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In this article the author examines the United States Supreme Court's recent decision in *Sporhase v. Nebraska*. He discusses the implications the decision has for western states' attempts to control their water resources and suggests a revision in the Court's approach to such questions.

SO ITS NOT "OURS" - WHY CAN'T WE STILL KEEP IT? A FIRST LOOK AT SPORHASE V. NEBRASKA

By

*A. Dan Tarlock**

INTRODUCTION: THE ORIGINS OF WESTERN CLAIMS OF RESOURCE SOVEREIGNTY

With one exception, God was good to the West. He gave it great natural beauty (accentuated by some vast, barren stretches), abundant and varied natural resources, and substantial areas of productive soil. However, he failed to provide enough water to enjoy and exploit these gifts with abandon. An Old Testament explanation for the perversity of western geography might conclude that God did this to test man's ability to use the gifts wisely. Certainly, many of those who originally went West did so in the Old Testament spirit of settling a promised land to exploit it. From the middle of the nineteenth to the early twentieth centuries, the West was settled as a society based on mining, livestock grazing, and irrigated agriculture.¹

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1. The origins of western settlement are traced in R.A. BILLINGTON, *THE FAR WESTERN FRONTIER: 1830-1860* (1956).

One had to be hardy to survive outside of the more gentle Pacific Coast region, and those who did took justifiable pride in this accomplishment and naturally thought that they had earned the exclusive right to chart the region's future.² They therefore resented sharing control of their resources with other parts of the country. But, however justified this labor theory of exclusive sovereignty was, it was made by colonists. The West was, until very recently, a resource rich, capital poor region.³ Eastern and foreign capital was necessary to develop the resources, and the western states were subject to a national government that claimed not only superior political sovereignty but also, as proprietor of the public domain, proprietary ownership of much of the West's wealth.

Still, the West had reason to expect that it would gain exclusive sovereignty over the key to its destiny, its natural resources. The federal government failed to assert its claims to the mineral and water wealth on the public domain until much of that wealth had passed into private hands.⁴ Furthermore, for much of the nineteenth century it appeared that the federal government would dispose of most of the public domain to the states and to private parties.⁵ However, the disposition era of the public domain ended before the West was fully settled and disposed of so the federal government ended up owning vast areas of public land or severed mineral titles. This and the distance between Washington and the West have made the region feel threatened by the national government and somewhat disdainful of its expertise and direction.

Although the West never fully adjusted to the shifts in public lands policy from disposition to simultaneous

2. See R. ATHEARN, *HIGH COUNTRY EMPIRE* 207 (1960).

3. The history of the west's transition from a colony to a major region of the United States is described in G. NASH, *THE AMERICAN WEST IN THE TWENTIETH CENTURY: A SHORT HISTORY OF AN URBAN OASIS* (1973).

4. For example, coal lands were withdrawn in 1905 and 1906 after "[i]t had been discovered by the Geological Survey that large areas of valuable coal lands in the West had been obtained from the government by means of agricultural entries." B. HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 518 (1924 U. Wis. ed. 1965).

5. GATES, *A HISTORY OF PUBLIC LAND LAW* (1968) is the standard history of public domain policy.

retention and disposition and ultimately to retention and comprehensive management, as the latest Sagebrush Rebellion illustrates,⁶ it has been able to live with less than full resource sovereignty. There has been of course, and always will be, conflict — at times substantial conflict⁷ — between federal and state resource policies, but an overall congruence of interest in areas such as grazing, mineral leasing, timber production and reclamation has kept the friction tolerable. The shock of shared control was further softened because the states did effectively retain exclusive control over the one resource, water, that determined the growth of the region. The doctrine of prior appropriation, upon which western water law is based, helped to contain sectional conflicts because it served both federal and state interests well. Appropriation supported an irrigation and livestock economy desired by both governments and gave mineral and other industries adequate access to water.⁸

Western adjustment to shared resource sovereignty was made possible by a long period of gradual growth after the initial rush of settlement. But, in the 1970's,

6. The Western states have always felt cheated that the disposition era ended before they or private patentees obtained title to the public domain. In recent years, the Western states, having failed to convince Congress to cede either control or ownership of the bulk of the public lands to the states, have asserted ownership of large amounts of the public lands under various legal theories. Those theories conclude that the federal government has a constitutional duty to divest itself of non-wilderness national forest lands, and lands managed by the Bureau of Land Management under the Taylor Grazing Act. The strongest constitutional argument asserted by the states is that the equal footing doctrine, as interpreted in *Pollard v. Hagen*, 15 U.S. (3 How.) 391 (1844), imposes a duty on the federal government to put new states on a resource par with the original 13 states (the federal government has no retained lands in the original states). To date, this argument has been properly rejected. *Nevada State Bd. of Agriculture v. United States*, 512 F. Supp. 166 (D. Nev. 1981).

For an overview of the history of earlier divestiture movements, see L. PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN* (1951). For a review of current legal arguments, see Leshy, *Unravelling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C.D. L. REV. 317 (1980); Mollison and Eddy, Jr., *The Sagebrush Rebellion: A Simplistic Response to the Complex Problems of Federal Land Management*, 19 HARV. J. ON LEGIS. 97 (1982); Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980) and Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?* 1980 UTAH L. REV. 505.

7. For a review of the classic twentieth century public lands battles, see L. PEPPER, *supra* note 6, and *Regional Conflict and National Policy*, 70 RESOURCES 1, July, 1982.

8. The vision of Wyoming's irrigation economy in 1940 is described in *WYOMING: A GUIDE TO ITS HISTORY, HIGHWAYS, AND PEOPLE* 105-08 (1941). See also Trelease, *The Role of Water Law in Conserving and Developing Natural Resources in the West*, 18 WYO. L.J. 3 (1963).

the West began to come into its own as its population grew rapidly. People were drawn to the region by the somewhat incompatible lures of amenity and energy.

The energy boom in states such as Wyoming has stressed both the states' resources⁹ and their institutions, including the traditional assumption of the law of prior appropriation that the locus of use is irrelevant to the right. Most western states have reacted with both concern and gratitude to the energy boom because it threatens to change substantially or destroy the uniqueness of the region in return for instant prosperity. Nowhere is this dual view of energy development better reflected than in state policies on the use of water for coal slurry pipelines.¹⁰

Wyoming, along with other states, has singled out the use of water for coal slurry pipelines for special regulation and has placed severe restrictions on water use for interstate pipelines. These statutes may represent yet another chapter in the endless friction between state and national interests. As a matter of federal constitutional law, it is said that export barriers may violate the negative commerce clause,¹¹ and as a matter of legislative policy, it is said that they may be inconsistent with the national goal of energy independence.¹²

In the 1981-82 Term, the Supreme Court held that water was an article of interstate commerce, despite the strenuous, longstanding arguments of the western states that state ownership in trust for the public immunized

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9. See Doherty, *Wyoming Plays Its Hole Card*, SPORTS ILLUSTRATED, May 17, 1982, at 75.
 10. See generally C. BORIS & J. KRUTILLA, WATER RIGHTS AND ENERGY DEVELOPMENT IN THE YELLOWSTONE RIVER BASIN (1980); ACQUIRING WATER FOR ENERGY: INSTITUTIONAL ASPECTS (G. Weatherford ed. 1982).
 11. Tarlock, *Western Water Law and Coal Development*, 51 U. COLO. L. REV. 511, 538-41 (1980); Martz and Graziis, *Interstate Transfers of Water and Water Rights — The Slurry Issue*, 23 ROCKY MTN. MIN. L. INST. 33 (1977); Corker, *Can a State Embargo the Export of Water by Transbasin Diversion?* 12 IDAHO L. REV. 135 (1976); Comment, *Do State Water Anti-Exploration Statutes Violate the Commerce Clause, or Will New Mexico's Embargo Statute Hold Water?* 21 NAT. RESOURCES J. 617 (1981); Comment, *"It's Our Water" — Can Wyoming Constitutionally Prohibit the Exportation of State Waters?* 10 LAND & WATER L. REV. 119 (1975).
 12. Clyde, *State Prohibitions on Interstate Exportation of Scarce Water Resources*, 53 U. COLO. L. REV. 529, 531 (1982).

state water law from negative commerce clause review. In *Sporhase v. Nebraska*,¹³ the Court found that a Nebraska statute prohibiting the export of water from the state violated the negative commerce clause.

Sporhase will be hailed by many as the death knell for all state export ban statutes, including Wyoming's coal slurry legislation, but this may be a premature conclusion. This article attempts to develop, within the framework of the *Sporhase* analysis, an approach to export statutes that allows a state to assert its essential interests in determining the locus of water use. This effort is animated by the normative argument that there is no basis for federal preemption of state water law in this or any other energy issue.¹⁴

A. The Coal Slurry Problem: Resource Sovereignty Aroused

After the Arab Oil Embargo of 1973, the federal government announced a goal of energy independence. Under Presidents Ford and Carter this goal was to be implemented, in part, by increasing the use of abundant domestic resources. After a long period of neglect and shrinking markets, coal was again nominated for energy stardom.¹⁵

One goal of the new coal policy was to transport coal as cheaply as possible from areas of supply to areas of demand. Pipeline companies argued that this could be done, by changing lump coal into slurry and piping the mixture to areas of high demand, such as the Southeast.¹⁶ Railroads, afraid of losing a near monopoly on western coal transportation, objected strenuously to such proposals. Western ranchers and environmentalists objected as well, fearing

13. _____ U.S. _____, 102 S.Ct. 3456 (1982).

14. See Tarlock and Fairfax, *Federal Proprietary [Water] Rights for Western Energy Development: An Analysis of Red Herring?* 3 J. ENERGY L. & POL'Y 1 (1982).

15. See Tarlock, *Western Coal in Context*, 53 U. COLO. L. REV. 315 (1982) (This article provides a brief history of the role of coal in Post-World War II energy planning).

16. For an early summary of the pipeline companies' arguments, see Haerle, *Legal and Practical Aspects of Coal Slurry Construction and Use*, in COAL CONVERSION: PRACTICAL AND LEGAL IMPLICATIONS 217 (P.L.I. 1977).

the impact on water resources. Estimates vary, but the amounts involved are substantial.¹⁷

The issue took on an added edge, which has now blurred, during the mid-1970's when the West was awash with energy and water studies that forecast the drying up of western streams to develop conventional and unconventional energy sources and to generate electricity to keep pace with demand. Western states responded to these vague fears of water depletion with a variety of export ban statutes, many of which singled out coal slurry pipelines either directly or indirectly. The issue became complicated when the pipelines turned to Congress for national legislation giving them the power of eminent domain in order to circumvent the railroads' refusal to grant rights of way under their tracks. The water issue quickly became enmeshed in the pipeline legislation, which has yet to pass Congress.¹⁸

B. Water Export Bans: Resource Sovereignty Asserted

Western states have enacted a variety of laws to limit the diversion of water for out-of-state uses. A few states have flat export prohibitions. New Mexico flatly prohibits the withdrawal of all groundwater for out-of-state uses.¹⁹ Montana prohibits the export of all waters and, to be doubly safe, provides that the use of water for coal slurry is non-beneficial.²⁰ Similar legislation exists in Oklahoma.²¹ Pro-

17. See OFFICE OF TECHNOLOGY ASSESSMENT, *THE DIRECT USE OF COAL* 237 (1979); Boris & Krutilla, *supra* note 10, at 123-25.

18. See Comment, *Do State Restrictions on Water Use by Slurry Pipelines Violate the Commerce Clause?* 53 U. COLO. L. REV. 655 (1982).

19. The prohibition extends to drilling a well on New Mexico territory and transporting the water out of state or by drilling on the territory of a neighboring state and extracting the water from beneath land lying within New Mexico's boundaries. However, the statute expressly allows the out-of-state transportation by tank truck of water withdrawn from an underground source if the water will be used out of state for exploration and drilling for oil and gas. The maximum allowable amount of water withdrawn from any one well for exploration may not exceed three acre-feet. The statute also prescribes certain duties owed by the owner of a well from which water for export is withdrawn. He must ascertain that the water is exported only for use in oil and gas drilling. He must also keep records of the amount of water withdrawn for export. These records are subject to state inspection. N.M. STAT. ANN. § 72-12-19 (1978).

20. An act of the legislature would be required in Montana to circumvent the flat prohibition laid down by the statute: "None of the waters in the state of Montana shall ever be appropriated, diverted, impounded or otherwise restrained or controlled while within the state for use outside the boundaries thereof, . . ." MONT. CODE ANN. § 85-1-121 (1981). MONT. CODE ANN.

hibitions in other states are facially less absolute but have the effect of barring out-of-state uses. Nebraska,²² Nevada²³ and Washington²⁴ limit out-of-state diversions to states that allow a reciprocal right of interstate use. Colorado also has a reciprocity statute, but in addition to demonstrating host-state reciprocity, the diverter must obtain legislative approval for an out-of-state use.²⁵

Concern over the use of water has led other states to the requirement of legislative approval for any out-of-state uses. Wyoming has required that slurry coal pipelines receive legislative approval.²⁶ South Dakota requires legisla-

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- § 85-2-104(1) and (2) (1981) provides that using water "for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state" and that such use "is not a beneficial use of water." For a useful discussion of the legislative history of the Montana legislation, see Comment, *Coal Slurry: All Quiet On the Western Front?* 3 THE PUB. LAND L. REV. 156 (1982).
21. "No Oklahoma water from any source shall be used in connection with the transportation, maintenance or operation of a coal slurry pipeline within or through the State of Oklahoma." OKLA. STAT. ANN. tit. 27, § 7.6 (West Supp. 1977).
 22. Nebraska requires that anyone intending to divert water for an out-of-state use must file a permit application with the Department of Water Resources. The permit will be granted if the Director finds that the request "is reasonable, is not contrary to the conservation and use of groundwater, and is not otherwise detrimental to the public welfare." NEB. REV. STAT. § 46.613.01 (Reissue 1978). This statute was held unconstitutional in *Sporhase v. Nebraska*, U.S. , 102 S.Ct. 3456 (1982).
 23. NEV. REV. STAT. § 533.515 (1979).
 24. The Washington statute differs from those of Nebraska and Nevada in that the granting of permits for diversion of Washington water to another state is discretionary with the Supervisor of Water Resources, unless the other state has enacted a reciprocity statute. WASH. REV. CODE ANN. § 90.03.300 (1962). On the statute's face the Supervisor may allow appropriation of water to a state that does *not* have a reciprocity statute. However, the last section of the Water Rights Act specifies that the provisions of the Water Rights Act shall not apply to any state which does not grant reciprocal rights to the state of Washington. WASH. REV. CODE ANN. § 90.16.120 (1962).
 25. COLO. REV. STAT. § 37-81-101 (Supp. 1981). Colorado prohibits, in most instances, diversion of its waters outside its boundaries. However, the use of Colorado water outside the state is allowed only where an owner of agricultural land within Colorado also owns agricultural land in another state, and the Colorado water is to be used only for agricultural purposes. The statute requires that the land in Colorado be contiguous with the land in the adjacent state. In addition, legislative approval (on the advice of the state engineer) is required for such use. A factor in the legislature's decision will be the "willingness of said state to allow diversions of its water for use in Colorado." COLO. REV. STAT. § 37-81-101 (Supp. 1982).
 26. WYO. STAT. § 41-3-105 (1977). The Wyoming statute allows an interstate appropriation of water only to states that have granted reciprocal rights. WYO. STAT. § 41-3-115(c) (1977). In addition, the use of Wyoming water as a means of transportation of mineral or chemical products outside the state without prior legislative approval is prohibited. WYO. STAT. § 41-3-115(b) (1977). These provisions do not extend to the use of Wyoming water in coal slurry pipelines. Generally, however, *any* use of water outside the state must be with the prior consent of the legislature. WYO. STAT.

tive approval for all diversions over ten thousand acre-feet annually, except "for the approval of water permits for energy industry use."²⁷ The export of water for coal slurry pipelines is controlled by other statutes that are not designed to conserve water for in-state use, but to allow the state to enter the water market directly. Oregon requires that all interstate diversions obtain legislative consent.²⁸

In general, there is very little positive to be said for water export barriers. Such statutes frustrate the efficient allocation of water resources because they prevent the market from operating to shift uses to the areas of the highest demand. Economic efficiency is, by general consensus, the major goal of water resources allocation. Of course, the state has plenary power to choose goals other than efficiency.²⁹ Ideally, however, when allocative efficiency is subordinated to equity, one ought to be able to identify with some precision the alternative goals sought to be advanced by the legislation. Judged by this standard, the statutes by and large fail.

It is easy to imagine state interests that might be served by export barriers. However, the statutes, like so much of mega-water law and water politics, are poses. They reflect a variety of fears about what might happen if

§ 41-3-105 (1977). Wyoming has special provisions which legislatively approve the Energy Transportation Systems' (ETSI) coal slurry pipeline proposal. The statute provides a two-tiered screening procedure for this coal slurry pipeline use application. The application must first be approved by the state engineer and then by the legislature. Furthermore, diversions are limited to twenty thousand acre-feet annually. WYO. STAT. § 41-3-115(d) (1977). The Wyoming legislature grandfathered ETSI's pipeline application statute subject to stringent conditions to protect vested rights. WYO. STAT. § 41-3-115(g) (Supp. 1982).

27. Under the South Dakota statute, the Water Management Board must present any application for appropriation of over ten thousand acre-feet of water to the legislature for approval. However, even if the legislature approves the application, the Water Management Board has the final word. The statute states expressly that legislative approval does not constitute an issuance of a water permit. S.D. COMP. LAWS ANN. § 46.5.20.1 (Supp. 1982). See *infra* note 105 for a further discussion of South Dakota's water allocation scheme.

28. Oregon law requires legislative approval of an out-of-state diversion of Oregon water. The statute gives the legislature the discretion to attach to an application any "terms, conditions, exception, reservations, restrictions and provisions as it may care to make in the protection of the interests of the state and its inhabitants." OR. REV. STAT. § 537.810 (1981).

29. See Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NAT. RESOURCES J. 1 (1965):

"outsiders" gained access to "our" water.³⁰ There is little evidence that they are necessary to conserve essential supplies on which the state's population depends. Nor is there much evidence that the statutes represent a reservation of future supplies to prevent future shortages and to allow various intrastate development plans to be realized. These statutes bear only a superficial resemblance to more careful area protection schemes such as California's area of origin statutes³¹ or Nebraska's recent effort to condition trans-basin diversions.³²

C. Limits on Exclusive State Control Over Water: The Duty to Share

By law, tradition, and history, western states possess a strong expectation that they may control the allocation of waters arising within their borders. But, however strong the expectation of exclusive control, state claims are subject to two interstate, and one inter-sovereign, sharing duties. Common property claimants have equal claims; thus, the law has always recognized that common resources such as interstate streams must be shared among riparian states. The Supreme Court's power to decree equitable apportionments means that "higherority" can never be a perfect priority.³³ States are quasi-sovereign units of a federal system, and the national government can require that state interests be subordinated to federal interests. This subordination is accomplished under the authority of the commerce and supremacy clauses. Congress has plenary power to allocate navigable waters among states under the commerce and other clauses, and courts may use the negative commerce clause to do this. In addition to the two extra-territorial sharing duties, western states must share some,

30. Clyde, *supra* note 12, at 530-31.

31. Robie and Kletzing, *Area of Origin Statutes — The California Experience*, 15 IDAHO L. REV. 419 (1979).

32. NEB. REV. STAT. § 46-265 was amended in 1981, 1981 NEB. LAWS 252, in response to *Little Blue N. Natural Resources Dist. v. Lower Platte Natural Resources Dist.*, 206 Neb. 535, 294 N.W.2d 598 (1980), which overruled a prior Nebraska case prohibiting transbasin diversions. See also *Little Blue N. Natural Resources Dist. v. Lower Platte Natural Resources Dist.*, 201 Neb. 862, 317 N.W.2d 726 (1982).

33. See *Wyoming v. Colorado*, 259 U.S. 419 (1922).

although not a great deal, of their waters with the federal government. The federal government's proprietary ownership of the public lands entitles Congress to claim reserved water rights when public lands (and Indian reservations) are dedicated to a water-related use.³⁴

The commerce clause is both a grant of legislative power to Congress and a judicially administered restraint on state legislation alleged to be inconsistent with federal interests. At one time, the scope of Congress' power over waters not navigable under historic tests was unclear. This is no longer the case, but the use of the negative commerce clause continues to be controversial. The negative commerce clause is important to the West because it threatens to nullify state efforts to block the diversion of intrastate waters for out-of-state uses. A long line of Supreme Court cases has progressively undermined state claims to exclusive rights to allocate their waters free from negative commerce clause review. In the 1981-82 Term, the Court decided *Sporhase v. Nebraska*, which held that a state law prohibiting the transportation of water diverted in Nebraska out of state unless the host state permitted reciprocal interstate diversions, violated the negative commerce clause.

Chief Justice Marshall first announced the negative commerce clause doctrine in *Gibbons v. Ogden* in 1824,³⁵ but the legitimacy of the use of the doctrine is questioned as much today as it was by early critics. The doctrine lacks textual support in the Constitution, and the results of recent Supreme Court opinions suggest that the Court is ill-suited to play the grand role of regional conflict adjuster.

Both Marshall and subsequent promoters of the doctrine have sought to validate the doctrine by the theory that the

34. *Cappaert v. United States*, 426 U.S. 128 (1976). As a result of *United States v. New Mexico*, 438 U.S. 696 (1978), the federal government must meet a strict three-part test. The right must relate to the original purpose of the reservation, the right must be necessary to prevent the frustration of the primary purpose of the reservation and the right must be for a primary, not secondary, purpose of the reservation. For a discussion of the federal reserved rights doctrine, and a summary of the voluminous literature that has developed around it, see Tarlock and Fairfax, *supra* note 14.

35. 6 U.S. (9 Wheat.) 1 (1824).

benefits of federal union are constantly being undermined by parochial state legislation. Building on Mr. Justice Jackson's opinion in *H.P. Hood & Sons, Inc. v. DuMond*,³⁶ Professor Ernest Brown articulated the current justification for the active use of the doctrine to scrutinize state legislation said to have an adverse impact on interstate commerce: it is appropriate for the Court to reinforce the nationalist vision of free trade among the states in situations where state legislatures have enacted anti-competitive statutes that are unlikely to be the subject of Congressional review and revision.³⁷

Given a federal system that allows states considerable discretion to adopt regulatory schemes, especially those that further traditional spheres of state interest, but that must of necessity effect interstate commerce, it is not easy to articulate what should be the Supreme Court's role in deciding if a piece of legislation or a regulation violates the negative commerce clause. At the heart of the matter is the lack of standards for sharing among states. There is no core concept, like access to forums to express ideas, on which the Court can fall back.³⁸ "Free trade" is too simplistic to describe the current course of state and federal economic policies. Any attempt to reduce to a doctrinal formula what level of sharing is essential to the preservation of the federal union is bound to be arbitrary. Why is it that a state must share access to waste management sites but not to state-manufactured cement?³⁹

The Court has attempted to define its role in deciding whether state regulation is inconsistent with national interests in interstate commerce by a two-level analysis. First, statutes that facially discriminate against interstate com-

36. 336 U.S. 525 (1949).

37. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219 (1957). For a recent articulation of this justification, see J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 205-09 (1980).

38. Justice Frankfurter made an unsuccessful attempt to enunciate such a standard in his concurring opinion in *Toomer v. Witsell*, 334 U.S. 385, 409 (1948) (Frankfurter, J., concurring).

39. *Compare City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) with *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

merce or citizens of another state are almost per se invalid.⁴⁰ The standard applied is strict scrutiny. Second, non-facially discriminatory legislation is subject to a balancing test that requires the strength of the local interest to be identified and weighed against national interests.

Since *Pike v. Bruce Church*,⁴¹ the Court has adhered to this analysis, which is a refinement of Justice Stone's *Southern Pacific Co. v. Arizona*⁴² balancing test. According to *Pike*:

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: 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. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. 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.⁴³

The test has the merits of candor and conciseness, but it is open to the criticism that the factors balanced give insufficient weight to legitimate state interests. For example, the Court had long held that a state had the power to impede interstate commerce through the imposition of quarantine or other public health laws, but in *City of Philadelphia v. New Jersey*⁴⁴ the Court applied the negative commerce clause doctrine to require New Jersey to take its fair share of wastes generated out of state.

40. Hellerstein, *Hughes v. Oklahoma: The Court, The Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51, 59.

41. 397 U.S. 137 (1970). See also *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

42. 325 U.S. 761 (1945).

43. 397 U.S. at 142.

44. 437 U.S. 617 (1978). *Accord* *Washington State Bldg. and Constr. Trades Council v. Spellman*, 18 ERC 1073 (9th Cir. 1982).

City of Philadelphia is especially troubling because it uses the negative commerce clause to invalidate state legislation where the state interests are quite strong and the problem is part of a larger problem that is being addressed at the national level. Congress has passed extensive legislation to regulate the transportation and treatment, storage, and disposal of hazardous and other wastes. But Congress and the Environmental Protection Agency have chosen to leave waste disposal-siting issues to the states. Thus, it is not clear that the Supreme Court's insistence that all states take their fair share of wastes correctly reflects national policy.⁴⁵ Moreover, whether the Constitution compels the acceptance⁴⁶ of interstate wastes or other evils is even more doubtful.

A more sensible rule, sanctioned by Justice Holmes' opinion in *Georgia v. Tennessee Copper*,⁴⁷ is a presumption of a state right of self-help until preempted by Congress. The Court has had a difficult time applying the proper standards to test state legislative motivation and state interest in routine interferences with interstate commerce. Consequently, there is very little basis for optimism that Supreme Court decisions invalidating state legislation in areas such as slurry bans and environmental protection statutes will articulate basic national policies in a fashion superior to that of the legislative process.⁴⁸

D. The Rise and Fall of the Special Status of Natural Resources Under the Commerce Clause: Ownership of Western Waters

To shore up their claims to resource sovereignty, the western states have long argued that they alone could con-

45. See Tarlock, *Anywhere But Here: An Introduction to State Control of Hazardous Waste Facility Location*, 2 U.C.L.A. J. ENVTL. L. & POL'Y 1 (1982).

46. *City of Philadelphia v. New Jersey*, 437 U.S. at 628-29 (1978). Justice Stewart did say, in dictum, that "it may be assumed . . . that New Jersey may pursue those ends [pollution prevention] by slowing the flow of all waste into the state's remaining land fills, even though interstate commerce may incidentally be effected." *Id.* at 626.

47. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

48. An analogous issue in the energy area is state mineral severance taxes. The Court recently upheld Montana's 30% tax against a commerce clause challenge in *Commonwealth Edison Co. v. Montana*, 450 U.S. 991 (1981),

trol the allocation of their waters because they "owned them in trust for the public." This argument is nothing more than an assertion of the police power, but for years the western states argued that this ownership made water unique in the sense that it was immune from regulation under the federal Constitution. Long after the issue of affirmative federal power was settled, the uniqueness argument lived on in the negative commerce clause. Until *Sporhase*, the states clung to the slim, unreasonable hope that the Court would adhere to early precedents and affirm the uniqueness of water. The reason was that the Supreme Court began its application of the negative commerce clause to resource embargo statutes with a sweeping theory upholding them.

In the foundation case *Geer v. Connecticut*,⁴⁹ the Court rejected a commerce clause challenge to a statute that prohibited the interstate transportation of game birds lawfully killed within the state. *Geer* capped a remarkable development of the Roman law conceptions of things *ferae naturae* and *res nullius*, things in the negative community awaiting capture. The Roman notion that everything had to be assigned to someone was a perfect justification for the use of the principle of capture to recognize private rights in common pool resources such as oil and gas and water. Roman law was also elastic enough to serve as a basis for state conservation legislation at a time when the claim that the state had the power to decide, by virtue of its police power, who would capture what and under what conditions was constitutionally suspect. In Roscoe Pound's famous words:

We are also tending to limit the idea of discovery and occupation by making *res nullius* (e.g., wild game) into *res publicae* and to justify a more stringent regulation of individual use of *res communes* (e.g., of the use of running water for irri-

and Professor Stephen Williams has developed a rationale similar to that stated in the text here for the Court's decision. Williams, *Severance Taxes and Federalism: The Role of the Supreme Court in Preserving a National Common Market for Energy Supplies*, 53 U. COLO. L. REV. 281, 309-13 (1982).

49. 161 U.S. 519 (1896).

gation or for power) by declaring that they are the property of the state or are "owned by the state in trust for the people." It should be said, however, that while in form our courts and legislatures seem thus to have reduced everything but the air and the high seas to ownership, in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*.⁵⁰

Geer went beyond this use of Roman law. Not only did the Supreme Court accept without question the argument that the statute was an appropriate food conservation statute, but it suggested that resources owned in trust by the state could never become part of interstate commerce "except with the consent of the state and subject to the conditions which it may deem best to impose for the public good."⁵¹

Geer was directly applied to water export bans in *Hudson County Water Co. v. McCarter*.⁵² Justice Holmes was too good a jurist to use the state title fiction; instead, he sustained the New Jersey statute banning the export of water on the broader theory of state sovereignty over resources:

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But 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 forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. What it may protect by suit in this court from interference in the name of property outside of the State's jurisdiction, one would think that it could protect by statute from interference in the same name within.

50. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 111 (1954 Yale U. Press ed.). The state ownership theory as justification for exclusive state power to allocate its water is generally traced to *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 P. 258 (1900).

51. 161 U.S. at 535.

52. 209 U.S. 349 (1908). See also *McCready v. Virginia*, 94 U.S. 391 (1876).

The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. 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.⁵³

Geer was flawed from the start because the theory of state ownership swept too broadly. Given the reach of the negative commerce clause, no state assertion of regulatory power can be immune from judicial scrutiny to determine its effect on interstate commerce and the risk to the continued validity of the federal union. *Geer* was substantially undermined in *Oklahoma v. Kansas Natural Gas Company*⁵⁴ and in subsequent opinions, but it survived formally until 1979.

Oklahoma v. Kansas National Gas Company arose because Oklahoma passed a statute forbidding the interstate transportation of natural gas. The state defended its legislation on the strongest of necessity grounds: Oklahoma was the fastest growing state in the country; it was without domestic fuel except coal, which was becoming more costly to produce; it was dependent on natural gas because almost all of its oil was transported out of state; and as a result, certain cities next to gas fields "should be supplied with gas, are not now supplied with it, and will never be if complainants are allowed to transport it from Oklahoma."⁵⁵ Over the dissents of Justices Holmes, Lurton and Hughes, the Court held that the statute violated the commerce clause.

Geer was not directly discussed; instead the Court began its analysis with the seminal oil and gas conservation

53. *Hudson County Water Co. v. McCarter*, 209 U.S. at 355-56 (1908) (citations omitted). *Accord* *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

54. 221 U.S. 229 (1911).

55. *Id.* at 246.

case, *Ohio Oil Co. v. Indiana*.⁵⁶ *Ohio Oil* sustained the first state effort to conserve natural gas supplies by banning well flaring. Indiana had tried to circumvent *Ohio Oil*'s claim that the ban interfered impermissibly with the company's right to dispose of its gas as it chose by arguing that oil and gas were *ferae naturae* and thus never owned by the company prior to reduction to possession. Justice White rejected this argument on the ground that oil and gas were not truly analogous to things *ferae naturae* because the right to capture had been assigned to a limited class of property owners — those who owned land overlying a common source of supply. The statute was sustained, however, on the narrow, but innovative theory that it was an exercise of the state's power to protect the correlative rights of those property owners, which included a fair opportunity to capture a reasonable share of the supply.

In *Oklahoma* the Court concluded that the embargo was bad precisely because it did not protect the correlative rights of property owners but rather reserved resources for the future use of state residents. Gas, the Court stated, when reduced to possession, was clearly an article of interstate commerce. The purpose of the statute, the Court found, was commercial rather than physical conservation; therefore the statute violated the commerce clause because it undermined the concept of a federal system bound together by free trade:

In other words, the purpose of its 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 them 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. And why may not the products of the field be brought within the principle? Thus enlarged, or

56. 177 U.S. 190 (1900).

without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.⁵⁷

McCarter was discussed and distinguished on several weak grounds. The strongest was that the common law of riparian rights did not allow diversion to non-riparian land. Today this view prevails in its strict form in very few states. Furthermore, the Court has recognized the power of states to enter into interstate compacts which might limit private water rights. The suggestion in *McCarter*, repeated in *Oklahoma*, that the export ban did little more than preserve private correlative rights is therefore too broad, because the private rights protected may be substantially modified pursuant to an interstate compact or decree of equitable apportionment. Justice Holmes perhaps anticipated this weakness and ultimately rested his opinion in the case on the state's power to preserve its natural advantage.⁵⁸ The *Oklahoma* Court could only deal with Holmes' analysis by arbitrarily concluding that natural gas was a less important resource than a flowing river: "And surely we need not pause to point out the difference between such a river flowing upon the surface of the earth and such a substance as gas seeping invisibly through sands beneath the surface."⁵⁹ It is hard to see why.

Since *Oklahoma v. Kansas Natural Gas Company*, the Court has adhered to its vision of the resource embargo causing a complete breakdown of interstate commerce in its

57. 221 U.S. at 255.

58. Justice Holmes applied his views of state sovereignty in the foundation case recognizing a common law of nuisance. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). It is ironic that Justice Rehnquist, who dissented in *Sporhase* along the lines of Justice Holmes' theory of state power, wrote the opinion in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). *Milwaukee* reversed *Illinois v. Milwaukee*, 406 U.S. 91 (1972), which had held that the Federal Water Pollution Control Act did not preempt the federal common law of nuisance. *Milwaukee* held that the Clean Water Act, enacted a year after *Illinois* was decided, did preempt the common law of nuisance. This is bad law and bad policy, but relief will have to come from Congress.

59. 221 U.S. at 260.

analysis of export bans. For example, in 1982, the Court in *New England Power Co. v. New Hampshire*⁶⁰ unanimously invalidated an order of the New Hampshire Public Service Commission revoking previously granted permission for a utility to transport hydroelectric energy generated within the state to traditional areas of high demand in New England. Chief Justice Burger contemptuously wrote off the statute as "simple economic protectionism."⁶¹

Despite the flawed analysis of state power in *Geer*, western states clung tenaciously to the ownership fiction for two reasons. First, the states asserted ownership as a basis for denying federal proprietary rights, although this effort failed. The Supreme Court is committed to the doctrine of federal reserved water rights, and few doubt the constitutional basis of the federal government's power.⁶² Second, since the mid-1960's there have been plans afoot for massive inter-basin water transfers. In most cases the political and economic costs of these projects carry their own death wound in the form of an unfavorable benefit-cost analysis, but more modest inter-basin diversions, such as coal slurry pipelines, may be cost-justified. To prevent all inter-basin transfers, the states have urged the *Geer* rule and its application in *McCarter*. This argument was doomed to failure as it is nothing more than an ineffective assertion of the state's police power;⁶³ the only remarkable thing is that *Geer* formally lasted until 1979 and *McCarter* lingered until 1982.

Geer finally fell in *Hughes v. Oklahoma*.⁶⁴ At issue was the epic question of whether Oklahoma could prohibit the

60. U.S., 102 S.Ct. 1096 (1982). The more interesting issue was whether Congress had authorized export bans in section 201(b) of the Federal Power Act. It seems clear that this section was drafted to preserve New Hampshire's right under the 1913 statute. The Court agreed that Congress could authorize barriers to interstate commerce but found that Congress merely left standing existing laws banning the export of hydroelectricity and did not intend to suspend the negative commerce clause. See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

61. *New England Power Co. v. New Hampshire*, 102 S.Ct. at 1101 (1982) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. at 624 (1978)).

62. See Trelease, *Arizona v. California: Allocation of Water Resources to People, States and Nation*, 1963 SUP. CT. REV. 158.

63. The argument was laid to rest in Dean Trelease's classic article, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638 (1957).

64. 441 U.S. 322 (1979).

transport of natural minnows "seigned or procured within the waters of the state."⁶⁵ Writing for a seven member majority, Justice Brennan traced the demise of *Geer's* formalistic⁶⁶ ownership analysis and concluded "that challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources . . .";⁶⁷ he then expressly overruled *Geer*.

Applying the Court's reasoning in *Pike v. Bruce Church, Inc.*,⁶⁸ Justice Brennan subjected the statute to the "strictest scrutiny" because it was facially discriminatory, and found it invalid. The state put forward a modern conservation argument to the effect that it wanted to preserve the ecological balance of its waters by preventing the removal of an inordinate number of natural minnows, but this justification was found to be an insufficient, although legitimate, state interest. The Court stated that the fiction of state ownership could no longer be used to force those outside the state to bear the full costs of "'conserving' the wild animals within its borders when equally effective nondiscriminatory conservation measures are available":⁶⁹

Far from choosing the least discriminatory alternative, Oklahoma has chosen to "conserve" its minnows in the way that most overtly discriminates against interstate commerce. The State places no limits on the numbers of minnows that can be taken

65. OKLA. STAT. tit. 29, § 4-115(B) (Supp. 1978).

66. 411 U.S. at 328. *Geer* was in effect overruled in *Toomer v. Witsell*, 334 U.S. 385 (1948). The Court used both the privileges and immunities and commerce clauses to strike down legislation that discriminated against out-of-state fishermen. With respect to the commerce clause, the Court wrote:

The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

Id. at 402.

Toomer was recently followed and applied in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977).

Inc., 431 U.S. 265 (1977).

67. 441 U.S. at 335.

68. 397 U.S. 137, 142 (1970).

69. 441 U.S. at 337.

by licensed minnow dealers; nor does it limit in any way how these minnows may be disposed of within the State. Yet it forbids the transportation of any commercially significant number of natural minnows out of the State for sale. Section 4-115(B) is certainly not a "last ditch" attempt at conservation after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively.⁷⁰

The state of Oklahoma attracted only the votes of Chief Justice Burger and the new guardian of Western state interests, Mr. Justice Rehnquist. The dissent accepted the majority's analysis up to the point where it downgraded the state's conservation interest. To Mr. Justice Rehnquist, the fear-of-Balkanization argument relied on by Justice Brennan supported only the invalidation of statutes that conflict with a federal statute or treaty or represent "a naked attempt to discriminate against out-of-state enterprises in favor of in-state businesses unrelated to any purpose of conservation."⁷¹ He distinguished Oklahoma's statute from the long line of cases striking down statutes, palmed off as conservation measures, that protected in-state businesses from out-of-state competition. Given what he saw as the statute's evenhandedness, he found the burden on interstate commerce to be minimal and the state's conservation interest substantial:

Oklahoma does regulate the manner in which both residents and nonresidents procure minnows to be sold outside the State. But there is no showing in this record that requiring appellant to purchase his minnows from hatcheries instead of from persons licensed to seine minnows from the State's waters in any way increases appellant's costs of doing business. . . . So far as the record before us indicates, hatchery minnows and naturally seined

70. *Id.* at 337-38 (citations and footnotes omitted).

71. *Id.* at 342 (Rehnquist, J., dissenting). See, e.g., *Toomer v. Witsell*, 334 U.S. 385 (1948); *Foster Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Johnson v. Haydel*, 278 U.S. 16 (1928).

minnows are fungible. Accordingly, any minimal burden that may result from requiring appellant to purchase minnows destined for sale out of state from hatcheries instead of from those licensed to seine minnows is, in my view, more than outweighed by Oklahoma's substantial interest in conserving and regulating exploitation of its natural minnow population.⁷²

Negative commerce clause decisions reflect a high level of doctrinal consistency and predictability. However, they are increasingly being criticized. The *Pike* test emerges upon closer examination as just another version of the largely discredited theory of substantive due process.⁷³ It is not surprising that those uncomfortable with the difficulty of distinguishing the discredited notion of substantive due process from the Court's commerce clause analysis have turned to alternative approaches to justify the Court's role in this aspect of federalism.

To some, a revived theory of privileges and immunities is the answer.⁷⁴ Others have been influenced by Dean John Hart Ely's *Democracy and Distrust* and have sought a process-based approach that seeks the important but more limited goal of curing serious malfunctions in the representative process. An approach based on this theory replaces the Court's balancing test with a four part test; to determine whether a statute offends the negative commerce clause, a court should inquire whether (1) the end is legitimate, (2) the statute has a disproportionate impact on nonrepresented interests, (3) the legislation is likely to achieve its goal, and (4) the legislature has chosen the least restrictive means of implementing its goal in light of the heavy impact on nonrepresented entities.⁷⁵

The Ely-influenced test holds the promise of possible constitutionality for some embargoes, because it relaxes

72. 441 U.S. at 345-46.

73. See Kitch, *Regulation and the American Common Market*, in REGULATION, FEDERALISM AND INTERSTATE COMMERCE 29-36 (A. Tarlock ed. 1981).

74. See Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981). See also Anson and Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEXAS L. REV. 71 (1980).

75. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

rules that result in findings of per se invalidity and it validates state laws that do not foreclose access to the political process: "The representation-enforcing approach commands judicial intervention where the mechanisms of participatory government have failed to operate, but it also requires deference where no such defect appears."⁷⁶ It also offers a way out of the motives trap into which the Court has fallen under the present test.⁷⁷ In the final section of this paper, the implications of this approach for western water embargoes are explored.

E. *Sporhase v. Nebraska ex. rel Douglas*:⁷⁸ Is Western Water No Longer Unique?

In 1982 the second precedential pillar of the western states' "ownership" argument fell. *Sporhase v. Nebraska*⁷⁸ effectively overruled *McCarter* and held that a Nebraska groundwater export ban violated the negative commerce clause. On one level *Sporhase* is simply another in the growing line of Supreme Court cases clearing away nineteenth century fictions thought to be inconsistent with free trade. However, Justice Stevens' opinion demonstrates more sensitivity to the arid states' interests in water policy than one might expect after *Hughes* and other recent natural resources commerce clause cases and suggests that some export bans might be constitutional. Further, the opinion suggests, at a minimum, other means by which the western states can constitutionally achieve the objectives reflected in such statutes.

The facts of *Sporhase* made the case a relatively easy one and therefore do not necessarily foreclose a different result where the state's interest is stronger. Nebraska required a permit for the interstate diversion of groundwater. The Director of the Department of Natural Resources had

76. *Id.* at 442. For a democratic defense of the Court's current role, see Gibson, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 260, 265 (1981).

77. Compare *Kassel v. Consolidated Freightways Corp.*, U.S., 101 S.Ct. 1309 (1981) with *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978). See *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 17, 93-102 (1981).

78. U.S., 102 S.Ct. 3456 (1982).

to find that the withdrawal was "reasonable" and "not otherwise detrimental to the public welfare" and that the host state "grant[ed] reciprocal rights to withdraw and transport groundwater from that state for use in the State of Nebraska."⁷⁹ A farmer on the Colorado border who owned contiguous tracts of land in both states acted as would any single rational landowner and shifted water from a Nebraska well to the Colorado portion of his land when that land required water. But, he failed to apply for the permit required by Nebraska law, and the state sued to enjoin the interstate transfer.

Both the trial court and the Nebraska Supreme Court held that the statute did not impose an undue burden on interstate commerce.⁸⁰ The supreme court based its decision on the conclusion that a groundwater right was not "a marketable item freely transferable for value among private parties, and therefore [is] not an article of commerce."⁸¹ This allowed the court to distinguish the enigmatic case of *City of Altus v. Carr*.⁸² The court in *City of Altus* followed *Oklahoma v. Kansas Natural Gas Co.* to strike down Texas legislation, which was similar to Nebraska's, as an undue burden on interstate commerce. The United States Supreme Court affirmed summarily, and there has been considerable speculation ever since over the reach of the decision.⁸³

To the Nebraska Supreme Court, the crucial issue was the difference between a Texas and a Nebraska groundwater right. Texas, until recently, followed the classic English rule that allowed unlimited, even wasteful,⁸⁴ pumping of groundwater for use on overlying or non-overlying land provided that the purpose was not malicious. Nebraska is an appropriation state for surface water but not for ground-

79. NEB. REV. STAT. § 46-613.01 (Reissue 1978).

80. 208 Neb. 703, 305 N.W.2d 614 (1981).

81. *Id.*, 305 N.W.2d at 616.

82. 255 F. Supp. 828 (W.D. Tex.), *aff'd mem.*, 385 U.S. 35 (1966).

83. See, *eg.*, Corker, *supra* note 11.

84. *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955). In *Friendswood Dev. Co. v. Smith-Southwest Indus.*, 576 S.W.2d 21 (Tex. 1978), the Texas Supreme Court prospectively modified its adherence to the English rule that allows a landowner injured by subsidence to show that the pumper's use pattern negligently caused the injury.

water. A Nebraska groundwater right, like a Texas one, is based on overlying land ownership, but the state legislature and courts have placed significant restrictions on its use compared to those imposed in Texas. Groundwater users in Nebraska have some right to a fair share of a pool,⁸⁵ and the state has natural resources districts and management districts that limit pumping levels in areas of actual or potential overdraft.⁸⁶ This distinction, however, even if correct cannot be an answer to a commerce clause challenge, if for no other reason than that the statute prohibits interstate transportation of water after it has been extracted from the ground and has thus become the personal property of the diverter.

Hughes v. Oklahoma removed the conceptual underpinnings from the state's ownership argument by overruling *Geer*. Justice Stevens dealt the coup de grace to state ownership arguments in *Sporhase* by holding that *Hughes* overruled *McCarter* by implication, and by brushing aside the proffered distinction between water and minnows:

Although appellee's greater ownership interest may not be irrelevant to Commerce Clause analysis, it does not absolutely remove Nebraska ground water from such scrutiny. For appellee's argument is still based on the legal fiction of state ownership. The fiction is illustrated by municipal water supply arrangements pursuant to which ground water is withdrawn from rural areas and transferred to urban areas. Such arrangements are permitted in Nebraska, but the Nebraska Supreme Court distinguished them on the ground that the transferor was only permitted to charge as a price for the water his costs of distribution and not the value of the water itself. Unless demand is greater than supply, however, this reasoning does not distinguish minnows, the price of which presumably is derived from the costs of seining and of transporting the catch to market. Even in cases of shortage, in which the seller of the natural resource can demand a price

85. *Prather v. Eisenmann*, 200 Neb. 1, 261 N.W.2d 766 (1978).

86. See Aiken, *Nebraska Ground Water Law and Administration*, 59 NEB. L. REV. 917 (1980).

that exceeds his costs, the State's rate structure that requires the price to be cost-justified is economically comparable to price regulation. A State's power to regulate prices or rates has never been thought to depend on public ownership of the controlled commodity.⁸⁷

There is little that should surprise western water lawyers in the Court's conclusion that water rights are an article of commerce because of the interstate effects of state water allocation choices. This is perfectly illustrated by the fact that *Sporhase* involved the Ogallala aquifer. Western water rights are no different from Arizona cantaloupes⁸⁸ or North Carolina apples.⁸⁹ The existence of federal power over waters was conclusively established in *Arizona v. California*.⁹⁰ As Justice Stevens recognized in *Sporhase*, a contrary conclusion "would curtail the affirmative power of Congress to implement its own policies."⁹¹

To say that water is an article of interstate commerce is not to conclude that a state export statute impermissibly burdens interstate commerce. The Court, in *Sporhase*, did find such a burden, but the majority's application of the *Pike v. Bruce Church, Inc.*⁹² test leaves western states with some room to maneuver. Nebraska's statute failed to pass muster because the stand-off between the two state reciprocity statutes operated "as an explicit barrier to [interstate] commerce" and the statute failed to demonstrate "a close fit between the reciprocity requirement and its asserted local purpose."⁹³ Nebraska's sole justification for the statute — conservation — was bound to be overbroad because the state straddles the line between humidity and aridity. States entirely west of the 98th meridian, however, may take hope from the following language:

The Western States' interests, and their asserted superior competence, in conserving and pre-

87. 102 S.Ct. at 3462 (citations omitted).

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

89. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

90. 373 U.S. 546 (1963).

91. 102 S.Ct. at 3463.

92. 397 U.S. 137 (1970).

93. 102 S.Ct. at 3465.

servicing scarce water resources are not irrelevant in the Commerce Clause inquiry. Nor is appellee's claim to public ownership without significance. Like Congress' deference to state water law . . . these factors inform the determination whether the burdens on commerce imposed by state ground water regulation are reasonable or unreasonable. . . . If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision. A demonstrably arid state conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water.⁹⁴

Two of the three westerners on the Court, Mr. Justice Rehnquist and Mme. Justice O'Connor, dissented. Mr. Justice Rehnquist's point was that a groundwater right in Nebraska was "only a usufructory right," so it could not be said that "'commerce' in groundwater exists as far as Nebraska is concerned."⁹⁵ He distinguished *Hughes* as a case where the state had allowed a natural resource to be reduced to private possession:

By contrast, Nebraska so regulates groundwater that it cannot be said that the State permits any "commerce," intrastate or interstate, to exist in this natural resource. As with almost all of the Western States, Nebraska does not recognize an absolute ownership interest in groundwater, but grants landowners only a right to *use groundwater on the land from which it has been extracted*. Moreover, the landowner's right to use groundwater is limited. Nebraska landowners may not extract groundwater "in excess of a reasonable and beneficial use upon the land in which he owns, especially

94. *Id.* at 3463, 3465.

95. *Id.* at 3468-69.

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." With the exception of municipal water systems, Nebraska forbids any transportation of groundwater off the land owned or controlled by the person who has appropriated the water from its subterranean source.⁹⁶

Justice Rehnquist's argument is either based on a fundamental misconception of the relationship between the commerce clause and state property law or the Justice seeks to return to the days when commerce clause law consisted of fictions on fictions. His attempt to characterize the Nebraska groundwater statute as exempt from the commerce clause because the right to use has been limited, fails because the analysis potentially applies to all common pool property rights. Private rights to use common pool resources are, of necessity, less complete than those in other resources, but incomplete or shared rights are no less property because they are "only . . . usufructory right[s]."⁹⁷

Today all property rights, common pool or exclusive, are limited by the state's exercise of its police powers. There is no difference between a Nebraska groundwater right limited to use on underlying land and a tract of fee simple absolute land in Lincoln, the use of which is limited by a stringent zoning ordinance that prevents a factory from relocating there from out of state. In each case the issue is the same: has the state enacted a law that is inconsistent with the policies implicit in the negative commerce clause? To use a more realistic example, surely a state could not defend a statute prohibiting the burial of hazardous or low-level nuclear wastes simply because state law prohibited the use of land for that purpose. The constitutional problem cannot be simplified by adopting old categories of property rights.

96. *Id.* (emphasis in original) (citation omitted) (quoting *Olson v. City of Wahoo*, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933)).

97. *Id.* at 3468.

Moreover, the characterization of Nebraska water law is too extreme. The state does not absolutely tie, as do some appropriation states, a water right to the land. The meaning of *Olson v. City of Wahoo*, cited by Justice Rehnquist in his dissent, has long been disputed within the state. It is either an adoption of the California correlative rights rule or it is an adaptation of the modern rule of riparian rights that allows non-riparian uses so long as other riparians are not injured. Under either of these options, the result is not to prohibit absolutely the use of groundwater on non-overlying land. Rather, uses on overlying land are only given a preference over uses on non-overlying land. Finally, there is no clear state administrative policy prohibiting groundwater transfers.⁹⁸

F. Export Bans After *Sporhase*: Are All Bans Invalid?

What does *Sporhase* mean for other western state water embargoes? *Sporhase* confirms the heavy burden states bear to justify anti-slurry and related legislation. The states can no longer claim that state trust ownership or other distinctive features of western water law allow the states to unilaterally exclude water resources from commerce clause scrutiny. It is equally clear that state trust ownership does not give the states a tenth amendment claim that federal intervention is inconsistent with essential attributes of state sovereignty.⁹⁹

The issue is whether the burden on interstate commerce is impossible to justify, and, if it is, what other options remain open to the state. The last question is answered easily. *Sporhase* reaffirmed the principle of *Prudential Insurance Company v. Benjamin*¹⁰⁰ that Congress can exempt state legislation from commerce clause review. The stan-

98. See Aiken, *supra* note 86, at 986-87. Nebraska is often described as a state that does not permit transfers of water. The issue, however, is much more complicated. See HUTCHINS, 1 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 463-66 (1971).

99. State of Minnesota by Alexander v. Block, 660 F.2d 1240, 1251-53 (8th Cir. 1981). *But see* Hellerstein, *supra* note 40, at 77. Compare, Varat, *supra* note 74, at 556-57.

100. 328 U.S. 408 (1946).

dards for congressional consent are strict¹⁰¹ and the limits of *Benjamin* have never been defined, but political protection of their interests remains open to the western states.

To many, the availability of congressional relief, which the western states have used effectively with respect to water resources policy generally, is a sufficient answer to state interests in export barriers. This is a powerful argument, but I think that *Sporhase* provides some basis for concluding that a more strongly justified export ban might be sustained absent congressional consent. In this final section, I will examine the impact of the decision on slurry and other export bans and suggest the arguments that might be open to the western states under a generous, admittedly creative, reading of *Sporhase*.

1. The Per Se and Reciprocity Export Bans

Colorado, Montana, New Mexico, Nevada, and Washington¹⁰² have either per se or reciprocal export bans. All of these statutes are presumptively invalid under *Sporhase*. New Mexico, Nevada, and perhaps Colorado might be able to argue that they suffer from a chronic statewide, as opposed to a regional, water shortage. Montana's special anti-slurry statute¹⁰³ does not discriminate on its face against interstate commerce, but its discriminatory effect is clear and it will probably be treated as a per se export ban under *Sporhase*. The state will have trouble showing the compelling statewide need for the water that was required by the Court's opinion in *Sporhase*.

2. Legislative Approval

Oregon, South Dakota, and Wyoming¹⁰⁴ require legislative approval for major interstate diversions. These statutes do not per se discriminate against interstate commerce. In

101. *New England Power Co. v. New Hampshire*, U.S., 102 S.Ct. 1096 (1982).

102. See *supra* notes 25, 20, 19, 23 and 24.

103. See *supra* note 20. But see Comment, *supra* note 20, at 169 (which argues that the statute should be sustained because "[t]he construction of one slurry line could significantly interfere with alternative" future uses of water).

104. See *supra* notes 28, 27 and 26.

fact, they contemplate, at least on their face, substantial interstate diversions. South Dakota might argue that its system making state appropriations available for sale to slurry pipelines and other energy developers¹⁰⁵ merely represents a decision by the state to enter the resource market and capture for the public the benefits of state owned resources, as in *Reeves, Inc. v. Stake*,¹⁰⁶ where the Supreme Court held that the state could give in-state residents a preference in purchasing state-manufactured cement. This would be an intriguing argument but its success is open to considerable doubt. In *Reeves*, the Court went out of its way to distinguish cement from natural resources, especially scarce ones, and the rationale for the decision is less than compelling.¹⁰⁷

The major problem that legislative approval schemes face is that the statute that was invalidated in *City of Altus v. Carr* conditioned out-of-state diversions on legislative approval. At a minimum, the state has subjected out-of-state users to higher standards than those required for in-state users and the burden of justifying such discrimination requires a substantial, although not compelling, demonstration of state interest.

105. South Dakota has adopted a water allocation scheme similar in concept to the California State Water Plan for interstate energy diversions. The State Board of Water and Natural Resources is authorized to apply to the regulatory agency, the Water Management Board, for an appropriation permit "to appropriate water for energy industry use for marketing to energy industry users for such consideration and under such terms and conditions as are fixed by contract or instrument of conveyance." S.D. CODIFIED LAWS ANN. § 46-17-18.1 (Supp. 1982). State appropriation applications are exempt from both the legislative approval and due diligence requirements of the general appropriation law. S.D. CODIFIED LAWS ANN. §§ 46-5-20.1 and 21.1 (Supp. 1982). In effect, South Dakota is claiming ownership of the water stored behind multipurpose dams on the Missouri River and offering the water for sale to the highest bidder. Downstream states have already threatened suit. The federal government's interest in navigation and flood control is also a factor to be considered.

106. 447 U.S. 429 (1980).

107. Varat, *supra* note 74, at 501-08. Professor Varat argues that the problem of resident versus nonresident interests can be best addressed through a theory of state citizenship derived from the privileges and immunities clause. To Professor Varat, the real issue in *Reeves* is not the regulatory-proprietary distinction drawn by the Court, but whether the state's monopoly power was sufficient to require a non-discriminatory access policy. *Id.* at 550-52. Some doctrinal justification for *Reeves* may be found in *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978), which distinguished between fundamental and non-fundamental rights claimed by out-of-state citizens.

3. The Least Restrictive Alternative Hurdle

In short, the arid states' efforts to validate export bans face a limited prospect for success. Money can make water run up hill, but it is not clear that legal arguments can accomplish the same result. *Sporhase* requires a close fit between the statute and a narrow conservation and preservation rationale. One creative argument is that such laws, as reverse quarantines, represent legitimate responses to emergencies, but this is not likely to be accepted by the Supreme Court after *City of Philadelphia v. New Jersey*. New Jersey tried to justify a law banning out-of-state solid wastes as a quarantine, but the seven member majority rejected the characterization. The Court narrowly defined quarantine as a situation where the articles had to be destroyed as soon as possible to prevent contagion and other evils. The problem with New Jersey's law was:

There has been no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible. The harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter.¹⁰⁸

Perhaps, Montana's legislation, since the use of all water for coal slurry is per se non-beneficial, might be presented as an evenhanded reverse quarantine, but I doubt it.

The major barrier that states face is that export bans are not the least discriminatory alternatives for conserving water resources. An attorney for Energy Transportation Systems, Incorporated has developed this argument at some length, and it is a powerful one.¹⁰⁹ On his list of nondiscriminatory alternatives are interstate compacts, denial of appro-

108. *City of Philadelphia v. New Jersey*, 437 U.S. at 629 (1978).

109. Clyde, *supra* note 12, at 547-56 (emphasis in original).

priations in the public interest, instream use appropriations or reservations, and the imposition of conditions on the right to change uses.

The force of the requirement that states seek the least discriminatory means to achieve their ends, in the context of western water law, is that it forces the states to accept responsibility for something that they have been reluctant to do for political reasons; that is, to use their broad powers to allocate waters arising within their borders to further state interests regardless of the effect on interstate commerce.

In Justice Stevens' majority opinion in *Sporhase*, he went out of his way to confirm the power of states to act solely in their self-interest. He spoke of a state's powers "to conserve and preserve for its own citizens this vital resource in times of severe shortage" and to give a "limited preference for its own citizens."¹¹⁰ The opinion can be read as a blueprint for the passage of laws that severely restrict access to water generally but will survive a negative commerce clause challenge. The statement "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the state,"¹¹¹ will, ironically, sustain much more severe burdens on interstate commerce than those attempted by Nebraska.

At the same time, Justice Stevens seemed to be counseling the states to avoid ad hoc, hasty legislative judgments that are little more than a refusal to face the problem of how change can be accommodated, and which have the highest risk of offending the negative commerce clause. Instead, Justice Stevens would advise the states to concentrate on the development of balanced and comprehensive water policies. There is much truth in Dean Trelease's warning that water law alone should not be used to make decisions about regional

110. 102 S.Ct. at 3464.

111. *Id.*

growth. The law ought to return to its traditional function of setting the necessary conditions for the operation of the market, which include the forced absorption of the major external costs of reallocations.¹¹²

G. The Case for Export Bans After *Sporhase*

Despite the argument that export bans are not the least restrictive means of conserving a state's water resources, I think that there is still a role for them. The Court suggested in *Sporhase* that export bans might be necessary to conserve water in the arid west. In addition, bans could be analogized to interim zoning ordinances. A ban does not reflect a determination to preserve forever the status quo, but instead represents an effort by a state to buy breathing time in order to make more rational allocation decisions.

That argument was made and rejected in *City of Philadelphia*, but that case should not be viewed as dispositive of this argument. New Jersey tried to characterize its import ban statute as an effort to preserve existing in-state landfill capacity until the technology of waste management became more developed, so that the state might be able to avoid dedicating critical areas such as wetlands to waste disposal. The Court conceded that it might be proper for a state to slow "the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected."¹¹³ The rub was that the New Jersey statute discriminated against out-of-state wastes. Out-of-state commercial interests bore "the full burden of conserving the State's remaining landfill space."¹¹⁴ In addition, New Jersey's legislative justification seemed post hoc.

The interim zoning ordinance analogy would be stronger if the current balancing test were replaced by an analysis that asks a different, more relevant question. Under the *Pike* balancing test the relevant factors are the evenhanded-

112. Trelease, *Water Law, Policies, and Politics: Institutions for Decision Making* 199 in WESTERN WATER RESOURCES: COMING PROBLEMS AND THE POLICY ALTERNATIVES (1980).

113. 437 U.S. at 626.

114. *Id.* at 628.

ness of the statute, the relationship between the local interest and its impact on interstate commerce, and the feasibility of a less discriminatory alternative. This test is nothing more than a restatement of the much discredited, although occasionally revived, substantive due process approach. All of the faults of substantive due process can be found in the *Pike* approach.

A better approach would be to focus on the relationship between the state regulation and the likely risk of a malfunction in the political process. This approach is not unique to me and was inspired by Dean John Hart Ely's much discussed and controversial book, *Democracy and Distrust*.¹¹⁵ Dean Ely mounts a defense of judicial review to protect those who are most likely to be the victims of majority control of legislative and administrative process. The use of the negative commerce clause to invalidate discriminatory legislation is a classic example of Ely's right-to-participate theory because in-state interests have failed to provide sufficient protection to voteless out-of-state interests.¹¹⁶ The experience of many western water allocation conflicts suggests that the above test would not require judicial review for much water legislation. Often there is no denial of access to the political process at either the local or national level. Thus, the relevance of Ely's process-based approach for western water law is that it suggests a case against judicial interference in water allocation choices when the risks of a malfunction in the political process are low.

If a court did as suggested above, and examined the impact of the regulation on the challenger in terms of the disproportionate impact on non-represented interests and the likelihood of state or national legislative redress, statutes such as Wyoming's statute might pass muster. It is true that the statute imposes much of the cost of Wyoming's decision to preserve its waters for non-coal slurry uses on out-of-state citizens, but the state has expressly opened its legislature to these citizens to make the case for the use of water

115. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

116. *Id.* at 84.

for this purpose. The legislature has not simply been used as a conduit for allowing in-state interests to gain a competitive advantage over out-of-state interests, which is the case in the usual negative commerce clause case.

Furthermore, if, as proponents claim, slurry pipelines are an essential element of national energy policy, then congressional relief is a real possibility.¹¹⁷ The fact that Congress has considered legislation to give pipelines the right of eminent domain despite objections from the railroads, but to date has refused to preempt state water rights suggests that judicial intervention is not necessary to prevent economic balkanism. It is proper for courts to continue to inquire whether interim bans on the use of water for slurry are acceptable in light of less discriminatory alternatives, but the argument that such alternatives exist under traditional water law ought to have less force here because of the easy access to both the state and national political process.¹¹⁸

There is some justification for the continued use of the negative commerce clause to invalidate low-visibility encroachments on the national interest. However, I think that there is a valid distinction between low-visibility state regulations that do no more than favor local interests at the expense of interstate or national interests and state actions that are grounded in the protection of traditional interests, such as water allocation. The latter are entitled to a greater presumption of constitutionality because of the lower risk of a malfunction of the political process. There is still a role for judicial invalidation of low-visibility state regulations that impede national markets; the possibility of congressional preemption, no matter how remote, is not a reason for the Court to abdicate its traditional commerce clause role.¹¹⁹ This caveat aside, statutes that seek to advance legitimate state interests and do more than interfere with the operation of the market by conferring a competitive advan-

117. See Comment, *supra* note 20.

118. See Eule, *supra* note 75, at 460-68.

119. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

tage on in-state interests at the expense of out-of-state interests are entitled to greater deference by the courts regardless of the effect on interstate commerce.¹²⁰ This is especially true if the national interest is nothing more than an abstract notion of free trade.

This standard would not apply to the Nebraska statute invalidated in *Sporhase*, but might apply to coal slurry bans. In the second case, especially where energy policy is at issue, state decisions are likely to command a prominent place on both the local and national political agenda, and the possibility of political relief is a real, rather than a theoretical, possibility. The danger of politicizing water law still exists, but legislatures retain a marginal comparative advantage over courts to do inter-regional equity, if that is required. Because of the potential for abuse, the state ought to carry the burden of explaining the purpose of its statute and of demonstrating the likelihood of effective non-judicial relief.¹²¹

H. Conclusion

This article has suggested a major revision in the Supreme Court's use of the negative commerce clause in order to protect the flexibility of the western states to allocate their water resources. Perhaps my arguments can be dismissed as special pleading, but they are grounded in a deep respect for the positive role that western water law has long played in shaping the development of the region. To allow the states to continue to play this role, courts need to avoid formulating too many hard and fast rules about the duty to share scarce waters among interested states. Exist-

120. *But see* Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 HARV. ENVTL. L. REV. 241, 248 (1982). Professor Stewart observes:

The judicial ban on discriminatory state taxes and regulations, like the per se rule against price fixing, has the virtue of simplicity. There are few instances where discriminatory state measures accomplish anything beyond transferring wealth from one state to another, and the effort to identify the exceptions to the rule is likely to cost more than it is worth.

(footnote omitted).

121. The challenger bears the burden of presenting a prima facie case which includes a showing of disproportionate impact, but a court can best avoid the dangerous plunge into the motives by shifting the burden of justifying the statute to the state. Eule, *supra* note 75, at 471.

ing principles of law provide a sufficient context for the political process to function to determine inter-regional equity issues. While the courts may be the proper forum for deciding questions relating to train lengths, mudguard standards, and apple labelling, the political process is, in my opinion, the superior mechanism, though perhaps only marginally so, for resolving inter-regional equity debates over water allocation.