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*In an effort to ensure future water supplies, many western states are becoming participants in the market for water. As market participants, states gain a proprietary interest in their water resources which more effectively secures their right to the water than mere regulation or claims of ownership under the public trust doctrine. As the author points out, however, the Constitution imposes numerous limitations on state water market activity. The privileges and immunities clause, the commerce clause, the property clause, as well as the equal protection clause of the fourteenth amendment, all influence the manner in which states may behave. Most significantly, the author explains, these clauses prevent states from using their power as water market participants as a disguise for economic protectionism.*

A not so quiet revolution is taking place in states' attitudes toward water resources. The primary impetus for change is the increasing uncertainty over the ability of state governments to ensure the availability of water in the future for a wide variety of societal needs. This uncertainty is the result of a combination of factors, but the most important are growing water scarcity and the creation of an interstate water market. Initially, water scarcity led states to engage in water resources planning and management; it was believed that future needs could be met by carefully regulating demand based upon a predetermined available supply.[1] The

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1. For New Mexico, depletion of an artesian aquifer led to early groundwater regulation. *See* Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929). In Arizona, groundwater depletion was the impetus for the promulgation of a comprehensive groundwater management code. *See* FINAL REPORT OF ARIZONA GROUNDWATER MANAGEMENT STUDY COMMISSION 1-2 (June 1980).

available supply was defined by law. As between states it was assumed that compacts or, perhaps, principles of equitable apportionment defined surface water supplies. It was believed that states had exclusive control over groundwater. With the creation of an interstate market, though, the law no longer assures certainty of supply. The available supply may be defined more by economic trends within a region than by notions of legal entitlement. In response to this new uncertainty, some states have decided to become active participants in the water market, thereby acquiring sufficient supplies to meet the needs of future generations.

This article examines the possible constitutional limitations on state participation in the water market to determine if it is an appropriate tool for water resources management. Before focusing on the possible constitutional limits of market participation, it will be useful to consider the extent of state authority to regulate the use of water resources, thereby highlighting why some states have decided that regulation, alone, is not sufficient to meet future water needs.

## THE NEED FOR STATE PROPRIETARY INTERESTS IN WATER RESOURCES

Before 1982, officials in most states believed they had an absolute right to some portion of the water flowing in interstate streams through their state. Groundwater was assumed to be the subject to exclusive state control for two reasons: (1) its use was seen as a matter of local concern, just as land use is still primarily a local matter, and (2) in many western states groundwater was thought to be owned by the state under the public trust doctrine.[2] Even when states compacted to equitably apportion surface water rights, there was little or no mention of groundwater because it was not viewed as a shared resource. By projecting future instate demand and relating that to the instate supply of surface and groundwater, states were able to manage water resources and be reasonably certain of their water future.

In 1982, however, litigation to equitably apportion the Vermejo River between Colorado and New Mexico made state rights to surface waters uncertain in at least two respects. In *Colorado v. New Mexico (I)*,[3] the Court rejected the notion that a state had some inchoate right to use surface waters flowing through its territory because it was inconsistent with the Court's "emphasis on flexibility in equitable apportionment."[4] The Court also held that, in an equitable apportionment, harms and benefits to the competing states should be weighed. This suggests that existing uses in one state might not be certain if another state could make more efficient use of the water in a proposed future diversion.[5] Although the potential impact of this efficiency test was somewhat modified in *Colorado*

2. In many states, rights to groundwater attach to the ownership of land. *See infra* note 30 and accompanying text. Land use regulation has been identified with a states' police power. *See infra* text accompanying notes 12-13. Many constitutions of western states have provisions specifying that water is public property. *See infra* text accompanying notes 9-13.
3. 459 U.S. 176 (1982).
4. *Id.* at 181 n.8 (citations omitted).
5. *Id.* at 190.

*v. New Mexico (II),*[6] so as to require a state to present clear and convincing evidence of inefficiency before existing uses would be reduced to allow for other present or future uses, the Court made it clear that state authority over surface water is now dependent on use, not territory.[7] To provide some protection for existing uses, this holding establishes that water will be apportioned for the future only where there are concrete plans for future use. In *New Mexico (II),* for example, the Court held that Colorado's proposed uses were too vague:

> [W]e find ourselves without adequate evidence to approve Colorado's proposed diversion. Colorado has not committed itself to any long-term use for which the future benefits can be studied and predicted. Nor has Colorado specified how long the interim agricultural use might or might not last. All Colorado has established is that a steel corporation wants to take water for some unidentified use in the future.[8]

In 1982, the Supreme Court also fundamentally altered the authority of states over groundwater resources within their boundaries. In *Sporhase v. Nebraska ex rel. Douglas,*[9] the Court held that groundwater rights were commodities in interstate commerce.[10] Nebraska had argued that its exportation permit process was not subject to commerce clause scrutiny because groundwater was owned not by individual appropriators but by the state as trustee for the public by virtue of the public trust doctrine.[11] The Supreme Court rejected the view that the public trust doctrine created a proprietary interest for the state in its water supplies, concluding that Nebraska's asserted "state ownership" was merely a legal fiction, a shorthand description of the importance of the resource to the welfare of the state's citizens.[12] While the Court rejected the notion that the public trust interest in water constitutes ownership, it recognized that a state has a heightened police power, or regulatory interest, in water resources by virtue of the doctrine.

In deference to this heightened regulatory interest, the Court allowed that a state could prefer instate uses to a limited extent. An export permit could be denied if it was found to work against the conservation of groundwater or proved to be detrimental to the public welfare even though these were not requirements for intrastate transfers.[13] The only requirement of the statute that offended the commerce clause was the reciprocity provision which declared that water could not be exported to a state that did not allow its water to be used in Nebraska.[14]

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6. 104 S.Ct. 2433 (1984).
7. *Id.* at 2438. *See generally* Comment, *Is There a Future for Proposed Water Uses in Equitable Apportionment Suits,* 25 NAT. RES. J. 791 (1985).
8. 104 S.Ct. at 2441.
9. 458 U.S. 941 (1982).
10. *Id.* at 954.
11. *Id.* at 951.
12. *Id.*
13. *Id.* at 955.
14. *Id.* at 957-58.

Admittedly there was little in the decision to shock constitutional specialists. Recent rulings involving other natural resources had debunked the notion that the public trust doctrine created state-held property rights, especially where individuals could acquire property rights to the resource,[15] and few reciprocity statutes have been upheld when resource conservation was the asserted legislative purpose.[16] After *Sporhase*, however, states could no longer claim an exclusive right to groundwater within their boundaries and the availability of water supply became a function of the phrase "public welfare," a concept incapable of precise definition.[17]

The Supreme Court did not have to grapple with the much harder issues involved in public welfare preferences. Those issues were addressed by the Federal District Court in *City of El Paso v. Reynolds*,[18] in which El Paso applied for permits to appropriate water in southern New Mexico for export to Texas. The city challenged the constitutionality of the New Mexico export statute on its face because it only allowed water to be exported if it was not otherwise "detrimental to the public welfare of the state."[19] El Paso argued that the statute was intrinsically discriminatory because it allowed the decision-maker to disregard the public welfare of noncitizens.[20] The court rejected this argument and held the statute to be facially constitutional.[21] It cautioned, however, that the public welfare preference could not be used to protect economic interests:

> [W]hen the State exercises a preference for its citizens under the rubric of protecting their public welfare and economic interests are implicated, the resulting burden on interstate commerce must be weighed against the putative noneconomic local benefits. . . . If the public welfare criterion is used to effectuate simple economic protectionism, a per se rule of invalidity will be applied.[22]

El Paso's challenge to the statute was based upon the notion that the promotion of local economic interests cannot be separated from a generalized promotion of the public welfare. Yet, many definitions of public welfare include the promotion of local economies.[23] In the alternative, the city tried to limit any noneconomic public welfare preference to basic human

15. Hughes v. Oklahoma, 441 U.S. 322 (1979); Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977); Toomer v. Witsell, 334 U.S. 385 (1948). As with complete embargoes, the result of such statutes is that the burdens of resource conservation are borne by out-of-state interests, those least able to take part in the legislative process.

16. A reciprocity provision does not promote conservation since it does not limit in-state uses. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 958; Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976).

17. Berman v. Parker, 348 U.S. 26, 32 (1954) (upholding the use of eminent domain for urban renewal projects).

18. 597 F. Supp. 694 (D.N.M. 1984).

19. *Id.* at 699.

20. *Id.* at 700.

21. *Id.* at 702.

22. *Id.* at 700-01 (citing Pike v. Bruce Church, 397 U.S. 137, 142 (1970)).

23. *See* Berman v. Parker, 348 U.S. 26, 31. *See also* Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321 (1984).

survival, or purely health and a safety needs. These narrow constructions were also rejected:

> "Public welfare" is a broad term including health and safety, recreational, aesthetic, environmental and economic interests. Admittedly, except to the extent that it refers to bare human survival, every aspect of the public welfare has economic overtones. This does not mean that New Mexico may constitutionally exercise a limited preference for its citizens only when their survival is at stake. The Supreme Court in *Sporhase* did not equate "public welfare" with "human survival."[24]

For New Mexico, defining available water supplies is increasingly difficult due to the amorphous nature of the "public welfare." "An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts."[25] When a court must also decide whether the purpose of a public use is primarily for economic growth, the scope of any preference becomes exceedingly grey. For example, a statute that grants a preference for agricultural use over other commercial uses in a state that has an agricultural economy might be seen, on one hand, as mere economic protectionism or, on the other hand, as a legitimate collective preference for the cultural and aesthetic values associated with a pastoral lifestyle. Line drawing would also be difficult if a preference for some recreational uses is challenged; a lake can serve recreational purposes and as an inducement to attract tourism and associated economic development to an area.

When both the *Colorado v. New Mexico* cases and the progeny of *Sporhase v. Nebraska* are taken together, it seems that state control of water resources will be inextricably entwined with notions of economic efficiency. The danger is that this will be at the expense of competing noneconomic values. As noted by Professor Trelease, "[t]he possibility that the regulation may be economically inefficient ordinarily gives rise to no substantial constitutional objection. The Constitution did not enact Adam Smith's *Wealth of Nations.*"[26] Professor Sax points out that "[t]o characterize [the state's] behavior as inappropriate or illegitimate or to hold it to some specified test of efficiency is simply to deny the possibility of a distinctive collective preference."[27]

One response to the notion that interstate market preferences may dictate regional water futures in a manner inconsistent with noneconomic values has been the issuance by states of joint policy statements asserting regional collective preferences. States surrounding the Great Lakes, along with their Canadian counterparts, have created the Great Lakes

24. City of El Paso v. Reynolds, 597 F. Supp. 694, 700 (D.N.M. 1984).
25. Berman v. Parker, 348 U.S. 26, 32 (1954).
26. Trelease, *State Water and State Lines: Commerce in Water Resources,* 56 U. COLO. L. REV. 347 (1985) (citing to Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause and State Control of Natural Resources,* 1979 SUP. CT. REV. 51, 73).
27. Sax, *The Legitimacy of Collective Values: The Case of the Public Lands,* 56 U. COLO. L. REV. 537 (1985).

Charter, vowing to prevent large-scale diversions to maintain the integrity of the Lakes.[28] The region is certainly not short of water; instead, the people of the region have unequivocally stated their desire to preserve the quality of life by protecting the lakes. It must be realized that, no matter how grand, the charter does not have the force of law[29] and the

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28. The Great Lakes Charter provides the following "Principals for Management of Great Lakes Water Resources":

> In order to achieve the purposes of this Charter, the Governors and Premiers of the Great Lakes States and Provinces agree to the following principles.
>
> Principle I:
> Integrity of the Great Lakes Basin
>
> The planning and management of the water resources of the Great Lakes Basin should recognize and be founded upon the integrity of the natural resources and ecosystem of the Great Lakes Basin. The water resources of the Basin transcend political boundaries within the Basin, and should be recognized and treated as a singly hydrologic system. In managing Great Lakes Basin waters, the natural resources and ecosystem of the Basin should be considered as a unified whole.
>
> Principle II:
> Cooperation Among Jurisdictions
>
> The signatory States and Provinces recognize and commit to a spirit of cooperation among local, state, and provincial agencies, the federal governments of Canada and the United States, and the International Joint Commission in the study, monitoring, planning, and conservation of the water resources of the Great Lake Basin.
>
> Principle III:
> Protection of the Water Resources of the Great Lakes
>
> The signatory States and Provinces agree that new or increased diversions and consumptive uses of Great Lakes Basin water resources are of serious concern. In recognition of their shared responsibility to conserve and protect the water resources of the Great Lake Basin for the use, benefit, and enjoyment of all their citizens, the States and Provinces agree to seek (where necessary) and to implement legislation establishing programs to manage and regulate the diversion and consumptive use of Basin water resources. It is the intent of the signatory States and Provinces that diversions of Basin water resources will not be allowed if individually or cumulatively they would have any significant adverse impacts on lake levels, in-basin uses, and the Great Lake Ecoystem.
>
> Principle IV:
> Prior Notice and Consultation
>
> It is the intent of the signatory States and Provinces that no Great Lakes State or Province will approve or pemit any major new or increased diversion or consumptive use of the water resources of the Great Lake Basin without notifying and consulting with and seeking the consent and concurrence of all affected Great Lakes States and Provinces.
>
> Principle V:
> Cooperative Programs and Practices
>
> The Governors and Premiers of the Great Lakes States and Provinces commit to pursue the development and maintenance of a common base of data and information regarding the use and management of Basin water resources, to the establishment of systematic arrangements for the exchange of water data and information, to the creation of a Water Resources Management Committee, to the development of a Great Lakes Basin Water Resources Management Program, and to additional and concerted and coordinated research efforts to provide improved information for future water planning and management decisions.

GREAT LAKES GOVERNORS TASK FORCE ON WATER DIVERSIONS AND GREAT LAKES INSTITUTIONS, FINAL REPORT AND RECOMMENDATIONS 41 (Jan. 1985).

29. The charter does not constitute binding law for a variety of reasons. First, although the governors and premiers of the states and provinces agreed to the Charter, it was not enacted by any legislative body. Furthermore, the Charter is an agreement between individual

charter, alone, does not prevent any diversion. It merely states a regional desire to maintain the character of the lakes. In contrast state-held property interests *are* entitled to protection under law. Hence, states are entering the water market to create such property interests thereby providing certainty, minimal prerequisites of rational planning, some notion of the future water supply and to ensure the legitimacy of any planned use.

For some states, the ownership of land is sufficient to create a property interest in water resources by virtue of state law.[30] However, in states that apply the doctrine of prior appropriation or the rule of capture, ownership of land is not sufficient to create a proprietary interest in water resources. To create proprietary rights in water, many states are appropriating water and investing state monies to develop aquatic resources, just as private individuals do. Montana has asserted proprietary interests in water by legislative mandate. In addition to acquiring proprietary in-

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states and a foreign nation. Under the compacts clause of the United States Constitution, Congress would have to consent to the Charter before it could have the force of law. The intent of the Charter could be given the force of law if states adopted legislation to effectuate the intent of the Charter.

30. Following is a discussion of states in which proprietary interests in groundwater are automatically derived from ownership of overlying lands:

*Arizona*

The rule of reasonable use still applies to groundwater located outside critical areas in Arizona. Therefore, where the state is the owner of land, it has the right to all the groundwater that it can put to reasonable use on overlying lands it owns. *See generally* 5 WATER AND WATER RIGHTS, §§ 441-46 (R. Clark ed. 1972)

*California*

The correlative rights doctrine governs groundwater use in this state. This rule gives the overlying landowner the right to a reasonable share of the water in the groundwater basin for use on their overlying lands. This right exists whether or not the overlying landowner has used water in the past. Any surplus can be transferred to other users; therefore, as with Arizona, California has proprietary interests in groundwater based on land ownership. In contrast to groundwater, use of surface waters in California is governed by both riparian and prior appropriation principles. *Id.*

*Colorado*

Colorado amended its groundwater laws this past year to allow the state to claim proprietary interests in groundwater underlying state-owned lands. *Colorado Rejects Use It or Lose It,* U.S. WATER NEWS, July 1985, at 6. The state also imposed an export fee on interstate transfers of water. The Attorney General of Colorado has already issued an opinion finding this fee to be unconstitutional:

> The imposition of a fee on exports, on the other hand, is not narrowly tailored to these equitable apportionment and conservation purposes and is certainly not the least discriminatory means to achieve them. *See* Hughes v. California, 441 U.S. 337. When section 37-81-104 is superimposed on the other limitations contained in sections 37-81-101(3) and 37-81-103, it does not appear that the imposition of an export fee adds anything to those provisions that "significantly advances the state's legitimate conservation and preservation interest. . . ." *Sporhase v. Nebraska,* 458 U.S. 958. The statute also suffers from the same defect that was condemned in *Philadelphia v. New Jersey,* 437 U.S. at 628—it imposes the full burden of conserving the scarce natural resource on out-of-state interests. Finally, it is unclear, in light of *Commonwealth Edison Company v. Montana,* 453 U.S. 609, and the *Complete Auto Transit* test applied therein, that a fee that on its face discriminates against interstate commerce, no matter what its justification, can withstand constitutional scrutiny.

Application of House Bill 1070 § 6 (May 23, 1985), ON/R8504066/AON Op. Att'y Gen. 11 (1985).

terests, some states, especially Montana,[31] Texas,[32] and perhaps Colorado,[33] are preparing to participate in the water market.

## MARKET REGULATION VERSUS MARKET PARTICIPATION

A state is a participant, rather than a regulator, in the interstate market of goods or resources if it expends its revenues to acquire goods and services in the market or to produce goods and services that are subsequently sold in the market.[34] When state activity has these characteristics, the state is free to make the same market choices as any other market participant. Many state activities might fall into these categories. A fundamental limitation on state market participation is that it cannot be used as a subterfuge to regulate the activities of other markets or unrelated transactions in the same market.[35] If a state's real goal is to regulate a secondary market and favor its own citizens over citizens of other states, this not true market participation.

Although state legislation often recites the explicit purpose it seeks to serve,[36] courts are not obliged to accept that stated purpose. The court must "determine for itself the practical impact of the law."[37] Thus, a statute that impermissibly regulates the market might be invalid even though it expressly states that it is *not* designed to regulate the market. The *South-Central Timber v. Wunnicke,*[38] decision exemplifies this principle. Alaska adopted a primary manufacture requirement for the sale of timber on state-owned lands. Timber could only be purchased by lumber companies only if the initial processing would be done in the state.[39] Although the state was acting in a proprietary capacity when selling the

31. MONT. CODE ANN. § 85-2-141 (1985). Montana has adopted a state water-leasing program rather than merely making arrangements to sell water.
32. TEX. WATER CODE ANN. § 15.323(a) (Vernon Cum. Supp. 1986). The Texas Department of Water Resources can sell unappropriated public water of the state and other water acquired by the state.
33. *See supra* note 30.
34. The market participant exception to dormant commerce clause scrutiny was described by the Court in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) and Reeves, Inc. v. Stake, 447 U.S. 429 (1980). Absent some exercise of the federal commerce power, state market activity is not subject to restraint because the activity does not constitue state regulation of interstate commerce.
35. South-Central Timber v. Wunnicke, 104 S.Ct. 2237 (1984). Essentially, a state may not use its sovereign authority to control downstream or secondary markets, which would be similar to an illegal restraint on trade and thus viewed as a regulatory subterfuge. The line between valid market participation and regulatory subterfuge is not easy to see. Some commentators have argued that distinctions between state proprietary actions and regulatory actions are artificial and serve no purpose. *See* Varat, *State "Citizenship" and Interstate Equality,* 48 U. CHI. L. REV. 487 (1981). For a different approach, see Easterbrook, *Antitrust and the Economics of Federalism,* 26 J. LAW & ECON. 23 (1983). In the past, courts have used the proprietary/regulatory distinction in other contexts, particularly inter-governmental tax immunity. For a brief discussion of why the distinction is no longer used in tax immunity cases, see Garcia v. San Antonio Metropolitan Transit Auth., 105 S.Ct. 1005 (1985).
36. *See, e.g.,* N.M. STAT. ANN. § 72-12A-2 (Repl. Pamp. 1983), which sets out the legislative purposes of the Mine Dewatering Act.
37. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).
38. 104 S.Ct. 2237 (1984).
39. 11 ALASKA ADMIN. CODE § 76.130 (1974) (repealed 1982).

timber, the Supreme Court struck down the initial processing requirement because the effect was indirect regulation of a secondary market—timber processing—in a manner that violated the commerce clause. Rather than affecting state market activity, the statute served only to limit the activities of the state's trading partners in a completely different market.[40]

In the case of *Cory v. Western Oil & Gas Association*,[41] the court considered a system introduced by the State of California for calculating fees for the use of state-owned lands that increased state land revenues substantially. A lessee challenged the new fee schedule as an undue burden on commerce.[42] California insisted that it was merely acting as a market participant, leasing its property on the "open market."[43] The lands in question were submerged tidelands, the bulk of which were owned by the state. The lessee had been leasing the property for a number of years and had made substantial improvements.[44] Therefore, the lessee was not in the same position as one who could obtain the same "good" from another seller in the market. From the standpoint of the lessee the state was the only seller, using its inordinate bargaining power in a coercive manner.

The court of appeals rejected California's argument that it was a market participant, preferring to describe promulgation of a fee schedule as a regulatory activity and therefore the fee as a tax.[45] As a tax the new fee schedule was unduly burdensome because it was not reasonably related to services provided by the state.[46] One commentator has said, "[w]hen a proposed government business mirrors so closely what is now being done without proprietary coloring, a court could be expected to examine the enterprise very closely to determine its justification."[47] Thus, the first overall federal limitation on state market participation is that it must, in fact, be *real* market participation, not disguised regulation.

## LIMITATIONS DERIVED FROM INDIVIDUAL RIGHTS

The Fourteenth Amendment of the Constitution applies to any state action regardless of whether the state is acting as a market participant

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40. *See supra* note 34.

41. 726 F.2d 1340 (9th Cir. 1984), *aff'd.* 105 S.Ct. 2349 (1985) (no opinion, equally divided court). *Cf.* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), in which an oil company alleged that a tribal tax was not a regulatory act, but merely an invalid increase in royalities to be paid to the tribe in a proprietary capacity. The Supreme Court found that the power to tax was a valid tribal government activity, distinct from proprietary activities.

42. *Cory*, 726 F.2d at 1341.

43. *Id.* at 1342.

44. *Id.* at 1341.

45. *Id.* at 1345.

46. *Id. See* Complete Auto Transit v. Brady, 430 U.S. 274 (1977). In that case, the Supreme Court adopted a four-part test to determine the validity of state taxes on goods in interstate commerce. The state must show a nexus with the taxing state, proper apportionment between states, non-discriminatory application, and that the tax is fairly related to services provided by the taxing state. The California fee schedule did not meet this last requirement and, therefore, constituted impermissible taxation. *Cory*, 726 F.2d at 1345.

47. Note, *New Mexico Continues to Study Water Embargo Measures: A Reply to the State Water Law Study Committee*, 16 TEXAS TECH L. REV. 939, 948 (1985).

or as a regulator.[48] The discussion is divided into three areas. The first examines possible market participation limitations imposed by the due process clause. It is followed by an examination of the privileges and immunities limitations and the equal protection limitations on market participation.

*Due Process*

The due process clause of the fourteenth amendment prevents the states from taking private property for a public purpose without compensation. Although one cannot own a body of water, the right to use water is a transferable property right in many states. When a state exerts its sovereign authority it may act by eminent domain. While this results in the state obtaining a proprietary interest, the interest is created by sovereign coercion rather than by proprietary action. The property is taken and the owner is compensated, but, unless otherwise unconstitutional, the owner cannot prevent the taking.[49]

State market participation anticipates no condemnation of private water rights. Where the state is a market participant, water rights are acquired under the same procedures applicable to individuals. In prior appropriation states this would be by appropriation or by purchase. Consent of the parties is the vital element; there is no sovereign coercion as with an exercise of powers of eminent domain.

*The Privileges and Immunities Clause*

Individual rights under the privileges and immunities clause of the fourteenth amendment are those held by individuals as citizens of the United States. Early cases interpreting the fourteenth amendment construed this clause quite narrowly.[50] It has not been a prolific source of law for the modern court and will not be discussed in great detail. Should

48. U.S. CONST. amend. XIV provides:

> 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.

49. A taking would be otherwise unconstitutional if not taken for a public use. The public use requirement has been interpreted in a liberal manner, to be coterminous with the scope of the state's police power. Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321 (1984). In *Midkiff*, the Supreme Court upheld Hawaii's Land Reform Act, which created a condemnation scheme whereby title to real property is taken from lessors and transferred to their lessees. Lessors challenged the act, asserting that the condemnation was not for a public use since the property is redistributed to private persons, not the public. The Court disagreed, finding that it is only the taking's purpose, not is mechanics, that is subject to judicial scrutiny; regulating oligopoly and associated evils is a legitimate public purpose. *See generally* Comment, *Hawaii Housing Authority v. Midkiff—A New Slant on Social Legislation: Taking from the Rich to Give to the Well-To-Do*, 25 NAT. RES. J. 773 (1985).

50. The Slaughterhouse Cases, 83 U.S. 36 (1873). No definitive enumeration of rights protected by the clause was given by the Court in this case, but it was suggested that it protected those "which owe their existence to the Federal Government, its national characters, its Constitution, or its laws." *Id.* at 79. As examples, the Court referred to the right of access to the seat of government and to the seaports, subtreasuries, land officers, and courts of justice in the several states and rights secured by treaty.

a state action effectively deny someone a resident of another state the water necessary for survival, absent an equally compelling interest such as providing for the survival of its own residents, surely this would be a violation of a fundamental right of national citizenship. The action would be unconstitutional no matter what specific constitutional provision served as a basis for the challenge.[51]

Of greater importance to state participation in water markets are the individual rights protected by the privileges and immunities clause of article IV, section 2: "The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." While the fourteenth amendment protects the privileges and immunities of *national* citizenship, article IV clause, section 2 protects the privileges and immunities of state citizenship and ensures that a state cannot deny to citizens of other states the fundamental rights it recognizes in its own citizens inside its borders. Individual rights under this clause are most analogous to prohibitions on state regulation derived from the commerce clause. The privileges and immunities clause protects the right of people to move freely across state borders,[52] just as the commerce clause protects the flow of goods in the interstate market. Privileges and immunities issues arise primarily in cases involving conditions placed on receiving state-distributed goods and services.[53]

The clause "was designed to ensure to *a citizen of state A who ventures into state B* the same privileges which the citizens of state B enjoy."[54] The essence of the clause is that it guarantees individual mobility, allowing everyone the liberty to engage in the pursuit of happiness. It protects the rights of non-residents to seek employment,[55] pursue a commercial livelihood,[56] establish a home,[57] own and dispose of privately held property,[58] or procure needed services[59] in the state of their choice. The clause does not, however, require a state to provide benefits it bestows within the state on those located elsewhere.

51. The right of each individual to those resources necessary for survival transcends our constitutional document. According to Locke, it is the basis for the creation of private property. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. V. (1690) More contemporary treatment can be found in cases interpreting the right to travel because this right ensures the mobility of individuals to gain access to those necessary resources. *See* Zobel v. Williams, 457 U.S. 55 (1982) (equal protection clause); Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) (privileges and immunities clause in art. 4, § 2). Conversely, in Sporhase v. Nebraska, 458 U.S. 941 (1982), the Court made it clear that the commerce clause, which ensures the free flow of commerce, would not prevent a state from denying out-of-state uses of water if it was needed to ensure the public welfare of its residents. As noted above, public welfare is much more than bare human survival.

52. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Edwards v. California, 314 U.S. 160 (1941). *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-32 (1978) ("[This clause] builds a bridge between federalism and personal rights. . . .").

53. Hicklin v. Orbeck, 437 U.S. 518 (1978); Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978).

54. Toomer v. Witsell, 334 U.S. 385, 395 (1948) (emphasis added).

55. Hicklin v. Orbeck, 437 U.S. 518 (1978).

56. Toomer v. Witsell, 334 U.S. 385 (1948).

57. Zobel v. Williams, 457 U.S. 55 (1982).

58. Blake v. McClung, 172 U.S. 239 (1898).

59. Doe v. Bolton, 410 U.S. 179 (1973).

> A state clearly may undertake to enhance the advantages of industry, economy and resources that make it a desireable place to live. In addition, a state may make residence within its boundaries more attractive by offering benefits to its citizens in the form of public services, lower taxes or direct distribution of its munificence.[60]

Given that interstate commerce in water turns on where water is to be used and not on where the user resides, it is unlikely that a refusal to distribute water outside a state would invoke prohibitions based on the privileges and immunities clause. In all states, a citizen from state B is free to come to state A and use the water in state A, consistent with the laws of state A. Only if place-of-use requirements were held to be analogous to residency requirements would the privileges and immunities clause of the Constitution be of importance. The following review of recent cases involving state hiring practices suggests that, absent some showing that a state is using its market position in a coercive, monopolistic manner to place the cost of in-state benefits on outsiders, there would likewise be no violation of the privileges and immunities clause because a state is participating in an interstate market.

When a privileges and immunities issue is raised, the Court employs a two-part analysis to determine the validity of the challenged state activity. First, the party challenging the activity must show that it has the effect of denying a fundamental privilege. If no privilege is found the clause is of no force.[61] "Only with respect to those 'privileges' and 'immunities' bearing upon the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."[62] The second inquiry is whether state residency is a legitimate basis for discrimination. "The inquiry in each case must be concerned with whether [substantial] reasons do exist and whether the degree of discrimination bears a close relationship to them."[63] Essentially, it would have to be shown that those uses that were refused constituted "a peculiar source of the evil at which the statute is aimed."[64]

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60. Zobel v. Williams, 457 U.S. 55, 67-68 (1982).

61. *See* Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978).

62. *Id.* at 383.

63. Toomer v. Witsell, 334 U.S. 385, 396 (1948).

64. *Id.* at 398. Due to the close connection between this clause and the commerce clause, it was not clear until recently that this clause could limit a state if it were merely participating in a market. In *White v. Massachusetts,* 103 S.Ct. 1042 (1983), an executive order issued by the Mayor of Boston requiring that city-funded construction projects be performed by a work force, half of which had to be Boston residents, was challenged as an undue burden on commerce. The Court found that city spending on construction projects was merely state participation in a labor market and therefore the residency requirement was not violative of the commerce clause. The Court did not address whether state market participation was subject to limitations imposed by the privileges and immunities clause. It did suggest, however, that where market participation was used by the state to affect parties unrelated to the market transaction, residency requirements would be invalid. *Hicklin v. Orbeck,* 437 U.S. 518 (1978), the classic privileges and immunities clause case, was cited to support this proposition.

> In *Hicklin* we considered an Alaska statute which required employment in all work connected with oil and gas leases to which the State was a party to be offered first to 'qualified' Alaska residents in preference to nonresidents. The

The Supreme Court discussed the effect of the privileges and immunities clause on state market participant activity in *United Building & Construction Trades Council v. Mayor of Camden*,[65] in which labor organizations challenged state agency approval of a municipal ordinance that was very similar to Boston's executive order affirmed in *White v. Massachusetts*.[66] The Court, refusing to "transfer mechanistically" to the privileges and immunities clause an analysis fashioned to fit the commerce clause, found that characterizing state activity as market participation did not obviate concerns stemming from the privileges and immunities clause:

> The Privileges and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interest of interstate harmony. It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce. Thus, the fact that Camden is merely setting conditions on its expenditures for goods and services in the marketplace does not preclude the possibility that those conditions violate the Privileges and Immunities Clause.[67]

This does not mean, however, that any resident preference tied to state market activity would violate the privileges and immunities clause. As mentioned above, it must constitute a denial of a fundamental privilege. Cases involving resident preferences in hiring involve one of the most fundamental privileges in a free society: the pursuit of a common calling to seek employment. It is unlikely, however, that refusal to sell a commodity that is available from others in the market would deny a fundamental privilege.

In *Camden*, the only issue before the Court was whether the state market activity was subject to limitations imposed by the privileges and immunities clause. The case was then remanded for further fact finding

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> State sought to justify the 'Alaska Hire' law on the ground that the underlying oil and gas were owned by the State itself. Analyzing the case under the Privileges and Immunities Clause of Art. IV, § 2, we held that mere ownership of a natural resource did not in all circumstances render a state regulation such as the 'Alaska Hire' law immune from attack under that Clause.

*White*, 103 S.Ct. at 1046.

The Court summarized its view in *Hicklin*, in which it stated:

> In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents.

*Hicklin*, 437 U.S. at 531. Boston's executive order considered in *White*, by comparison, only covered "a discrete, identifiable class of economic activity in which the city is a major participant." *White*, 103 S.Ct. at 1046 n.7.

65. 104 S.Ct. 1020 (1984).

66. 103 S.Ct. 1042 (1983). In *Camden*, pursuant to a state-wide affirmative action program, the Camden City Council adopted an ordinance setting minority hiring goals on all public works contracts. The ordinance also created a hiring preference for Camden residents by establishing a goal that at least forty percent of the employees of contractors and subcontractors be Camden residents. The ordinance defined "resident" as "any person who resides in the City of Camden." Developers, contractors and subcontractors were to make "every good faith effort" to comply with the goal. *Camden*, 104 S.Ct. at 1023-25.

67. *Camden*, 104 S.Ct. at 1028-29 (citations omitted).

as to whether municipal residency was a legitimate basis for discrimination.[68] The Court made it clear that state ownership of a marketable good and the fact that a state is spending its own revenues are factors to be considered in evaluating whether a substantial reason exists to support discrimination against nonresidents. The Court suggested, however, that it would be impermissible for a state to indirectly regulate the private market transactions of any parties other than the state's trading partners.[69]

Since the decision in *Hicklin v. Orbeck,*[70] it has been clear that any resident preference must be narrowly tailored to address the perceived evil posed by nonresidents. The statute at issue in that case required the entire oil and gas industry in the state to prefer Alaska residents over nonresidents merely because the state owned the natural resources to be developed.[71] It was overinclusive because it not only restricted the hiring practices of its trading partners, but many others as well.

A review of cases challenging resident employment preference statutes in which a state is acting in a proprietary capacity suggests that a state may not use its bargaining power to indirectly regulate industry hiring practices. A recent decision of the Alaska Supreme Court invalidated a resident preference for employment on public construction projects.[72] The court found that "public works account for the majority of commercial construction in the state" and "the exclusion mandated by Alaska's statute—ninety to one hundred percent resident workers required—is far more absolute than that in the Camden ordinance."[73] The economy of the state was found to be "dynamic and growing" in constrast to that of Camden.[74] Thus, the Alaska statute smacked of pure economic protectionism, with the state using its large market share to indirectly regulate hiring practices of an industry.

The Wyoming Supreme Court reached the opposite result when it ruled on the validity of that state's resident hiring preference for publicly funded construction projects.[75] The court relied on language in *Camden* that suggested that state funding was a crucial factor in determining the validity of a resident preference. It is noteworthy that the Wyoming statute does not set out any resident quota[76] and there was no indication that public works accounted for the majority of all construction activity in the state.

The emerging restriction on state market activity by the privileges and immunities clause is that when a fundamental right is implicated a state cannot use its massive market power to indirectly regulate or restrict

68. *Id.* at 1030.
69. *Id.*
70. 437 U.S. 518 (1978).
71. *See supra* note 64.
72. Robinson v. Francis, No. 5-493, slip op. (Alaska Jan. 17, 1986).
73. *Id.*
74. *Id.*
75. State v. Antonich, 694 P.2d 60 (Wyo. 1985). *See* Note, *Wyoming Upholds a Resident Laborer Preference Statute,* 21 LAND & WATER L. REV. 219 (1985).
76. Wyoming Preference Act, WYO. STAT. §§ 16-6-101 to -206 (1977).

the practices of those who are not its trading partners, so as to arbitrarily hoard all secondary benefits for its citizens. This, of course, is also true under the commerce clause.

*The Equal Protection Clause*

State activity as a market participant is subject to limitations imposed by the equal protection clause of the fourteenth amendment for the same reason that the privileges and immunities clause poses limitations. When denial of equal protection is alleged, the burden of proof on this issue is weighed heavily in favor of the state: a classification will not be declared invalid unless violation of a fundamental right is demonstrated, along with a showing that the classification is not rationally related to a legitimate purpose and that it does not substantially further the asserted state objective.[77]

For many years, state action pertaining to social or economic welfare was accorded great deference by the Supreme Court.[78] There was rarely a question as to the legitimacy of the asserted state purpose or motive; the focus was on whether a rational relationship existed between the purpose and the statutory classification chosen to effectuate it.

There is, however, one recent case that has left many people guessing on the legitimacy of purpose issue. In *Metropolitan Life Insurance Co. v. Ward,*[79] the Court struck down an Alabama domestic preference tax that imposed a higher tax rate on out-of-state insurance companies. A federal law authorized the express discrimination against interstate commerce.[80] The question before the Court was whether the two legislative purposes offered for the tax, promoting the instate insurance industry and encouraging investment of insurance revenues in the state, were valid. The Court reviewed both purposes closely and found that their discriminatory effect violated the equal protection clause.

The opposite result was reached in a later decision, *Northeast Bancorp v. Board of Governors.*[81] In that case, the broad application of equal protection principles in *Metropolitan Life* is that if a state adopts a market participant stance for the *express* purpose of discriminating against interstate interests, it might violate the equal protection clause.[82]

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77. *See generally* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

78. McGinnis v. Royster, 410 U.S. 263 (1973). *See also* Dandridge v. Williams, 397 U.S. 471 (1970).

79. 105 S.Ct. 1676 (1985).

80. The McCarron-Ferguson Act, 15 U.S.C. §§ 1011-15 (1982), exempts the insurance industry from commerce clause restrictions on state regulation.

81. 105 S.Ct. 2545 (1985). In both *Northeast Bancorp* and *Metropolitan Life,* the states argued that federal legislation authorized the facially discriminatory treatment of interstate commerce. The *Northeast Bancorp* decision is more in line with traditional equal protection analysis.

82. Another view of *Metropolitan Life* would be that a statute that discriminates against interstate commerce creates a new "suspect" classification requiring that a "compelling" state interest be endangered for the law to be valid. Admittedly, this is an unusual equal protection case. Alabama's statute could not be challenged under the commerce clause because Congress had specifically authorized this type of statutory regulation. There was no viola-

LIMITATIONS DERIVED FROM FEDERAL-STATE RELATIONSHIPS

Federal activity may create exclusive state rights to water resources by unilateral action or by approval of compacts, or it may limit the amount of water available for the state to appropriate. This section examines those constitutional provisions that give substance to the principle of federalism by allocating authority between the federal government and the individual states. We begin with the tenth amendment.[83]

There has been a tension between the tenth amendment and other provisions of the Constitution that give the federal government plenary authority, particularly the commerce clause. In the past year, the Court made it clear that Congress, and not the Court, must determine what powers are reserved exclusively for the states.[84] Interstate Compacts and their interpretation reflect this tension. The issue is whether a compact is just another piece of federal legislation or an explicit recognition of state authority protected by the amendment.

Interstate compacts form the backbone of the plans in many states for appropriation and control of surface waters precisely because compacts are agreements that define available supply. The compacts are integral to a state water plan because, ultimately, surface water is the only reliable and renewable supply. The process by which states formulate compacts approved by Congress is one of the best examples of how the federal system can accommodate the diverse states' sovereign or quasi-sovereign interests.[85] In general, Congress participates by encouraging states to negotiate compacts. Once a compact is agreed to by the party states it must be approved by Congress under the compacts clause of the Constitution. It has then been approved by a majority of representatives from all the states and becomes federal law.

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tion of the privileges and immunities clause because the clause protects "citizens" or individuals, not businesses. Thus, the equal protection clause was the only basis available for asserting that the statute was unconstitutional. Perhaps this is the most crucial aspect of the decision: the Court's willingness to use equal protection to reach out and strike down what it perceives to be irrational and discriminatory legislation that works its way through the cracks of constitutional theory.

83. U.S. CONST. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by the State, are reserved to the states respectively, or to the people."

84. *See generally* Garcia v. San Antonio Metropolitan Transit Auth., 105 S.Ct. 1005 (1985). The structural argument is given force by the constitutional provisions concerning state equality or equal representation in the Senate. U.S. CONST. art. I, § 3, art. V. If the Senate adopts a measure, then the states have consented to it. Absent some clear failure of the constitutional scheme, the Amendment does not preclude federal action that the states find later to be merely onerous. Two standard types of legislative action bolstered the argument of the *Garcia* majority: (1) federal statutes that have special provisions when the law acts upon the state, or express exemptions applicable to the states, and (2) statutes that direct federal revenues to the states for services.

85. The legislative history of the early La Plata Compact reflects this view of compacts:

> *Mr. King*: Is the Federal Government interested in that in any way or is there any obligation incurred under it?
>
> *Mr. Bursum*: There is no obligation, Mr. President; but a compact was authorized by the Congress to be entered into between Colorado and New Mexico as to the waters of the La Plata. That compact has been agreed upon between the two States, and under the resolution it was required that the Congress

The courts have not addressed the distinction between the compacting process and other federal legislation. It is arguable, though, that a compact is a different species of rulemaking and is used because different principles are implicated. By definition, a compact is an agreement between states somewhat analogous to a treaty. Although there is a federal interest because more than one state is affected and Congress could unilaterally impose a solution fashioned by the legislative majority, there is also a compelling interest to allow those parties most affected by the outcome—the residents of the compacting states—to determine the rules they will live by. Federal approval of the agreement, then, is the acquiescence of the majority to a regional solution to a regional problem in the interest of self-governance.[86] Under the Court's interpretation of the tenth amendment it would seem that compacts create state-held proprietary interests not subject to any limitation derived from the dormant commerce clause.

The decision in *Sporhase,* however, has thrown into question the certainty of future water supplies in individual states. The court has placed into the matrix a countervailing need—the need in our federal system for water to flow to its highest economic use in the interstate water system. The possible impacts of *Sporhase* and other cases on congressionally approved compacts between states merit discussion.

Even if no substantive interpretation is given to the compact clause, it is a straightforward argument that congressionally approved compacts provide each state with a fixed amount of water outside the interstate market. First, a compact between states which regulates an interstate stream becomes a federal law enacted pursuant to the commerce clause when approved by Congress.[87] Under the commerce clause, Congress can authorize states to impede interstate commerce. Therefore, when Congress approves a compact, it expressly authorizes states to retain compacted water in perpetuity and *Sporhase* is not applicable.[88]

While the argument that congressional approval of compacts creates exclusive state apportionments of water seems clear on its face, there is sufficient uncertainty to suggest that there are circumstances in which the protection might not be absolute. Indeed, one commentator has concluded:

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> should consent to the compact. There is no other obligation whatever. It is a matter which involves no interest to anyone except Colorado and New Mexico, which are using the water of the La Plata River, which flows through the two States.

CONG. REC. H2246 (daily ed. Jan. 21, 1925). Muys, in his report to the National Water Commission on Interstate Water Compact, states that "the Court has viewed the purpose of the compact clause as essentially protective in nature, affording Congress a veto over those interstate agreements which might be prejudicial to broader national interests." J. MUYS, INTERSTATE WATER COMPACTS 248 (1971) (citing Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 YALE L.J. 685, 691-95 (1925)).

86. Texas v. New Mexico, 462 U.S. 554 (1982).

87. Intake Water Co. v. Yellowstone Compact Comm'n, 590 F. Supp. 293 (D. Mont. 1983), *aff'd,* 769 F.2d 568 (9th cir. 1985).

88. *Id.*

> [M]y guess is that the Court, in the absence of explicit territorial limitations [in a compact] will tend to be unfavorably disposed to state restrictions which interfere with providing water to expanding population centers and it will not construe compacts as placing territorial limitations on water use that avoid commerce clause scrutiny. The Court will be more inclined to solve the population problems than to read the intent of state legislatures into federal law.[89]

The key issue is how specific a compact must be in providing a state with the exclusive use of a quantity of water for the Court to conclude that the commerce clause has been waived by Congress.

In many cases, the specificity of a compact may not be an issue. For example, the Upper Colorado River Basin Compact provides that each state has the exclusive beneficial consumptive use of a portion of water in perpetuity.[90] The Klamath River Compact prohibits the transportation of water outside the upper Klamath River Basin.[91] The Snake River Compact,[92] the Yellowstone River Compact[93] and the Kansas-Nebraska Big Blue River Compact[94] condition out-of-basin use of the water on the approval of the signatory states or the compact commissions. The express language of the Yellowstone River Compact has been upheld by the Ninth Circuit Court of Appeals in the face of a constitutional challenge on commerce clause grounds.[95] Such decisions, however, do not indicate what would happen in the case of a compact that is vague or makes no reference to the potential place of use of the water.

Recently, the Supreme Court has addressed the issue of the degree of specificity necessary in a congressional act to vitiate the commerce clause. In *South-Central Timber v. Winnicke,* the Court stated: "[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear."[96] It stated further that congressional action in this area is not a "wooden formalism," but rather it must be clear that Congress has made a "collective decision" to benefit one state. Requiring states to prove that Congress affirmatively contemplated a waiver of the commerce power "reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce."[97]

89. R. Simms (Untitled paper presented at Rocky Mountain Legal Foundation Seminar, June 1985) (available from the author).
90. Pub. L. No. 37, ch. 48, 63 Stat. 31, 32 (1949).
91. Pub. L. No. 85-222, 71 Stat. 497, 499 (1957).
92. Pub. L. No. 464, ch. 73, 64 Stat. 29, 31 (1950).
93. Pub. L. No. 231, ch. 629, 65 Stat. 663, 669 (1951).
94. Pub. L. No. 92-308, 86 Stat. 193, 197 (1972).
95. Intake Water Co. v. Yellowstone Compact Comm'n, 726 F.2d 568 (9th Cir. 1985).
96. South-Central Timber v. Wunnicke, 104 S.Ct. 2237, 2242 (1984).
97. *Id.* at 2243. This specificity requirement has been consistently followed by the Supreme Court. For example, the twenty-first amendment to the Constitution prohibits "the transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof." On its face, the amendment appears to give expressly to the states the exclusive power to control

In short, the issue of how express a compact must be to give the states exclusive use of compacted waters creates great uncertainty for states relying exclusively on their compacts as the basis for a state water plan. Assuming that a compact does make a state the owner of its compacted share, if the state allows the creation of privately held, transferable property rights in the water, does the compact give the state authority to regulate the transfer of rights in a discriminatory manner? Since many compacts cover water that is already appropriated by private persons, if those persons could transfer the water out of state, the compact would appear to be meaningless if it did not bind the states's citizens as well. Certainly, the *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[98] case supports this argument. There, the Supreme Court held that the states have the power to agree to a compact allocation irrespective of the private rights of citizens and that the state, as sovereign or quasi-sovereign, can bind its citizens.[99] Professor Trelease, however, appears to support the view that apportioned waters, like state-owned timbers, once placed in purely private ownership, must be allowed to move freely in interstate commerce.[100]

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the importation of liquor into the state irrespective of considerations of interstate commerce. Yet the Supreme Court held that it granted no such power. Bacchus Imports, Ltd. v. Dias, 104 S.Ct. 3049 (1984). In *United States v. Taylor,* the First Circuit Court of Appeals refused to find a federal waiver of the commerce clause when interpreting a federal statute similar to the twenty-first amendment but relating to state fish and game laws. The court stated that to waive the commerce clause it must find an "unmistakably clear design to validate state laws." United States v. Taylor, 752 F.2d 757 (1st Cir. 1985), *cert. granted* 54 U.S.L.W. 3293 (U.S. 1985).

98. 304 U.S. 92 (1938).

99. *Id.* at 105-06. *Sporhase* and *South-Central Timber,* however, may undercut this view. First, in *Sporhase,* the Court found that state ownership of water is a legal fiction and, therefore, if the state has relinquished its compacted right to control the use of water to private citizens then the commerce power may dictate that the water be allowed to move in interstate commerce. In Alaska, no one could seriously doubt that timber on state lands belongs to the state. Unlike the purely private water rights in *Sporhase,* where the state was not the owner of the resource, in Alaska the state can initially distribute its timber resources to whomever it chooses. On the other hand, once severed from the state lands and put in private hands, the commerce clause controlled distribution of the timber, not Alaska's previous ownership.

100. Trelease, *State Waters and State Lines: Commerce in Water Resources,* 56 U. COLO. L. REV. 347, 350-51 (1985). Professor Trelease draws a distinction between unappropriated compacted water, such as exists on the Powder River in Wyoming and which the state may keep for the future, and water appropriated into private ownership, which must be allowed to move in interstate commerce:

> In 1945, when Nebraska sued Wyoming for allowing its citizens to violate Nebraskans' priorities, the Supreme Court refused to appoint a federal water master to enforce priorities across the state line. Instead, the Court decreed a percentage division of the water: twenty-five percent to Wyoming and seventy-five percent to Nebraska. When this was subdivided according to intrastate priorities, interstate priorities were sufficiently protected. The North Platte percentages, however, do not have the same effect as the Powder River division. Suppose that a Nebraska power plant purchases the water right of a Wyoming rancher and closes the Wyoming headgate, so that seventy-six percent of the river flows down to Nebraska and only twenty-four percent is used within Wyoming. Wyoming could not enact an embargo statute to prevent the sale and keep the benefits within it: this is exactly what *Sporhase* outlaws. A Wyoming water right is a transferable right; if it is transferable within Wyoming it can be transferred outside of the state.

Yet another area of uncertainty is the extent to which a compact might preclude temporary transfers of privately held water rights, even if the compact grants an exclusive right to a state. A lease of water out of state does not necessarily sever the state's ultimate right to have the water rights remain in the state. Rather, it merely changes the place of beneficial use in the short run.

With respect to tributary groundwater, the issues are the same as with surface water, with two important distinctions. The first is that it is rare for compacts to expressly include groundwater in their apportionment. A possible reason is that most interstate compacts were created prior to the *Sporhase* decision and it was generally assumed that states owned groundwater located within the territory of the state. This is obvious from the legislative history of many compacts. The second distinction is that even though a compact may not expressly include groundwater, states must regulate tributary groundwater use to insure deliveries of surface water required by compacts. Therefore, tributary groundwater is included in the compact, regardless of what it says on its face. The primary source of uncertainty here is not the law, but science, since hydrology determines whether there is a relationship between a stream and a given aquifer.

### LIMITATIONS IMPOSED BY THE PROPERTY CLAUSE

Before the turn of the century, the federal government did not assert any proprietary interest in water resources. The general rule was that states held the waters within their boundaries in trust for the people of a state.[101] In the humid, riparian east there was no scarcity so there was no need to protect federal uses from uses allowed by state law.

With the growth of the western prior appropriation systems, it became evident that a means of asserting federal proprietary interests in water was needed. In *Winters. v. United States*,[102] the Supreme Court addressed the issue of federal proprietary rights and held that when the federal government reserves or withdraws lands from the public domain, it also reserves or appropriates enough unappropriated water to fulfill the purposes of the reservation or withdrawal of land. In most instances the priority date is when the reservation or withdrawal is made by the federal government.[103] A relatively recent case has narrowed the standard by establishing that where lands are withdrawn for a variety of purposes, the federal reserve right is for the quantity necessary to meet the primary purpose of the reservation.[104]

Federal proprietary rights do not affect the ability of the state to appropriate water. State appropriation might raise some novel issues, though, if it were used to deny an appropriation by the federal govern-

101. Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).
102. 207 U.S. 564 (1908).
103. Arizona v. California, 373 U.S. 456 (1963).
104. United States v. New Mexico, 438 U.S. 696 (1978).

ment. In *United States v. California*,[105] the Supreme Court held that federal actors are subject to state regulation to some extent; they must obtain permits pursuant to state law. If the state appropriated all the presently unappropriated water, there would be none to meet reserved rights, especially those which may expand over time. The federal government, then, would have to condemn state-held rights or enter the water market, either leasing or purchasing water from the state or private parties. This argues for considering potential federal rights in any planning process.

At least one state has developed a comprehensive planning process that includes federal reserved rights. Montana's program has two components: the state reservation system allows state and federal entities to reserve water now for uses in the future, and the Reserved Water Rights Commission negotiates with Indian tribes and the federal government to determine the extent of federal reserved rights.[106] The planning process has been criticized as too time consuming and costly, and it has raised some heated controversy. This has led the state to question the suitability of the planning process.[107] It is not clear, however, that the alternative—extensive litigation—is any more efficient or equitable. Since 1966 New Mexico has been litigating an adjudication of the Nambe-Pojoaque stream system.[108] In addition to rights of numerous individual users, federal reserved rights for a national forest and the rights of four Indian pueblos (reservations) must be determined. Estimates of the total costs of all of the parties range from at least $5 million to $7.5 million.[109] Furthermore, animosity between the parties has reached a fever pitch—and all for a maximum of 30,000 acre-feet of water per year.[110]

Perhaps the greatest property clause issue is the potential extent of congressional power. As pointed out in other studies,[111] a simple amendment to the Desert Lands Act[112] could effectively federalize all unappropriated groundwater underlying federal land, thereby precluding any state appropriation system as far as these waters are concerned. As the costs of litigation escalate, new legislation might seem preferable to congressional leaders, especially if no attempts are made to improve the adjudication process.

105. 438 U.S. 645 (1978).

106. In the five years that the commission has been in existence, only one agreement has been adopted: The Fort Peck Compact, an agreement between the Assiniboine and Sioux Tribes of the Fort Peck Reservation and the State of Montana. MONT. CODE ANN. § 85-20-201 (1985).

107. Report of the Select Committee on Water Marketing, 49th Mont. Legis. (January 1985).

108. State of New Mexico *ex rel.* Reynolds v. Aamodt, No. 66390-M (D.N.M. Filed 1966).

109. Telephone discussion with Assistant U.S. Attorney Herbert Becker in Albuquerque, New Mexico (Feb. 1985).

110. *Id.*

111. WATER LAW STUDY COMMITTEE, THE IMPACT OF RECENT DECISIONS CONCERNING WATER AND INTERSTATE COMMERCE ON WATER RESOURCES OF THE STATE OF NEW MEXICO, A REPORT TO GOVERNOR TONEY ANAYA AND THE LEGISLATIVE COUNCIL PURSUANT TO LAWS, ch. 98 (1983) (published by the Institute of Public Law).

112. 43 U.S.C.A. § 321-39 (West 1986).

THE COMMERCE CLAUSE

Congress' plenary power to regulate commerce under the commerce clause is the greatest limitation on state activity in the interstate market. Even where Congress has not acted, the clause prohibits state regulation which discriminates against or unduly burdens the free flow of commerce among the states.[113] Unlawful discrimination arises in two ways: (1) if a statute expressly prefers intrastate commerce over interstate commerce; and (2) if the statute is neutral but the motive behind the statute is to discriminate against the interstate market or the statute has a discriminatory effect when applied in a particular instance. Due to the state's heightened regulatory interest over water resources, however, a state may prefer primarily non-economic uses in the state over interstate uses.[114]

When Congress acts to regulate commerce it usually does so in conjunction with other federal duties such as its duty to protect the national public welfare, to meet federal treaty obligations, to approve compacts or to enforce individual rights recognized in the Constitution. In these instances, Congress acts because the majority manifests a national preference in favor of some value over those related to the unbridled market's purely economic preferences. Congress can take action that impedes the market, or it can direct the states to take otherwise discriminatory actions.[115] If a state is acting pursuant to federal law, it can burden commerce. The issue is whether Congress intended to allow a state to impede commerce in the manner being challenged. As pointed out in the discussion of compacts, courts are reluctant to find congressional approval of burdensome state action in vague or unspecific federal legislation.

State market participation activity is subject to congressional regulation under the commerce power. If Congress has not acted, however, the commerce clause does not apply unless the state is said to be regulating commerce.[116] Thus, the state can acquire water rights and sell them without running afoul of this constitutional provision; however, a federal law could preempt the state if Congress chose to enact one. In *Wisconsin Department of Industry, Labor and Human Relations, et al. v. Gould, Inc.*,[117] the Supreme Court rejected an attempt by the state to evade the preemptive effect of the National Labor Relations Act (NLRA) under the guise of market participation. Although the NLRA would not have prohibited a private individual from conduct ascribed to the state, the preemptive effect of the NLRA did preclude inconsistent state action.

> We cannot believe that Congress intended to allow States to interfere with . . . the NLRA as long as they did so through exercises of the spending power . . . [G]overnment occupies a unique

113. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
114. *See supra* text accompanying notes 9-27.
115. *See supra* text accompanying notes 90-99.
116. Reeves v. Stake, 447 U.S. 429 (1980); Hughes v. Alexandria Scrap, 426 U.S. 794 (1976).
117. 54 U.S.L.W. 4428 (Feb. 26, 1986).

position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints.[118]

Congress has, in the past, enacted legislation to counteract the ill effects of unrestrained market participation by private enterprise. The antitrust laws prohibit monopolistic trade practices. In *Parker v. Brown*,[119] the Supreme Court held that federal antitrust acts do not apply to state regulatory programs. Thus, California could adopt a marketing program that prevented raisin producers from freely marketing their crop without violating federal antitrust laws. In a subsequent decision, the Court concluded that "the Parker doctrine exempts only anticompetitive conduct *engaged in as an act of government by the State as sovereign* . . . pursuant to state policy to displace competition with regulation or monopoly public service."[120]

It is unlikely that a state would ever be subject to antitrust actions as a market participant even though technically it was made subject to the antitrust laws. State market participation is not aimed at acquiring a large market share to artificially drive up the price of water so as to make inordinate profits for the state. Furthermore, given the number of presently existing private rights, it is unlikely that a state could monopolize the water market. In any event, an attempt by a state to monopolize water rights and make excessive profits by making the price artificially high or to discriminate against commerce would violate principles of antitrust law or the dormant commerce clause or both.

## CONCLUSION

While a state's regulatory powers over water resources are heightened by virtue of the public trust doctrine, a state cannot rely on this authority alone to ensure water supplies for continued present and expanded

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118. *Id.* at 4430. The Wisconsin statute prohibited the state from doing business with any entity that violated the NLRA three times within a five year period. WIS. STAT. § 101.245 (Supp. 1985). The Court found the statute to be an additional, separate, state law remedy for NLRA violations. The NLRA has been interpreted as preempting such additional state remedies because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity." Garner v. Teamsters, 346 U.S. 485, 498-99 (1953). The Court pointed out that the state could not prohibit individuals from refusing to deal with NLRA violators. Thus, the state was not merely acting within the market, but using its "unique position of power" the duty of a government to provide a means of legal redress—in a manner that conflicted with an express federal means of redress.

119. 317 U.S. 341 (1943).

120. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978). In Town of Hallie v. City of Eau Claire, 105 S.Ct. 1713 (1985), the Supreme Court found that municipality's anticompetitive activities involving the collection and transportation of sewage were also protected by the state action exemption to the federal antitrust laws established by *Parker*. These activities must be authorized, but need not be compelled, by the state. Since municipalities are not sovereign, the anticompetitive activities must be pursuant to a clearly expressed state policy. The Court did not impose an active state supervision requirement because the actor was a municipality rather than a private entity.

It is unlikely, however, that the exemption would extend to State activities as a market participant. In *South-Central Timber v. Wunnicke*, the dissent states that the antitrust laws apply to a State only when it is acting as a market participant. A State is immune from antitrust scrutiny only when it acts as a market regulator. *South-Central Timber*, 104 S.Ct. at 2248 (Rehnquist, J., dissenting).

future uses. Regulatory action is subject to the constraints of the commerce clause and the interstate water market, and interstate controversies boil down to the value-ladden perceptions of whether the action protects primarily noneconomic uses or amounts to economic protectionism. This ad hoc case-by-case approach is hardly a good method for shaping any state's water future. It is costly, both emotionally and economically.

State participation in the water market is a positive alternative to this process. It cannot, however, be a disguise for otherwise impermissible regulation of private transactions. The state may not give up to the private sector freely transferable water rights and later limit the transfer of those rights at the state line. No matter what constitutional provision serves as a basis for a challenge, preferential economic protectionism through regulation of private transactions is not valid under current constitutional doctrine.

The state market participant doctrine is not a method for "getting around" the commerce clause. It recognizes the existence of the interstate market and simply anticipates operation within it. By participating in the interstate market, a state, like any private buyer or seller, may determine the the terms of a transaction. It may decide when to sell or lease water for uses in a manner that maximizes the benefits to the state. Through this mechanism, the state can capture the equity interest in water resources that it has carefully created through water regulation and investment of its taxpayers' capital.[121] Market participation is not a substitute for careful regulation and planning, but an additional means to enhance the certainty of available supply for a wide variety of future uses.

121. *See* Trelease, *State Water and State Lines: Commerce in Water Resources,* 56 U. COLO. L. REV. 347 (1985). Trelease argues persuasively that where water is distributed for out-of-state uses a state should still be able to capture the secondary benefits it would have received if water had been used in the state. The state should be able to bargain to prevent collateral harms. "The in-state user pays his toll in property taxes and the production of wealth, and the exporting appropriator pays an approximate equivalent in cash or works for local development." *Id.* at 372.