kansas Natural Gas Company joined forces with three other complainants to attack an Oklahoma statute<sup>30</sup> regulating the interstate transport of natural gas as violative of the Commerce Clause. The complainants had secured the rights to construct natural gas wells on Oklahoma land and, in addition, had purchased the rights of way to lay pipes for the interstate

injunction issued in Georgia’s favor against the public nuisance of air pollution from Tennessee Copper Company’s out-of-state plant.

28. *Hudson*, 209 U.S. at 357. “[T]he 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.” *Id.* at 356-57. As previously discussed in the introduction and as will later be developed, population growth is a material factor in the argument for transfer of water to satisfy justifiable needs. Furthermore, the state, in attempting to enjoin interstate diversion/transfer of water, must justify its laws regulating such transfer, particularly under Commerce Clause analysis. *See, e.g., Sporhase v. Nebraska*, 102 S. Ct. 3456 (1982). *See supra* text accompanying notes 101-119.

29. 221 U.S. 229 (1911).

30. The Oklahoma statute, in part, read:

§ 2. No corporation organized for the purpose of, or engaged in the transportation or transmission of natural gas within this State shall be granted a charter or right of eminent domain, or right to use the highways of this State unless it shall be expressly stipulated in such charter that it shall only transport or transmit natural gas through its pipe lines to points within this State; that it shall not connect with, transport to, or deliver natural gas to individuals, associations, copartnership companies or corporations engaged in transporting or furnishing natural gas to points, places or persons outside of this State.

§ 3. Foreign corporations formed for the purpose of, or engaged in the business of transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this State.

1907 Okla. Sess. Laws 586-87. *See West*, 221 U.S. at 239-43 n.1 for text of the statute in its entirety. For the current statute on the subject, see OKLA STAT. ANN. tit. 52, §§ 1, 3, 4, 5, 7 (West 1969 & Supp. 1982-83).

transmission and eventual sale of the natural gas. The Oklahoma statute prohibited the transportation of natural gas over the state highways or transmission of the natural gas through pipelines within the state, to destinations outside the state. The Circuit Court of the United States for the Eastern District of Oklahoma issued a "perpetual" injunction against the statute's enforcement, declaring the statute's aims, as scrutinized under the authority of the Commerce Clause, "unreasonable, unconstitutional, invalid and void, and of no force or effect whatever. . . ." <sup>31</sup>

On appeal to the United States Supreme Court, Oklahoma argued that "the statute's 'ruling principle is conservation, not commerce; that the due process clause is the single issue.' And due process, it is urged, is not violated, because the statute is not a taking of property, but a regulation of it under the police power of the State."<sup>32</sup> Despite the state's effort, the Supreme Court affirmed the Circuit Court's decision, and articulated its rejection of the state's position:

The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of *intrastate* commerce and *interstate* commerce. The statute . . . recognizes [gas] to be a subject of *intrastate* commerce, but seeks to prohibit it from being the subject of *interstate* commerce, and this is the purpose of its conservation. In other words, the purpose of the conservation is in a sense commercial — the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine [the coal or timber] to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals . . . . To what consequences does such power

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31. *West*, 221 U.S. at 248 (citing *Kansas Natural Gas Co. v. Haskell*, 172 F. 545 (C.C.E.D. Okla. 1909) (prior to 1912, the judicial system was structured differently. See C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 1, at 1-6 (1976)).

32. *West*, 221 U.S. at 249.

tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.<sup>33</sup>

The objective of the Commerce Clause to foster the free flow of commerce among and between the states was clearly frustrated by the Oklahoma statute. Therefore, the statute was declared unconstitutional, and a permanent injunction issued against its operation.

The *West* Court highlighted the national concerns implicit in avoiding the creation of "embargo" legislation. Nonetheless, the controversy continued in *Pennsylvania v. West Virginia*,<sup>34</sup> this time on a larger scale between three states. Pennsylvania and Ohio sought a prohibitory injunction against the operation and enforcement of a West Virginia statute.<sup>35</sup> The statute recognized an anticipated depletion of natural gas resources within West Virginia and sought to prefer *intra*-state consumers as the supply diminished. Again, this attempted restraint of "an established current of commerce"<sup>36</sup> was challenged as forbidden by the Commerce Clause. At the time, West Virginia was the leading producer of natural gas in the United States and had nurtured and promoted its position by developing an *intrastate*, as well as *interstate*, market.<sup>37</sup> For years before the suit, the bordering states of Pennsylvania and Ohio relied heavily on West Virginia gas for private and public consumption.<sup>38</sup> As its gas fields began to show signs of ex-

33. *Id.* at 255 (emphasis added).

34. 262 U.S. 553 (1923).

35. 1919 W. Va. Acts ch. 71.

36. *Pennsylvania v. West Virginia*, 262 U.S. at 591.

37. *Id.* at 597-98.

Much of the business is interstate and has grown up through the course of years. West Virginia encouraged and sanctioned the development of that part of the business and has profited greatly by it. Her present effort, rightly understood, is to subordinate that part to the local business within her borders. In other words, it is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do.

*Id.*

38. "In West Virginia the production of natural gas began as much as thirty years ago and for the last fourteen years has been greater than in any other State. The producing fields include thirty-two of her fifty-five counties." *Id.* at 586. The Court also noted that the gas was used by 300,000 consumers and ultimately provided for 1,500,000 persons in Pennsylvania and 725,000 consumers, ultimately 3,625,000 per-

haustion, West Virginia moved to protect local needs. It exhibited a preference for its inhabitants in the purchase and sale of the resource by withdrawing "a large volume of the gas from an established interstate current whereby it is supplied in other States to consumers there."<sup>39</sup>

The Court recognized the probable ramifications of the statute's enforcement,<sup>40</sup> but avoided those negative results by relying on the purpose behind the Commerce Clause and prior case law including *West*.<sup>41</sup> The injunction was issued and the Court advised that if interstate regulation of natural gas was necessary, assistance should be sought from Congress.

Justice Holmes vigorously dissented here, as in *West*, promoting his notion of a state's police power to control its resources. "I see nothing in the commerce clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages."<sup>42</sup> Justice Holmes, echoing his opinion in *Hudson County Water Co. v. McCarter*,<sup>43</sup> emphasized the right of the state to provide for its local needs.

Although not a "natural resources" case, *H.P. Hood & Sons, Inc. v. DuMond*<sup>44</sup> offered an analysis of the Commerce Clause, helpful to the understanding of the "resources" controversy. The seminal case of its time, *Hood*, surveyed the field of Commerce Clause litigation and

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sons, in Ohio. "To change to other fuel would require an adjustment of heating and cooking appliances at an average cost of more than \$100 for each domestic consumer, or an aggregate cost exceeding \$30,000,000 in Pennsylvania and \$72,500,000 in Ohio." *Id.* at 590.

39. *Id.* at 595.

40. *Id.* at 596.

The question is an important one; for what one State may do others may, and there are ten States from which natural gas is exported for consumption in other States. Besides, what may be done with one natural product may be done with others, and there are several States in which the earth yields products of great value which are carried into other States and there used.

*Id.*

41. 221 U.S. 229.

42. *Pennsylvania v. West Virginia*, 262 U.S. at 602.

43. 209 U.S. 349 (1908).

44. 336 U.S. 525 (1949).

emphasized the national economic interest as more imperative than the state's internal economic preoccupation. The Hood Company, a milk distributor, was denied a license by the New York Commissioner of Agriculture and Markets to open and operate an additional distribution plant at Greenwich, New York. Hood purchased raw milk from farmers, which it then tested, weighed, and cooled for eventual shipment. It was conceded that Hood's entire business, both present and future, was interstate.<sup>45</sup>

In denying the license, the New York Commissioner guided by state law, concluded: "The issuance of a license to [the] applicant which would permit it to operate an additional plant, would tend to a destructive competition in a market already adequately served, and would not be in the public interest."<sup>46</sup> Justice Cardozo, writing for a unanimous Court in the earlier case of *Baldwin v. G.A.F. Seelig, Inc.*,<sup>47</sup> had struck down a New York statute which attempted to bar the importation of milk from Vermont. The legislation was declared an unconstitutional burden on interstate commerce. Justice Jackson, writing for the majority in *Hood*, compared *Baldwin* and found the facts there to be the converse of *Hood*, but the principles to be identical. *Baldwin* involved the attempted curtailment of importation, while *Hood* involved a similar restraint on the exportation of a commodity. "In neither case is the measure supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competition."<sup>48</sup>

Justice Jackson, referencing Justice Cardozo's view in *Baldwin*, noted the economic mission of the *Hood* statute, as distinguished from a legitimate objective of guarding the health, safety, and welfare of a state's citizens. It was this economic objective, in light of the Commerce Clause and its functions, which was precisely at "the root of its invalidity."<sup>49</sup> In examining the early history of the Commerce Clause, Justice Jackson found that "[t]he desire of the Forefathers to federalize regulation of foreign and interstate commerce [stood] in sharp contrast to their jealous preservation of the state's power over its internal

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45. *Id.* at 526.

46. *Id.* at 529.

47. 294 U.S. 511 (1935).

48. *Hood*, 336 U.S. at 531.

49. *Id.* at 532.

affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished.”<sup>50</sup>

Justice Cardozo in *Baldwin* had marked the parameters limiting state regulation: “What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.”<sup>51</sup> Justice Jackson, in *Hood*, noted the probable consequences of “embargo” statutes as the result of the “established interdependence of the states . . . .”<sup>52</sup> He foresaw states coveting their treasures of copper, timber, ore, cotton, oil, and gas. “What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!”<sup>53</sup>

By the mid 1960’s, conservation of our natural resources was a national concern. Although the country had experienced incidental water shortages throughout the first half of the century, the first meaningful water related case following the 1908 dispute in *Hudson*,<sup>54</sup> was *City of Altus v. Carr*<sup>55</sup> in 1965. The controversy stemmed from a Texas statute<sup>56</sup> limiting the transport of water to other states and an Oklahoma city’s dire need of outside water supplies.<sup>57</sup>

An engineering firm, hired by the city of Altus, Oklahoma to locate alternative sources of water, recommended tapping the subsurface water reserve under six of the 5,663 contiguous acres of Texas land owned by plaintiffs C.F. and Pauline Mock. The land bordered Oklahoma and was fourteen miles from the city of Altus. The city of Vernon, Texas, just south of the Mocks’ land, was already drawing

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50. *Id.* at 533-34.

51. *Baldwin*, 294 U.S. at 527.

52. *Hood*, 336 U.S. at 538.

53. *Id.* at 538-39.

54. 209 U.S. 349.

55. 255 F. Supp. 828 (W.D. Tex.), *aff’d mem.*, 385 U.S. 35 (1966).

56. The statute stated: “No one shall withdraw water from any underground source in this State by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it.” TEX. STAT. ANN. art. 7477b (Vernon 1965). Statute held void in *City of Altus*, 255 F. Supp. 828, and therefore omitted from TEXAS WATER CODE ANN. § 5.096 (Vernon 1972 & Supp. 1982-83).

57. The City of Altus, Oklahoma experienced a rapid population boom from 9, 735 persons in 1959 to approximately 23,500 persons at the time of suit in 1966. *City of Altus*, 255 F. Supp. at 831 n.3. Available water supplies from the W.C. Austin Project of the United States Bureau of Reclamation were limited. *Id.* at 831.

from this “natural subsurface water-bearing formation”<sup>58</sup> of high quality percolating ground water. The Mocks and the city of Altus executed a lease which granted the city of Altus the land “for the sole and only purpose of mining and operating for subsurface water and for the transportation of such water to the city of Altus for its use.”<sup>59</sup> Two months later, the Texas legislature enacted article 7477b<sup>60</sup> which effectively barred interstate transfer of water unless the state legislature first approved the transfer. Thereafter, plaintiffs Mock and the city of Altus filed suit to permanently enjoin enforcement of the Texas statute as violative of the Commerce Clause. The Texas state courts had previously addressed intrastate water rights,<sup>61</sup> thereby providing some guidance for the federal district court.

The federal district court reiterated the views expressed in *Pennsylvania v. West Virginia*<sup>62</sup> and *West v. Kansas Natural Gas Co.*<sup>63</sup> in finding for the plaintiffs. Water, like gas, when reduced to possession was considered personal property — a commodity — free for sale in *intrastate* or *interstate* commerce. Regulation restraining transportation of a commodity was not tolerated under the Commerce Clause and its theme proscribing burdening and interfering with interstate commerce. Texas’ argument that the statute’s intentions were lawful as an exercise of the state’s police power in the interest of conservation was discarded.<sup>64</sup> The court eliminated any distinction between a statute

58. *Id.* at 831.

59. *Id.* at 832.

60. TEX. STAT. ANN. art. 7477b (Vernon 1965). Statute held void in *City of Altus*, and therefore omitted from TEX. WATER CODE ANN. § 5.096 (Vernon 1972 & Supp. 1982-83).

61. *City of Altus*, 255 F. Supp. at 832 n.8. *See, e.g.,* *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955) (declaring that the rule in Texas permitted a landowner to withdraw as much percolating ground water as necessary for beneficial aims and could thereafter market it as that landowner saw fit).

62. 262 U.S. 553.

63. 221 U.S. 229.

64. *City of Altus*, 255 F. Supp. at 840.

In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant . . . Obviously, the statute had little relation to the cause of conservation.

*Id.*



which restrained the movement of an article in interstate commerce once reduced to personal property and possession and a statute which prohibited the withdrawal of ground water, for example, with the intent to transport it interstate.<sup>65</sup>

### Natural Resources and the Privileges and Immunities Clause

In addition to the Commerce Clause, the Privileges and Immunities Clause of Article IV of the Constitution<sup>66</sup> has been asserted as a basis from which to contest state laws aimed at coveting natural resources solely for *intrastate* use. An early case which considered the Privileges and Immunities Clause as related to state regulation of natural resources was *McCready v. Virginia*.<sup>67</sup> The common or public ownership doctrine discussed in *Geer v. Connecticut*,<sup>68</sup> was also the topic of controversy in *McCready*. The Supreme Court upheld the conviction of *McCready*, a Maryland citizen, for his violation of a Virginia statute<sup>69</sup> which prohibited out-of-state citizens from planting oysters in or taking oysters from Virginia waters. The Court upheld the statute stating that “[t]he right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.”<sup>70</sup>

For further guidance in its interpretation and application of the Privileges and Immunities Clause of Article IV, the Court turned to *Corfield v. Coryell*,<sup>71</sup> in which it was established that “those privileges and immunities which are, in their nature, fundamental . . . belong, of

65. *Id.*

66. U.S. CONST. art. IV, § 2, provides in part: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

67. 94 U.S. 391 (1876).

68. 161 U.S. 519 (1896). *See also supra* note 15 for discussion of the common ownership doctrine.

69. The Virginia statute read, in part: “If any person other than a citizen of this State shall take or catch oysters . . . or plant oysters in the waters thereof . . . he shall forfeit \$500, and the vessel, tackle, and appurtenances.” 1874 Va. Acts 214.

70. *McCready*, 94 U.S. at 395. The Court also rejected the notion that the Virginia statute was an impermissible burden on interstate commerce. *Id.* at 396-97.

71. 6 F. Cas. 546 (C.C.E.D. Pa. 1823)(No. 3230) (access to oyster beds “owned” by New Jersey citizens could be limited solely to New Jersey citizens).

right, to the citizens of all free governments . . . ”<sup>72</sup> and were meant to be protected by the Clause. The Pennsylvania statute in *Corfield*, like the Virginia statute in *McCready*, established “that it shall not be lawful for any person who is not at the time an actual inhabitant and resident in this state, to rake or gather clams, oysters, or shells, in any of the rivers, bays, or waters in this state . . . . ”<sup>73</sup> The *Corfield* Court concluded not only that the state could regulate the fisheries within the state’s borders under the common ownership theory, but also that farming oysters was not considered a “fundamental” privilege of the citizens of all states.<sup>74</sup>

The *McCready* Court, influenced by the *Corfield* approach, concluded “that the citizens of one State [were] not invested by [the Privileges and Immunities] clause of the Constitution with any interest in the common property of the citizens of another State.”<sup>75</sup> As in *Corfield*, the Court rejected employment of the Commerce Clause to bolster the challenge against the enforcement of the state statute: “There is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade.”<sup>76</sup>

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72. *Corfield*, 6 F. Cas. at 551.

73. Act of June 9, 1820, quoted in *Corfield*, 6 F. Cas. at 548.

74. *Corfield*, 6 F. Cas. at 552. The Court said:

[The fishery] is the property of all [citizens or subjects of the state]; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent . . . of the sovereign who has the power to regulate its use.

. . . [I]t would . . . be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state, to the citizens of all the other states. . . . The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe.

*Id.*

75. *McCready*, 94 U.S. at 395.

76. *Id.* at 396.

In addition to *McCready* and *Corfield*, the Privileges and Immunities Clause was extensively examined in the *Slaughterhouse Cases*<sup>77</sup> where the Louisiana Legislature created a corporation which monopolized the slaughtering of livestock. Approximately 1000 butchers unsuccessfully challenged the statute as an unconstitutional abridgement of their rights under the privileges or immunities clause of the fourteenth amendment.<sup>78</sup> The majority of the Court concluded that the fourteenth amendment protected only those privileges and immunities inherent in United States citizenship, as opposed to the privileges or immunities of state citizenship.<sup>79</sup> The Court examined the fourteenth amendment and said:

It is a little remarkable, if this clause [No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*] was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.<sup>80</sup>

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77. 83 U.S. (16 Wall.) 36 (1873). See *supra* note 66 for the text of the Privileges and Immunities Clause of Art. IV.

78. *Slaughterhouse*, 83 U.S. (16 Wall.) at 66. U.S. CONST. amend XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute was also challenged as an unconstitutional creation of an involuntary servitude prohibited by the thirteenth amendment, and a denial of equal protection and deprivation of property without due process of law contrary to the proscriptions of the fourteenth amendment. *Slaughterhouse*, 83 U.S. (16 Wall.) at 66.

79. *Slaughterhouse*, 83 U.S. (16 Wall.) at 73-74.

80. *Id.* at 74. Professor Tribe interpreted the Court's analysis:

The fourteenth amendment retained the distinction between the privileges of state citizenship and those of national citizenship; therefore, the Court reasoned, the fourteenth amendment left responsibility over the fundamen-

The Supreme Court recently discussed the Privileges and Immunities Clause in *Baldwin v. Fish & Game Commission of Montana*,<sup>81</sup> where a Montana resident and hunting guide for nonresident hunters joined with several Minnesota residents to challenge the Montana licensing scheme applicable to nonresident hunters. Montana residents were able to purchase hunting licenses for substantially less cost than nonresident hunters.<sup>82</sup> Consequently, the statute was attacked as a violation of the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

Justice Blackmun, writing for the majority, noted the scant litigation and judicial analysis involving the Privileges and Immunities Clause. Nonetheless, Justice Blackmun formulated what was in his view the modern articulation of the Clause's purpose and protections:

Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the nation as a single entity must the State treat all citizens, resident and nonresident, equally.<sup>83</sup>

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tal rights of state citizenship where it had always rested, in the state governments. Since the privilege claimed by the *Slaughterhouse* plaintiffs numbered among the rights of state citizenship, they were told to look to Louisiana for redress: the privileges or immunities clause provided federal protection only for the rights of *national* citizenship.

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 7-2, at 419 (1978 & Supp. 1979).

The Court suggested some privileges and immunities of national citizenship "which owe their existence to the Federal Government, its National character, its Constitution, or its laws." For an enumeration, see *Slaughterhouse*, 83 U.S. (16 Wall.) at 79-80.

81. 436 U.S. 371 (1978).

82. In 1975, a Montana resident paid \$4 for a license to hunt only elk. A nonresident hunter, on the other hand, paid \$151 for a combination license which limited him to kill only one elk and two deer. In 1976, a Montana resident had the choice between a combination license for \$30 or an elk license for \$9, while the nonresident hunter was required to purchase a combination license only, for \$225. *Id.* at 373-74.

83. *Id.* at 383.

Justice Blackmun did not conclude that the Montana elk hunting licensing scheme upset the “formation” or “vitality” of the nation, nor did he consider the issue one of “fundamental,” “natural,” “basic,” or “essential” rights.<sup>84</sup> Moreover, Justice Blackmun did not concede the public ownership theory as defunct despite the weakening effect of extensive Commerce Clause litigation. Although Justice Blackmun admitted the theory was “by no means absolute,”<sup>85</sup> he found its vitality evident in *Baldwin*: “The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved.”<sup>86</sup>

Justice Brennan, joined in his dissent by Justices White and Marshall, was uncomfortable with the majority’s emphasis on the “fundamental rights” view of the Privileges and Immunities Clause.<sup>87</sup> Justice

84. *Id.* at 387. In Justice Blackmun’s words, only “[w]ith respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and nonresidents without unnecessary distinctions.” *Id.*

85. *Id.* at 385.

86. *Id.* at 388.

87. The dissenters’ discomfort is exemplified through the following comments: “Corfield’s view of the Privileges and Immunities Clause might, and should be, properly interred as the product of a bygone era . . . .” *Id.* at 399 (Brennan, J., dissenting). Moreover:

The Court concludes that because elk hunting is not a ‘basic and essential activit[y], . . .’ the Privileges and Immunities Clause of Article IV, § 2 . . . does not prevent Montana from irrationally, wantonly, and even invidiously discriminating against nonresidents seeking to enjoy natural treasures it alone possesses. I cannot agree that the Privileges and Immunities Clause is so impotent a guarantee that such discrimination remains wholly beyond the purview of that provision.

*Id.* at 394.

Furthermore, Justice Blackmun’s “fundamental rights” view of the Privileges and Immunities Clause has been challenged and a modern enunciation of its implications noted:

*Toomer v. Witsell* dramatically shifted the focus of review under the privileges and immunities clause from categorizing fundamental rights of state citizenship to analyzing state justifications for maintaining the challenged discriminatory burdens. A flexible approach that seeks to allow discrimination but only where necessary was substituted for the rigidity inherent in a test that cast down any discrimination once found to diminish a fundamental right of state citizenship.

Brennan stressed that the burden was on the state to demonstrate a “substantial reason for the discrimination beyond the mere fact that they are citizens of other States.”<sup>88</sup>

*Toomer v. Witsell*,<sup>89</sup> relied on by the dissent in *Baldwin*, involved a South Carolina shrimping statute which, among other requirements, imposed a license fee on nonresidents 100 times as costly as the fee for residents.<sup>90</sup> Earle J. Toomer and five other Georgia fishermen, renouncing the statute’s “purpose and effect,” claimed the statute was not meant “to conserve shrimp, but to exclude non-residents and thereby create a commercial monopoly for South Carolina residents.”<sup>91</sup> Despite South Carolina’s conservation position, the Court in *Toomer* struck down the South Carolina statute because the state had failed to overcome the constitutional challenge under the Privileges and Immunities Clause.<sup>92</sup> The state had neglected to persuade the Court that: “(1) the presence or activity of nonresidents [was] the source or cause of the problem or effect with which the State [sought] to deal, (2) the discrimination practiced against nonresidents [bore] a substantial relation to the problem they present,”<sup>93</sup> and (3) “the actual impracticality of apparent and *less restrictive alternatives*.”<sup>94</sup>

Furthermore, Justice Brennan challenged the residual vitality of the public/common ownership property doctrine as the result of its qualification in *Toomer*; that is, “[t]he whole ownership theory, in fact, [was] . . . generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to pre-

L. TRIBE, *supra* note 80, § 6-33, at 410.

88. *Baldwin*, 436 U.S. at 399-400 (Brennan, J., dissenting) (citing *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). The Privileges and Immunities Clause “was designed to insure to a citizen of State A who venture[d] into State B the same privileges which the citizens of State B enjoy.” *Baldwin*, 436 U.S. at 399 (quoting *Toomer*, 334 U.S. at 395). Accordingly, the State first has to justify its attempted discriminatory practice.

89. 334 U.S. 385.

90. 1947 S.C. Acts 281.

91. *Toomer*, 334 U.S. at 395.

92. *Id.* at 403. The statute was also declared unconstitutional as a violation of the Commerce Clause. *Id.* at 406.

93. *Baldwin*, 436 U.S. at 402 (Brennan, J., dissenting). See *Toomer*, 334 U.S. at 396-99.

94. L. TRIBE, *supra* note 80, § 6-33, at 410. See *Toomer*, 334 U.S. at 396-99.

serve and regulate the exploitation of an important resource."<sup>95</sup>

Immediately following *Baldwin*, Justice Brennan grasped the opportunity to dispose of the common ownership doctrine in *Hughes v. Oklahoma*.<sup>96</sup> William Hughes, who operated a commercial minnow business in Texas, was convicted of violating an Oklahoma statute which prohibited the commercial exportation of natural minnows from Oklahoma streams. Hughes challenged the statute as repugnant to the Commerce Clause.

In his majority opinion, Justice Brennan agreed that the Oklahoma statute violated the Commerce Clause, and rejected the state's reliance on the common ownership rationale. This effectively overturned the decision in *Geer v. Connecticut*<sup>97</sup> almost a century earlier. Justice Brennan, in his step-by-step dismantling of the *Geer* common/public/state ownership doctrine, identified the state's "protectionist motive,"<sup>98</sup> condemned in *West v. Kansas Natural Gas Co.*,<sup>99</sup> as the basis for the demise of *Geer*. Justice Brennan saw the Privileges and Immunities Clause analysis applied in *Baldwin*,<sup>100</sup> which had shed doubt on the vitality of *Geer*, as analogous to the *Hughes* Commerce Clause challenge.<sup>101</sup>

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95. *Toomer*, 334 U.S. at 402. The erosion of the common ownership doctrine can be seen in *Missouri v. Holland*, 252 U.S. 416, 434 (1920) where it was said: "To put the claim of the State upon title is to lean upon a slender reed." See also *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977) where it was said:

A state does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture . . . . Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.

*Id.* at 284-85. In essence, it appears that the common ownership doctrine of natural resources is no more than a slogan employed by the inhabitants of a state to covet its treasures despite the real need of others.

96. 441 U.S. 322 (1979).

97. 161 U.S. 519 (1896).

98. *Hughes*, 441 U.S. at 329.

99. 221 U.S. 229 (1911).

100. 436 U.S. 371.

101. *Hughes*, 441 U.S. at 334. See also *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978), where Justice Brennan said there is a "mutually reinforcing relationship be-

Justice Brennan also utilized a functional approach to declare the Oklahoma statute regulating the interstate transfer of minnows facially discriminatory, and therefore unconstitutional. This approach had been utilized before in *Pike v. Bruce Church, Inc.*<sup>102</sup> where the Bruce Church company grew, harvested, processed, and packed fruits and vegetables at various plants throughout Arizona and California for ultimate shipment in interstate commerce throughout the nation. The company employed its California facilities for packing cantaloupes harvested in Arizona. Bruce Church, Inc. commenced an action in federal court to enjoin the operation of the Arizona Fruit and Vegetable Standardization Act, which in part required that "all cantaloupes grown in Arizona and offered for sale must 'be packed in regular compact arrangement in closed standard containers approved by the supervisor . . . .'"<sup>103</sup> The effect of the Arizona statute was to bar the Bruce Church company from continued transportation of its cantaloupes, harvested in Arizona, to its packing facilities in California.

In striking down the Arizona statute as unconstitutional under the authority of the Commerce Clause, the Supreme Court announced a more precise rule for purposes of determining the constitutionality of state statutes in Commerce Clause litigation:

Where 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. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>104</sup>

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tween the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause . . . . " *Id.*

102. 397 U.S. 137 (1970).

103. *Id.* at 138.

104. *Id.* at 142 (citation omitted). The Court determined, based on this test, that the Arizona statute burdened interstate commerce:

[T]he State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded \$200,000 packing



Justice Brennan, in *Hughes*, focused on the *Pike* approach and noted that the Oklahoma statute banning the interstate transportation of minnows from Oklahoma streams “overtly block[ed] the flow of interstate commerce at [the] state’s borders.”<sup>105</sup> Furthermore, Justice Brennan stated that a facially discriminatory statute, like Oklahoma’s, cannot be sanctioned regardless of the state’s attempted justification for its enforcement, because “the evil of protectionism can reside in legislative means as well as legislative ends.”<sup>106</sup>

### *Sporhase v. Nebraska*: Water as an Article of Commerce

Understanding the judicial treatment of the interstate transfer of natural resources is paramount to recognizing the impact of the United States Supreme Court decision in *Sporhase v. Nebraska*.<sup>107</sup> Until *Sporhase*, water was not readily thought of as an article of commerce; rather, it was widely recognized as a vital natural resource necessary for economic prosperity and human survival. The Court in *Sporhase* classified water as both an article of commerce — thereby bringing it within the purview of the Commerce Clause — and as a natural resource.

The *Sporhase* controversy grew out of a conflict between private need for water and provisions in the Nebraska statutes which read as follows:

Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources

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plant in [Arizona]. . . . For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.

*Id.* at 145.

105. *Hughes*, 441 U.S. at 337 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

106. *Hughes*, 441 U.S. at 337 (quoting *Philadelphia v. New Jersey*, 437 U.S. at 626).

107. 102 S. Ct. 3456 (1982).

to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.<sup>108</sup>

In *Sporhase*, two citizens of Colorado, Joy Sporhase and Delmer Moss, owned contiguous tracts of land in Nebraska and Colorado. From a well situated on their Nebraska land, Sporhase and Moss pumped ground water to irrigate both the Nebraska and Colorado tracts. They did not seek the required Nebraska permit to transport water across state lines prior to pumping. Consequently, the State of Nebraska sued in state court to enjoin Sporhase and Moss from withdrawing ground water from their well on the Nebraska tract for transport out-of-state. Despite Sporhase's and Moss' defense that the Nebraska statute violated the Commerce Clause, the trial court issued an injunction upon concluding that ground water was *not* an article of commerce.

The Nebraska Supreme Court affirmed<sup>109</sup> and thereby adopted the trial court's reasoning that, even if water was an article of commerce, the statute did not "impose an unreasonable burden [on] interstate commerce."<sup>110</sup> In its examination of Nebraska law, the court explained that Nebraska had employed the modified American reasonable use rule governing the rights of water "ownership."<sup>111</sup> In essence, the

108. NEB. REV. STAT. § 46-613.01 (1978).

109. *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), *rev'd sub nom. Sporhase v. Nebraska*, 102 S. Ct. 3456 (1982).

110. *Douglas*, 208 Neb. at 705, 305 N.W.2d at 616.

111. *Id.* at 705, 305 N.W.2d at 617 (citing *Olson v. City of Wahoo*, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933)).

The American [reasonable use] rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning.

state's highest court advocated public ownership of water. The court dismissed appellants' reliance on *City of Altus v. Carr*,<sup>112</sup> pointing out that Texas law, in contrast to Nebraska law, had adopted the English common law rule of absolute ownership in water.<sup>113</sup> Furthermore, the court distinguished other "natural resource" cases as dealing with resources which "have historically been market items, reducible to private possession and freely exchangeable for value."<sup>114</sup>

On appeal to the United States Supreme Court, the tables turned; the State of Nebraska was unable to overcome the Court's characterization of water as an article of commerce. The Court indicated that the "States' interest [in water] clearly [had] an interstate dimension,"<sup>115</sup>

*Id.*

Compare other major riparian rights doctrines applicable to ground water such as the English Rule, which "recognizes absolute ownership of ground water in the overlying land owner." *Douglas*, 208 Neb. at 705, 305 N.W.2d at 617; and the Prior Appropriation Doctrine, which is a system of water law dominant in most western states. The basic tenets of the doctrine are priority of right (first in time, first in right) and actual use of the water appropriated. Appropriative rights are lost by nonuse. See 1 R. CLARK, WATERS AND WATER RIGHTS §§ 51.5-51.9 (1967 & Supp. 1978).

In an attempt to further control and enforce the alleged state "conservation" objectives, the Nebraska Legislature supplemented Nebraska's judicially imposed modified American reasonable use rule of ground water rights with: (1) the Nebraska statute in controversy, NEB. REV. STAT. § 46-613.01 (1978), and (2) inclusion of the state's recognition of its conservation aims in the state constitution. See NEB. CONST. art. XV, § 4 which reads: "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want." See *Douglas*, 208 Neb. at 706, 305 N.W.2d at 617. See also *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 801, 140 N.W.2d 626, 637 (1966) in which the Nebraska Supreme Court held it is "the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their use."

112. 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd mem.*, 385 U.S. 35 (1966).

113. *Douglas*, 208 Neb. at 708-09, 305 N.W.2d at 618. "Ground water use is not an unlimited private property right in Nebraska law." *Id. Cf. City of Altus v. Carr*, 255 F. Supp. at 840: "[T]he general law of . . . Texas . . . recognizes water that has been withdrawn from under ground sources as personal property and subject to sale and commerce . . . ."

114. *Douglas*, 208 Neb. at 709-10, 305 N.W.2d at 619. The court, with little elucidation, said "water is the only natural resource absolutely essential to human survival," and therefore, rules governing the free flow of commerce in "less essential resources" ought not be applied, if at all, to water. *Id.* at 710, 305 N.W.2d at 619.

115. *Sporhase v. Nebraska*, 102 S. Ct. 3456, 3462 (1982).

despite the State's repeated argument that water was different from other natural resources. Justice Stevens specifically stressed the "*significant federal interest in conservation as well as in fair allocation of this diminishing resource.*"<sup>116</sup>

The Court was clearly not in harmony with Nebraska's persistence that water regulation was not to be scrutinized under the auspices of the Commerce Clause. Although the Court acknowledged and assented to limited state regulation, particularly in the water-scarce western states, those states were to achieve their goals of conservation and preservation within the parameters of the Constitution.<sup>117</sup>

After establishing the pertinence of the Commerce Clause, the Court employed the *Pike*<sup>118</sup> test to determine the constitutionality of the Nebraska statute. The Court agreed that conservation was a legitimate local ambition, identified similar water transport restrictions *in-*

116. *Id.* at 3463 (emphasis added). The following are Justice Stevens' remarks in their entirety:

Although water is indeed essential for human survival, studies indicate that over 80% of our water supplies is used for agricultural purposes. The agricultural markets supplied by irrigated farms are worldwide. They provide the archtypical example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation. The multistate character of the Ogallala aquifer — underlying appellants' tracts of land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas — confirms the view that there is a *significant federal interest in conservation as well as in fair allocation of this diminishing resource.*

*Id.* at 3462-63 (emphasis added). "An aquifer is a geological formation or structure that transmits water." 5 R. POWELL, POWELL ON REAL PROPERTY 415 (1981 & Supp. 1982).

117. *Sporhase*, 102 S. Ct. at 3463.

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. *Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.*

*Id.* (citations omitted, emphasis added).

118. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

trastate, and yielded to Nebraska's "limited preference for its own citizens in the utilization of the resource."<sup>119</sup> The *Sporhase* Court concluded that the first three conditions of section 46-613.01 of the Revised Statutes of Nebraska — i.e., that the requested withdrawal of ground water was to be reasonable, not contrary to conservation aims, and not detrimental to the public welfare — did not "impermissibly burden interstate commerce."<sup>120</sup> However, the fourth statutory requirement of reciprocity was declared facially discriminatory and, as such, subject to the "strictest scrutiny." Recognizing that Colorado did not permit the exportation of its ground water to other states, the Court found that "the reciprocity provision operate[ed] as an explicit barrier to commerce between the two States," and was therefore a violation of the Commerce Clause.<sup>121</sup>

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119. *Sporhase*, 102 S. Ct. at 3464.

120. *Id.* at 3465.

121. *Id.* "Because of the reciprocity requirement of § 46-613.01, appellants would not have been granted a permit had they applied for one." *Id.* at 3458 n.2. The Court also stated: "We therefore are not persuaded that the reciprocity requirement — when superimposed on the first three restrictions in the statute — significantly advances the State's legitimate conservation and preservation interest; it surely is not tailored to serve that purpose." *Id.* at 3465. The Nebraska Supreme Court decision was reversed and the case remanded to determine if the reciprocity provision could be severed from the statute.

Judgment of severance was issued on February 11, 1983 by the Nebraska Supreme Court. *State ex rel. Douglas v. Sporhase*, No. 43206 (Neb. S. Ct. filed Feb. 11, 1983). The court concluded that the unconstitutional reciprocity clause could be severed after consideration of the following criteria: (1) whether a "workable plan" remained following severance of the unconstitutional reciprocity provision; (2) whether the invalid reciprocity provision constituted an "inducement" to the enactment of § 46-613.01 and the overall objectives of Chapter 46 (Irrigation), article 6 (Ground Water); (3) whether the severance "would frustrate the intent of the [Nebraska] Legislature"; (4) whether a statement of severability was "included in the act, indicating that the legislature would have enacted the bill absent the invalid portion." *Id.* at 351-52. The court announced its decision:

An examination of Chapter 46, article 6, reveals a comprehensive approach to the conservation and beneficial use of ground water. The striking of the provision prohibiting transfer of water to nonreciprocating states does not weaken or otherwise impair the operation of the act . . . . The remainder of § 46-613.01, after the unconstitutional portion is stricken, remains a viable statute.

*Id.* at 352-53.

The Court also pointed out that the Nebraska statute, particularly the reciprocity provision, unconditionally prohibited the interstate transfer of water even if an abundance of available water existed and even though the most beneficial use of the resource might have existed out-of-state. With this in mind, the Court found the only way a state could justify its conservation-preservation program, via an absolute statutory embargo scheme, would be to prove: (1) the entire state experienced a water shortage, (2) *intrastate* transportation of water from locations of plentiful reserves to locations of scant supplies was feasible, and (3) importation of water would compensate for the exportation of water. Nebraska did not furnish such evidence; therefore, the reciprocity provision was struck down as not reflecting a "close fit" with asserted state objectives.<sup>122</sup>

Although recognizing that past cases, statutes, and interstate agreements support Congressional deference to state water laws and policies in some circumstances,<sup>123</sup> the Court moreover rejected Nebraska's "suggestion that Congress ha[d] authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water. . . ."<sup>124</sup>

Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal

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122. *Sporhase*, 102 S. Ct. at 3465. Through application of the Commerce Clause, the Court is able to check unbridled state regulation of state water resources.

123. Nebraska cited 37 statutes, particularly the 1902 Reclamation Act which in part "mandates that questions of water rights that arise in relation to a *federal project* are to be determined in accordance with state law." *Id.* at 3466 (emphasis added)(citing *California v. United States*, 438 U.S. 645 (1978), considering whether a state may impose conditions on the United States Department of the Interior's appropriation of water for a federal reclamation project). Nebraska also referred the Court to various interstate compacts "regarding rights to *surface water*" as evidence of Congressional deference to state water laws. *Sporhase*, 102 S. Ct. at 3466 (emphasis added).

124. *Id.* at 3465.

water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress has consented to the unilateral imposition of unreasonable burdens on commerce.<sup>125</sup>

Justice Rehnquist, joined by Justice O'Connor in his dissent, pointed to turn-of-the-century case law in his attempt to bolster the view that a state has the independent authority to manage its natural resources.<sup>126</sup> "In the exercise of this authority, a State may so regulate a natural resource so as to preclude that resource from attaining the status of an 'article of commerce' for the purposes of the negative impact of the Commerce Clause."<sup>127</sup> Under the purview of Nebraska's ground water law<sup>128</sup> — which, according to the dissent, recognized only a "usufructuary right"<sup>129</sup> to ground water — Justice Rehnquist suggested that "[c]ommerce' [could not] exist in a natural resource that [could not] be sold, rented, traded, or transferred, but only *used* . . . . Nebraska so regulates ground water that it cannot be said that the State permits any 'commerce,' intrastate or interstate, to exist in this natural resource."<sup>130</sup>

### Current Litigation and Policy

Most of what has been written regarding water transfers and shortages has primarily concerned the western portion of the United States.<sup>131</sup> Because of the continuous attention drawn to the western water problem, relatively little concern has been shown for the water crises plaguing the largely populated urban centers of the eastern states. These areas have suffered critical and alarmingly frequent shortages which have triggered water use restrictions.<sup>132</sup>

125. *Id.* at 3466.

126. *Id.* at 3468.

127. *Id.*

128. *See supra* note 111 and accompanying text.

129. *Sporhase*, 102 S. Ct. at 3468.

130. *Id.*

131. *See, e.g., Note, Interstate Transfer of Water: The Western Challenge to the Commerce Clause*, 59 TEX. L. REV. 1249 (1981).

132. *See generally* N.Y. Times, Nov. 11, 1982, at B1, col. 1; Canby, *Our Most*

The *Sporhase* controversy is the tip of the iceberg, signalling future litigation involving the access rights of arid regions versus the protectionist measures of the water-rich areas. For example, in *City of El Paso v. Reynolds*,<sup>133</sup> the city of El Paso, Texas sued to challenge New Mexico's absolute water "embargo" statute.<sup>134</sup> It challenged the statute as violative of the Commerce Clause on four grounds: (1) that New Mexico's minimal *intrastate* water restrictions and regulations did not illustrate a concern for conservation, (2) that New Mexico's regulations

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*Precious Resource: Water*, 158-2 NATIONAL GEOGRAPHIC 144 (August 1980). To many, Florida is seen as a tropical environment, and consequently, one assumes the existence of an abundance of water. Few people realize Florida's grave concern for a continued *fresh* water supply. This was exhibited during the severe droughts of 1980 and 1981 when Floridians witnessed the water level of Lake Okeechobee, a major depository of Florida's fresh water reserves, drop to alarmingly low levels. Victoria Tschinkel, head of the Florida Department of Environmental Regulation, has said that the water problem:

will tear the state apart politically . . . . There is a tension over the realization that in the long run there will be a struggle between agricultural and phosphate interests versus the urban areas that are growing very rapidly and generally . . . in areas that are running out of water. Coastal wells are being shut down because of salt water intrusion. They'll have to go inland, and rural areas are looking down the road when they will be developing, and their water is already spoken for.

N.Y. Times, July 7, 1982, at A17, col. 1.

133. Civ. No. 80-730-HB (D.N.M. Jan. 17, 1983).

134. The New Mexico embargo statute is as follows:

Removal of underground waters from state—

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 [72-12-18 to 72-12-21 NMSA 1978] prohibits the transportation of water by tank truck from any underground source in New Mexico to any other state where the water is used for exploration and drilling for oil or gas. The owner of the well from which the water is withdrawn shall have a duty to ascertain that the water exported is used only for the above purposes and such owner shall keep and maintain accurate records of the amount of water withdrawn and make such records available to the state engineer of New Mexico upon request. The amount of water withdrawn from any one well for such exportation shall never exceed three acre-feet.

N.M. STAT. ANN. § 72-12-19 (1978).



lacked “evenhandedness,” i.e., a balance between *intrastate* and *interstate* regulation as required under the present-day *Pike* analysis, (3) that New Mexico allocated its water resources *intrastate* for all uses, including so-called low priority uses, while simultaneously depriving out-of-state users with the highest priority — economic and human survival, and (4) that New Mexico’s “absolute” restrictions were a more obvious violation of the Constitution than Nebraska’s “discretionary” restrictions discussed in *Sporhase*.<sup>135</sup>

One of the major questions to be pondered in these cases is whether the state’s objectives in attempting to prevent exacerbated water shortages could be realized through alternative methods, thereby avoiding the alleged impact on interstate commercial activities. El Paso suggested some possible alternatives to New Mexico’s statutory scheme: changes in the pattern of uses, improvements in irrigation efficiency, desalinization projects, and importation of water, to name a few. Furthermore, the focus ought to be when and where the water may be put to its highest and most beneficial use.<sup>136</sup> In the *El Paso* case, as well as in *Sporhase*, the time is now and the place is across state lines for the highest and best use of water. Rather than accept New Mexico’s general assertion that it needs to guard its water preserves to offset future water shortages, El Paso responded: “To say that at some time in the indefinite future there will be a shortage and that this justifies the embargo is simply another way of saying that the state should be free to restrict all water to use in-state, forever.”<sup>137</sup>

The New Mexico absolute water embargo statute was struck down as unconstitutional under the Commerce Clause:

The purpose of the embargo is to promote New Mexico’s economic advantage. Even if the purpose were conservation and preservation, as [New Mexico] maintain[s], the embargo does not significantly advance the conservation and preservation of water. It certainly is not narrowly tailored to achieve that purpose and cannot survive strict scrutiny.<sup>138</sup>

135. See Plaintiffs’ Supplemental Post-Trial Brief, *City of El Paso v. Reynolds*, Civ. No. 80-730-HB (D.N.M. Jan. 17, 1983).

136. *Id.* at 21-24.

137. *Id.* at 27.

138. *City of El Paso v. Reynolds*, Civ. No. 80-730-HB, slip op. at 36 (D.N.M.

New Mexico's intrastate water laws sustained a policy of "maximum beneficial use [which meant] putting as much water to beneficial use as soon as possible."<sup>139</sup> The court noted that El Paso is the "economic hub of an interstate region which includes southern New Mexico [and consequently,] the most beneficial and economically productive use of [New Mexico's ground water] is in El Paso for the simple reason that what is good for El Paso is good for the entire region, including southern New Mexico."<sup>140</sup>

The recent movement by the Great Lakes States to control any diversion of water from the lakes of that region has been manifested in a resolution<sup>141</sup> forwarded to The White House. At first glance the reso-

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Jan. 17, 1983).

139. *Id.* at 33.

140. *Id.* at 34.

141. Mackinac Resolution (prepared at Great Lakes Water Resources Conference, June 9-11, 1982). From June 9-11, 1982, the 1982 Great Lakes Water Resources Conference was held at Mackinac Island, Michigan. The participant "Great Lakes States" included Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, Wisconsin, and the Canadian Provinces of Ontario and Quebec. The resolution regarding water "diversions" is reprinted here in its entirety. It includes an objection to any future diversion of Great Lakes water to alleviate the strains of fresh water shortages that "already are apparent and are expected to reach major proportions in the next decade . . ." in other parts of the United States. The resolution recognizes "substantial increases in consumptive uses within the Basin over the next half century to meet *our own* growing needs . . ." The proposal notes the economic interest of the participants and calls for the "concurrence" of the Great Lakes States, the United States Federal Government, and the Federal Government of Canada and the provinces contiguous to the Great Lakes system. *Id.* (emphasis added).

#### **MACKINAC RESOLUTION**

##### **DIVERSIONS**

**WHEREAS**, the States and Provinces in the Great Lakes Basin have been blessed with an incomparable water resource; and

**WHEREAS**, increasing evidence points to severe freshwater shortages in other parts of the United States, shortages that already are apparent and are expected to reach major proportions in the next decade; and

**WHEREAS**, the search already has begun for alternative sources of water for those regions, with support for some of that search coming from the United States Federal Government; and

**WHEREAS**, the water of the Great Lakes is needed to meet the current and future domestic, industrial, navigational, power, agricultural and recreational needs of the Great Lakes and St. Lawrence region;

**WHEREAS**, the findings of the International Joint Commission's Great

lution appears reasonable, because the Great Lakes States speak of

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- Lakes Diversions and Consumptive Uses Study Board indicates that we will be faced with substantial increases in consumptive uses within the Basin over the next half century to meet our own growing needs; and
- WHEREAS, the diversion of water from the Great Lakes Basin to other water basins reduces the net supply of water available to the Great Lakes Basin and lowers lake levels; and
- WHEREAS, lowered lake levels and reduction of flows in connecting channels could result in serious losses in water supply, navigation and recreational values causing critical economic, social and environmental problems adverse to the people of the Great Lakes and St. Lawrence States and Provinces; and
- WHEREAS, the wise use and development of the water resources of the Great Lakes is essential to the economy and prosperity of the Great Lakes and St. Lawrence States and Provinces; and
- WHEREAS, the diversion of Great Lakes waters to other regions of the United States or Canada could result in severe restrictions in the growth and development of the Great Lakes and St. Lawrence region; and
- WHEREAS, it makes far more sense for development to occur where abundant supplies of fresh water already exist, rather than moving the water to other regions; and
- WHEREAS, we share in the responsibility for the stewardship of the tremendous natural resources which the Great Lakes provide;
- WHEREAS, the Boundary Waters Agreement of 1909 requires that any change in the flows and levels of any boundary waters is subject to approval by the federal governments of both the United States and Canada.
- NOW THEREFORE BE IT RESOLVED by the Great Lakes States and Provinces that based on existing information they object to any new diversion of Great Lakes water for use outside the Great Lakes States and Provinces; and
- BE IT FURTHER RESOLVED that no future diversions be considered until a thorough assessment, involving all jurisdictions contiguous to the Great Lakes System, of the impacts on navigation, power generation environment and socio-economic development for all said jurisdictions takes place.
- BE IT FURTHER RESOLVED that any future decision on the diversion of Great Lakes water for use outside of the Great Lakes States and Provinces be made only with the concurrence of the Great Lakes States, the United States Federal Government, and the Federal Government of Canada and the Provinces contiguous to the Great Lakes system.

“shar[ing] in the responsibility for the stewardship of the tremendous natural resources which the Great Lakes provide . . . ,”<sup>142</sup> and of a “concurrence” among the Great Lakes States, the United States Federal Government, and the Canadian Government. But the motives accompanying these written words align themselves with the “protection-

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The Canadian Government and its provinces are included, as well as the United States Federal Government, because of an international treaty between the United States and Canada regarding the Great Lakes. *See* Boundary Water Treaty, Jan. 11, 1909, United States-Great Britain, 36 Stat. 2448, T.S. No. 548, and Great Lakes Water Quality Agreement, Nov. 22, 1978, United States-Canada 30 U.S.T. 1383, T.I.A.S. No. 9257.

Apparently, the participants at the Great Lakes Water Resources Conference intended to follow through on their commitments made at the Conference. Former Michigan Governor William Milliken is now the chairman of the board of the Center for the Great Lakes which was recently established in Chicago, Illinois. The Center, says Milliken, wants to help those involved with plans for the future of the Great Lakes, particularly water diversion from the lakes, to “make their decisions on an informed basis.” 69 A.B.A. J. 152 (1983).

*See also* H.R. 5278 proposed bill, which, if it had passed, would have prohibited the interstate transfer or sale of water by any state part of an interstate water system unless there was prior agreement among all the states affected. Introduced by Representative Berkley Bedell (D-Iowa), H.R. 5278 read as follows:

A BILL

To prohibit any State from selling or otherwise transferring interstate waters located in such State for use outside such State unless all other States in the drainage basin of such waters consent to such sale or transfer.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no State shall sell or otherwise transfer, for use outside of such State, water which is taken from any river or other body of surface which is located in or which passes through more than one State or any aquifer or other body of ground water which underlies more than one State unless—

(1) there is in effect an interstate compact (A) between the States in the drainage basin of such river or other body of surface water, or (B) between the affected States, in the case of such an aquifer or other body of ground water, which governs such sale or transfer, and

(2) all the States which are parties to such compact consent to such sale or transfer.

H.R. 5278, 97th Cong., 1st Sess. (1981).

142. Mackinac Resolution *supra* note 141.

ist" camp.<sup>143</sup> It is precisely this type of proposed "constituent legislation" which feeds the controversy, promotes self-regard, and offers little toward easing the tension between those who have and those who do not have.

In addition to current litigation and policy concerns on the subject of interstate transfer of water, it is important to note The National Water Commission's Report to the President.<sup>144</sup> Its report, upon the termination of its study of the nation's water policies in 1973, suggested that Congress and the States look at various factors when approaching the issue of interstate transfer of water necessary to satisfy the justified needs of those deprived. Among the considerations mentioned were local, regional, and national economic development, the need to put water to its highest and best use, federal aid, environmental concerns, and an equitable compensation system for the exporting state.<sup>145</sup> Unfortunately, balancing these concerns remains a difficult task.

### Conclusion

The *Sporhase*<sup>146</sup> case has not entirely settled the issue of interstate transfer of ground water. The United States Supreme Court, under the *Pike*<sup>147</sup> test, has sustained the constitutionality of the first three conditions of section 46-613.01 of the Revised Statutes of Nebraska<sup>148</sup> —

143. As staff aide to former Michigan Governor William Milliken, William Rustem explained the region's position:

We fully anticipate that one of the Western States will challenge our contention that the Great Lakes belong to the states that surround them and are not a national resource that can be tapped into by any state.

. . . Due to the population shift to the West and Southwest, the political power in Congress is shifting . . . . When these areas really start hurting for water, the obvious political solution will be to pipe more water. We want to be ready for that.

Quade, *Water Wars Predicted in a Thirsty Nation*, 68 A.B.A. J. 1067 (1982).

144. NATIONAL WATER COMMISSION REPORT TO THE PRESIDENT, WATER POLICIES FOR THE FUTURE (1973).

145. *Id.* at 317-33.

146. *Sporhase v. Nebraska*, 102 S. Ct. 3456 (1982).

147. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). For text of the *Pike* test, see *supra* text accompanying note 104.

148. NEB. REV. STAT. § 46-613.01 (1978). See *supra* text accompanying note

i.e., that the requested withdrawal of ground water be reasonable, not contrary to Nebraska's conservation aims, and not detrimental to the public welfare. Joy Sporhase and Delmer Moss must still, therefore, apply for a permit from Nebraska's Director of Water Resources before withdrawing ground water from their well, for irrigation of their Nebraska and Colorado land. In effect, the permit will be issued at the discretion of the Director of Water Resources dependent upon *his* evaluation of the request guided by the statutory conditions. Consequently, Sporhase and Moss could conceivably be denied the permit, thus prohibited from withdrawing quantities of ground water for their irrigation needs.<sup>149</sup>

All water embargo statutes classified as either absolute embargoes or as embargoes triggered by the reciprocity requirement,<sup>150</sup> should be eliminated as facially discriminatory legislation, and therefore unconstitutional. The discretionary water embargo statutes, similar to the Nebraska statute in *Sporhase* without the reciprocity provision, should be scrutinized under the force of the *Pike* Commerce Clause balancing test which was employed in *Sporhase*.<sup>151</sup> Although the *Pike* test focused on the effect of state legislation on interstate commerce balanced by "evenhanded" intrastate regulation, it is mandatory to recognize and incorporate into the balancing formula the individual, economic, and survival interests at stake.

The Supreme court in *Sporhase* declared water an article of commerce thereby triggering Commerce Clause analysis. However, water must also be appreciated and dealt with as an essential natural resource, and as such, "constituent legislation" which hinders its reasona-

108 for statute in its entirety.

149. See *Sporhase*, 102 S. Ct. at 3469 n.3 (Rehnquist, J., dissenting). For this very reason, all discretionary water embargo statutes must provide an appellate procedure for those denied a permit.

150. For examples of the various water embargo statutes, see ARIZ. REV. STAT. ANN. § 45-153 (Supp. 1982-83); CAL. WATER CODE § 1230 (Deering 1977); COLO. REV. STAT. §§ 101-103 (Supp. 1982); IDAHO CODE §§ 401-410 (1977); KAN. STAT. ANN. § 82a-726 (1977); MONT. CODE ANN. § 85-1-121 (1981); NEV. REV. STAT. §§ 533.515-533.524 (1979); N.J. STAT. ANN. § 58:1A-5 (1982); N.M. STAT. ANN. §§ 72-12-18, 72-12-19 (1978); OR. REV. STAT. § 537.810 (1977); UTAH CODE ANN. § 73-2-8 (1981); WASH. REV. CODE ANN. §§ 90.03.300, 90.16.110, 90.16.120 (1962); WYO. STAT. § 41-3-115 (1977).

151. See *supra* text accompanying notes 117-22.

ble use should be eliminated. There exists a fear that without water "embargo" statutes, unchecked withdrawal and subsequent transfer of ground water out-of-state will lead to an uncontrolled and rapid depletion of water reserves. In the most recent statement on this issue, the court in *City of El Paso v. Reynolds*<sup>152</sup> mollified this fear: "The absence of an embargo statute will not create havoc in New Mexico's system of ground water regulation. It will not result in unrestricted out-of-state use or uncontrolled transfers of water. Interstate usage of water can be restricted and controlled to the same extent as intrastate usage."<sup>153</sup>

Water, as both a natural resource and an article of commerce, is needed for life. It is needed by individuals to pursue their livelihood. "[A] State's interest in its resources must yield when . . . it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right protected by the Privileges and Immunities Clause of the Constitution."<sup>154</sup> Water is needed by communities throughout the nation to foster and sustain economic growth. The *Sporhase* balancing approach is clearly a step toward mitigating the controversy. Beyond *Sporhase* and the declaration that absolute and reciprocal water embargo statutes are unconstitutional, however, interstate compacts<sup>155</sup> to govern in the area of interstate ground water transfer between states may become necessary. These agreements will be especially applicable, for example, to those states which overlie an interstate aquifer.<sup>156</sup> Until sporadic water shortages, surface water pollution, acid rain, and conservation of water resources can be effectively managed, fresh ground water reserves will continue to be tapped as an alternative

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152. Civ. No. 80-730-HB (D.N.M. Jan. 17, 1983).

153. *Id.* slip op. at 31 (emphasis added).

154. Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371, 386 (1978).

155. See *supra* note 5 for a discussion of interstate compacts.

156. The Ogallala aquifer, from which *Sporhase* and *Moss* were withdrawing ground water, has a "multistate character" and underlies land in parts of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, and Texas. See *Sporhase*, 102 S. Ct. at 3463 (1982) (footnote omitted). It would seem that those states which overlie the same aquifer or ground water depository would desire the opportunity to design an interstate compact to govern ground water withdrawal among those states. Six independent ground water withdrawal policies and prohibitions, particularly in the case of the Ogallala aquifer which underlies six states, accomplishes little toward achieving equitably balanced withdrawals.

source of water supply.

This note recommends the employment of interstate compacts to govern in the area of interstate ground water transfer, similar to the compacts initiated in the area of surface water diversions.<sup>157</sup> Moreover, the surface water interstate compacts which currently contain dormant ground water transfer provisions,<sup>158</sup> ought to be reviewed, amended, and activated to avoid future conflict. The interstate compact is one step shy of promoting a uniform federal water policy which would specifically administer the interstate transfer of ground water. Although a national policy may seem feasible in order to terminate fifty independent state policies which may not be in harmony with the national welfare, the interstate compact enables the states to retain authority and control in their area of expertise — local water management. The interstate compact incorporates the federal component with the participation of a federal representative in the negotiation process between states.<sup>159</sup> Furthermore, Congressional consenting legislation, with or without modification, is generally required under the United States Constitution.<sup>160</sup> A uniform national policy presents the problem of the extent to which the federal government would carve out the law and place itself in the area of interstate water transfer, thereby impinging on the traditional deference to state and local water management.<sup>161</sup> Moreover, a federal policy would need to accommodate the various regional interests and factors including the disparity in geography, climate, and consumptive use.<sup>162</sup>

The fact that two farmers were threatened with a shutdown of their irrigation system because they were withdrawing ground water from a neighboring state, is a signal to reevaluate the nation's water laws and promote the sharing of our natural resources. This note illus-

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157. See discussion *supra* note 5.

158. See, e.g., Susquehanna River Basin Compact, Pub. L. No. 91-575, 84 Stat. 1509, § 11.1 at 1523 (1970). This note does not assert that this particular compact's ground water provision is dormant. Rather, citation is made as an example of a ground water provision in an interstate compact.

159. See discussion *supra* note 5.

160. See discussion *supra* note 5.

161. See *Sporhase*, 102 S. Ct. at 3465-66.

162. See generally *Sporhase*, 102 S. Ct. at 3462 n.13 (1982)(citing *California v. United States*, 438 U.S. 645, 648 (1978)).



trates precisely the type of “warring” between the states that the Commerce Clause and the Constitution sought to prevent:

In [interstate commerce], instead of the states, a new power appears and a new welfare, a welfare which transcends that of any State . . . . [L]et us say it is constituted of the welfare of all of the States, and that of each State is made greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States.<sup>163</sup>

As Justice Cardozo has said, the Constitution “was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”<sup>164</sup>

*Gary S. Betensky*

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163. *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911).

164. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).