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Turning Off the Valves: Why Tarrant v. Herrmann Unnecessarily Threatens Interstate Water Markets

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Turning Off the Valves: Why *Tarrant v. Herrmann* Unnecessarily Threatens Interstate Water Markets

Max Michon-Rollens[*]

Throughout the twentieth century, the U.S. Supreme Court routinely used the Dormant Commerce Clause to invalidate statutes that confined natural resources—such as felled timber and natural gas—within their state of origin. However, in Tarrant v. Herrmann*, the Court broke from its prior precedent by upholding multiple Oklahoma statutes, which, for all intents and purposes, prohibit the exportation of water across state lines. In so doing, the Court may have overlooked the practical implications of its decision; namely, that it bars many states from utilizing a market-based approach to reallocate water governed by interstate water compacts. Water markets stood to perform a critical role with respect to interstate rivers, as they provide the only practical method for reallocating water controlled by compacts. This Note argues that the Court could have better balanced the competing state sovereignty and national unity interests at issue by limiting its holding to water initially allocated to states under the Red River Compact, thereby leaving private parties free to negotiate mutually beneficial transactions unencumbered by economically protectionist statutes.*

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INTRODUCTION

Western states face increased water demands from growing populations,[1] environmental regulations,[2] and global climate change.[3] Yet, capturing new supplies has become cost prohibitive and environmentally unsound.[4] In response, some states have found solace in reallocation—the change, transfer, or exchange of water rights—principally through water marketing.[5] By reallocating existing supplies from inefficient uses, these states can meet their new demands while avoiding the problems associated with capturing new sources. However, other states cannot rely on rationing their existing in-state supply; they simply do not have enough water within their boundaries. For those states dealt the unlucky hand of both rapidly expanding populations and dwindling water supplies, securing new sources is a necessity—one that often remains easier said than done.

1. *See* PAMELA CASE & GREGORY ALWARD, U.S. DEP'T OF AGRIC., PATTERNS OF DEMOGRAPHIC, ECONOMIC AND VALUE CHANGE IN THE WESTERN UNITED STATES 10 (1997); Lawrence J. MacDonnell & Teresa A. Rice, *Moving Agricultural Water to Cities: The Search for Smarter Approaches*, 2 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 27, 27 (1994).

2. *See* Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 ECOLOGY L.Q. 279, 279 (2003).

3. *See* Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 ENVTL. & ENERGY L. & POL'Y J. 237, 244 (2010).

4. *See* George A. Gould, *Transfer of Water Rights*, 29 NAT. RESOURCES J. 457, 458 (1989).

5. *See* Robert E. Beck & Owen L. Anderson, *Reallocations, Transfers, and Changes*, *in* 1 WATERS AND WATER RIGHTS 14-1, 14-10 (Robert E. Beck & Amy K. Kelley eds., 2013) ("When compared to increased regulation, water marketing is generally seen as a preferable approach to reallocation." (citing BRUCE DRIVER, WESTERN WATER: TUNING THE SYSTEM 18–20 (1986))).

These dynamics can be particularly acute at the local level, where local leaders have fewer tools at their disposal to meet water needs than do statewide officials. The Dallas-Fort Worth Metroplex epitomizes this twenty-first century conundrum. With a population expected to double by 2060 and current water demands teetering on the brink of the available supply, the Metroplex risks losing over $160,000,000,000 from lost income and taxes by 2060 if future water demands are not met.[6] In recognition of this problem, cities within the area have already taken steps to secure access to new sources of water. For instance, in an effort to secure water for its citizens, Irving, Texas, a city within the Metroplex, contracted to purchase water from the city of Hugo, Oklahoma.[7] Unfortunately for both cities—who stood to share significant economic benefits—Oklahoma state laws restrict water transfers[8] across state lines,[9] quashing this interstate water market transaction.[10]

Commodity markets are guided by a classic economic principle: those willing and able to pay the most for a good are able to purchase it. Economists generally believe that free markets are utility maximizing, meaning they promote economic efficiency by pairing goods with those buyers who value them most.[11] In a free market, water, like any other commodity, would flow to individuals most willing to pay for it, crossing state borders if necessary. However, states have long confined water within their borders by enacting water embargoes—statutes that restrict or prohibit out-of-state exports. Historically, the U.S. Supreme Court has upheld these embargoes.[12] In 1982, however, the Court overturned an interstate export restriction in *Sporhase v. Nebraska ex rel. Douglas*.[13] The Court concluded that Nebraska's reciprocity requirement placed an unconstitutional burden on interstate commerce.[14] While *Sporhase* was clear that water is an article of commerce, it left scholars and

6. *See* J. MARK MCPHERSON, OKLA. WATER ENV'T ASS'N, WHY IS TEXAS SO HOT FOR OKLAHOMA WATER? BECAUSE THE METROPLEX IS AT THE WATER'S EDGE: LET THE WARS BEGIN 13–14 (2009), *available at* http://www.texash2olaw.com/pdfs/Texas%20v%20OK%20for%20Water.pdf.

7. *See* City of Hugo v. Nichols, 656 F.3d 1251, 1253–54 (10th Cir. 2011), *cert. denied*, City of Hugo v. Buchanan, 132 S. Ct. 1744 (2012).

8. "As used in this article, and as typically used in discussions of water rights, a 'transfer' indicates a change in purpose of use and/or a change in place of use, which often incidentally requires a change in point of diversion . . . ." George A. Gould, *Water Rights Transfers and Third-Party Effects*, 23 LAND & WATER L. REV. 1, 13 (1988).

9. *See* OKLA. STAT. ANN. tit. 82, § 105.12A(B)(1) (West 2014) (imposing additional restrictions on permits for water exported out-of-state); *id.* § 105.12A(D) (requiring legislative approval for water exported out-of-state); OKLA. STAT. ANN. tit. 82, § 1086.1(A)(3) (West 2014) (requiring that "[w]ater use within Oklahoma . . . be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state").

10. *See Nichols*, 656 F.3d at 1254.

11. *See* Charles W. Howe, *Protecting Public Values in a Water Market Setting: Improving Water Markets to Increase Economic Efficiency and Equity*, 3 U. DENV. WATER L. REV. 357, 358 (2000) (explaining the precise way in which economists use the term "efficiency").

12. *See, e.g.*, Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349 (1908) (upholding New Jersey's prohibition on out-of-state water diversions).

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

14. *Id.* at 960.

state officials questioning the circumstances under which states could enforce interstate water embargoes constitutionally.[15]

The Court was presented with an opportunity to clarify this thirty-year-old question in *Tarrant Regional Water District v. Herrmann*.[16] Instead, the Court's brief Commerce Clause analysis avoided *Sporhase* altogether and upheld Oklahoma's anti-export statutes—adding new hurdles for states seeking interstate water transfers.[17] *Tarrant* stands to unnecessarily constrain one of the only remaining methods for reallocating water governed by compacts[18]—the water market—by broadly validating Oklahoma's water embargoes.

Though the facts in *Tarrant* made ruling against Oklahoma difficult, the Court may have overlooked a practical implication of its opinion by focusing on a technical interpretation of the Red River Compact.[19] Upholding Oklahoma's anti-export statutes will needlessly promote state rivalry over water, to the detriment of local economies and national unity.[20] Furthermore, the Court should have looked more closely at the Commerce Clause issue in the case and distinguished between initial allocations to states and future reallocations. Had the Court's holding reflected this distinction, fealty to original allocations among states themselves could be sustained while freeing those possessing current water rights from the encumbrance of anti-export statutes.

Removing water embargoes would not leave states powerless to control their water. The Commerce Clause only requires equal treatment of interstate and intrastate users. Compelling state compliance with this well-established constitutional principle would promote national unity while also helping to meet the growing needs of water-starved areas like the Dallas-Fort Worth Metroplex.

I. WATER ALLOCATION IN THE WESTERN UNITED STATES

Demand for water in the West increased as populations grew. These increasing demands led to conflicts among the states—forcing them to begin strategic planning. In an effort to secure water rights, most Western states began dividing interstate rivers by negotiating compacts with one another.

A. The West's Progression to Reallocation and Water Marketing

By the 1860s, manifest destiny had become a reality: the United States had

15. *See* Mark S. Davis & Michael Pappas, *Escaping the* Sporhase *Maze: Protecting State Waters Within the Commerce Clause*, 73 LA. L. REV. 175, 179 (2012); Richard S. Harnsberger et al., *Interstate Transfers of Water: State Options after* Sporhase, 70 NEB. L. REV. 754, 758 (1991).

16. Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120 (2013).

17. *Id.* at 2136–37.

18. *See infra* Part II.C.

19. *See infra* Part V.

20. *Cf.* City of El Paso v. Reynolds, 563 F. Supp. 379, 389 (D.N.M. 1983) ("The fifty states cannot operate as separate economic units. Our material success depends on the vigilant maintenance of the principle that our economic unit is the entire nation.").

accomplished its goal of securing territory between the Atlantic and Pacific Oceans. During this time, the federal government passed various acts supporting western expansion.[21] These acts, passed in hopes of settling the West, gave miners and farmers freedom to acquire possessory and other rights on public lands.

As settlers moved westward, the eastern riparian water rights doctrine proved ill-suited to the region's aridity and geography.[22] In response to these characteristics, Western states adopted the prior appropriation doctrine.[23] Designed by miners and often characterized by the principle "first in time, first in right," prior appropriation soon became the water law of the West.[24] This era—termed the "Era of Allocation" and largely defined by the prior appropriation doctrine—placed an emphasis on allocating water to the extent development required.

By the 1980s, new demands on limited Western water supplies began requiring the reallocation of existing appropriations. While some additional unallocated water remained available in the West, it mostly took the form of snowmelt and floodwater.[25] To be useful, these sources required capture, which in turn involved building additional storage facilities. In comparison, purchasing existing rights was often a more economical and environmentally-conscious option.[26] Because little unappropriated water was available and securing new sources was not practical, reallocation became necessary to fuel the states' diversifying economies and changing societal values.[27] It should be noted that voluntary water reallocations occurred throughout the nineteenth century,[28] but it was not until the later part of the twentieth century that policies began favoring conservation and the transfer of existing water rights to new uses.[29]

This "Reallocation Era" may have officially begun in 1982, when the Western Governors' Association called for a study assessing the need for water

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21. *See, e.g.*, Homestead Act, ch. 75, 12 Stat. 392 (1862) (encouraging individuals to apply for a federal land grant); Mining Act, ch. 262, 14 Stat. 251 (1866) (granting certain property rights in mining claims); Desert Lands Act, ch. 107, 19 Stat. 377 (1877) (codified at 43 U.S.C. § 321 (2012)) (promoting development of arid and semiarid Western lands); Carey Act, ch. 301, 28 Stat. 422 (1894) (codified at 43 U.S.C. § 641 (2012)) (allowing private companies to establish irrigation systems on semiarid Western lands).

22. *See* Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882).

23. *Id.* at 447 (concluding the prior appropriation doctrine was founded out of "imperative necessity").

24. *See* John D. McGowen, *The Development of Political Institutions on the Public Domain*, 11 WYO. L.J. 1, 14 (1956).

25. Gould, *supra* note 4, at 458.

26. *Id.*; *see also* Howe, *supra* note 11, at 358–59.

27. *See* Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 105–06 (2003).

28. *See* Strickler v. City of Colo. Springs, 26 P. 313, 315 (1891); Kidd v. Laird, 15 Cal. 161, 162 (1860); Maeris v. Bicknell, 7 Cal. 261, 263 (1857).

29. *See* Frank J. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NAT. RESOURCES J. 1, 30 (1965).

efficiency.[30] The resulting report recommended that state water policies:

> [1] encourage efficiency of water use; [2] facilitate voluntary reallocation of water rights by allowing water districts to transfer water outside district boundaries, by establishing water banks, and by allowing trial transfers; [3] encourage water conservation and salvage of water through water marketing; [4] protect environmental values in water, including enacting legislation for instream flows; and [5] assist market transfers by providing data on water rights and supplies to private parties.[31]

During this time period, markets for water rights began entering the political landscape.[32] Typical arrangements included sales, leases, and transfers in place of use.[33] However, water markets take many forms and the "only real limit to [the] possibilities is the ingenuity of the parties."[34] In essence, reallocations are the ends, whereas water markets are the means.

B. Interstate Water Allocation and Dispute Resolution

Rivers often traverse state boundaries. In response, the law developed three methods for interstate water allocation and dispute resolution: equitable apportionment by the Supreme Court, interstate water compacts, and congressional action.[35]

At the turn of the twentieth century, the effects of water use on neighboring states had increased to the point of conflict. For example, Kansas sued Colorado arguing that upstream diversions had damaged its downstream users.[36] The problem stemmed from Kansas's concern that Colorado intended to divert "absolutely all of the water that does, can, or might flow down the Arkansas River."[37] To resolve the dispute, the Supreme Court recognized its role as arbiter of interstate water disputes and crafted the common law doctrine of equitable apportionment,[38] pursuant to the Constitution's grant of original jurisdiction over conflicts between states.[39] Under the doctrine, the Court would settle such disputes by attempting to apportion water in a way that allowed states to share the river's benefits equally.[40] Though well-intentioned, equitable apportionment often results in new problems, including protracted

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30. Beck & Anderson, *supra* note 5, at 14-7.

31. *Id.* (citing BRUCE DRIVER, WESTERN WATER: TUNING THE SYSTEM viii–xi (1986)).

32. *Id.*

33. John D. Musick, Jr., *Reweave the Gordian Knot: Water Futures, Water Marketing, and Western Water Mythology*, *in* 35 ROCKY MTN. MIN. L. INST. 22-1, 22-5 to 22-6 (1989).

34. Beck & Anderson, *supra* note 5, at 14-9 (citing BRUCE DRIVER, WESTERN WATER: TUNING THE SYSTEM 19 (1986)).

35. John B. Draper & Jeffrey J. Wechsler, *Gunboats on the Colorado: Interstate Water Controversies, Past and Present*, *in* 55 ROCKY MTN. MIN. L. INST. 18-1, 18-12 (2009).

36. Kansas v. Colorado, 185 U.S. 125, 146 (1902).

37. *Id.* at 135.

38. Kansas v. Colorado, 206 U.S. 46, 96–97, 104–05 (1907).

39. U.S. CONST. art. III, § 2, cl. 2.

40. 206 U.S. at 97, 100.

litigation, unpredictable outcomes based on numerous balancing factors,[41] the possibility of federal sovereign immunity,[42] and the Court's desire to protect existing economies.[43]

Beginning in the 1920s, Southwestern states concerned with the unpredictable results of equitable apportionment tried another approach—the interstate water compact.[44] The Compact Clause of the Constitution empowers states to enter into binding compacts with one another,[45] subject only to congressional approval.[46] Once ratified by Congress, and approved by the signatory states, the compact becomes federal law.[47] As federal statutes, ratified compacts can displace both state laws and federal common law. Additionally, as compacts are contracts between the signatory states, the courts interpret and construe them applying contract law.[48]

Interstate water can also be allocated by congressional apportionment. Grounded in Congress's power to regulate interstate commerce[49] and by way of the Supremacy Clause,[50] congressional apportionment can supersede prior state arrangement.[51] However, Congress has only apportioned interstate water twice. The first time it failed to do so explicitly[52] and required the Court to clarify congressional intent.[53] The second time, though at least explicit, served only to confirm an existing settlement agreement after Congress failed to ratify a compact.[54]

Water compacts have been the primary method for allocating interstate streams and rivers in the West. Supreme Court litigation has been protracted, expensive, and unpredictable. Even the Court has expressed its opinion that "litigation of such disputes is . . . a poor alternative to negotiation between the

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41. *See* Colorado v. New Mexico, 459 U.S. 176, 185–87 (1982); Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

42. *See* Arizona v. California, 298 U.S. 558, 568 (1936).

43. *See Colorado*, 459 U.S. at 187.

44. John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 440 (2005). Signed in 1922, the Colorado River Compact was the first major interstate water compact. *See* COLO. REV. STAT. ANN. § 37-61-101 (West 2014).

45. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . .").

46. *See, e.g.*, Cuyler v. Adams, 449 U.S. 433, 439–40 (1981). The Court held:

> The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority.

Id. (citation omitted).

47. Texas v. New Mexico, 462 U.S. 554, 564 (1983).

48. Texas v. New Mexico, 482 U.S. 124, 128 (1987).

49. U.S. CONST. art. I, § 8.

50. U.S. CONST. art. VI, cl. 2.

51. *See* Arizona v. California, 373 U.S. 546, 564–65 (1963).

52. *See* Boulder Canyon Project Act, 43 U.S.C. §§ 617–617v (2012) (passed 1928).

53. *See* 373 U.S. at 565.

54. *See* Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, § 204, 104 Stat. 3289, 3295–3304 (1990).

interested States."[55] The Court has consistently suggested that states should resolve disputes by negotiating compacts.[56] By virtue of congressional apportionment's rarity, it is likely that Congress sees such action as politically unpalatable.[57] In contrast to the minimal use of congressional apportionment, many states have followed the Court's suggestion, making water compacts the primary method for apportioning interstate rivers and streams.[58]

II. WATER COMPACTS ARE OUTDATED AND INFLEXIBLE

A. Most Water Compacts Are Relics of the Past

Water demands have changed drastically from those envisioned during the formation of many interstate compacts. Nineteen of the twenty-three existing Western water allocation compacts were ratified between 1922, when the first compact was signed, and the end of the 1960s.[59] During this time, water was seen as a necessity for future economic development, generally through irrigation, industrial, and municipal uses.[60]

Today, water managers face the problem of allocating water under an entirely new political and social landscape. Unanticipated and expanding demands include many recreational, ecological, urban, and Native American uses. First, society now views water as more than just an economically exploitable natural resource. In general, the modern-day public places an intrinsic value on the maintenance of instream flows for ecologic and recreational use.[61] These societal values have been codified in statutes such as the Endangered Species Act[62] and the Wild and Scenic Rivers Act.[63] As seventeen Western compacts took effect before these statutes were enacted, most do not include accommodating provisions.[64] Consequently, some states

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55. Texas v. New Mexico, 462 U.S. 554, 568 n.13 (1983).

56. *See* Oklahoma v. New Mexico, 501 U.S. 221, 241 (1991) (noting a preference that "[s]tates settle their controversies by mutual accommodation and agreement" (quoting 373 U.S. at 564) (internal quotation marks omitted)); Vermont v. New York, 417 U.S. 270, 277 (1974) ("The parties have available other and perhaps more appropriate means of reaching the results desired . . . .").

57. This may be due to the likelihood that many senators feel uncomfortable choosing winners and losers in regionally focused and politically charged battles between states, where most delegates do not have a direct interest in the matter.

58. *See* Grant, *supra* note 27, at 105–06; FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, COUNCIL OF STATE GOV'TS, THE LAW AND USE OF INTERSTATE COMPACTS 40 (1961) ("[T]he interstate compact has established itself as the preferred and most widely utilized method for effecting the allocation of waters of interstate streams.").

59. *See infra* note 276.

60. *See* SARAH F. BATES ET AL., SEARCHING OUT THE HEADWATERS: CHANGE AND REDISCOVERY IN WESTERN WATER POLICY 4, 35–42 (1993); Grant, *supra* note 27, at 106.

61. *See* Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 CALIF. L. REV. 2375, 2378 (2000).

62. 16 U.S.C. §§ 1531–1544 (2012).

63. *Id.* §§ 1271–1287.

64. *See infra* note 276.

have faced unanticipated burdens in the form of minimum flow requirements.[65] Second, metropolitan areas have experienced population growth beyond anything imagined in the past.[66] From 1960 to 1990, Western water withdrawals for domestic use rose from 6.5 to 14 million acre-feet,[67] spurred by growing cities like Las Vegas and Phoenix. Those managing particularly arid regions must consider the exponential effects of their citizens' significantly higher per capita use. For example, residents of the desert Southwest consume approximately three times more water than the national average.[68] Third, Native American water rights were greatly underestimated during compact negotiations.[69] These rights should now factor into the allocation scheme.[70]

Finally, water managers must now also consider global climate change when planning for the future.[71] Climate change will undoubtedly exacerbate an already stressed system by reducing water supply throughout most of the United States.[72] Experts anticipate decreased water supplies from reduced snowpack in Western mountains, raised sea levels, increased evapotranspiration, and furthered use of water by the energy sector's efforts to reduce carbon emissions.[73] Additionally, higher regional temperatures will increase water demands, with the most significant demand stemming from irrigation.[74] Nebraska, for example, would require a 39 percent increase in water, assuming global climate change predictions are accurate and the amount of irrigated land remains the same.[75] As the anticipated effects of climate change vary greatly from region to region, dated compact allocations will burden some states while benefitting others. Compacts designed to meet the times of years past simply did not anticipate today's changed water landscape.

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65. *See, e.g.*, Endangered and Threatened Wildlife and Plants; Notropis simus pecosensis (Pecos Bluntnose Shiner), 52 Fed. Reg. 5295 (Feb. 20, 1987) (to be codified at 50 C.F.R. pt. 17) (listing the Pecos bluntnose shiner as a threatened species under the Endangered Species Act, which required New Mexico to provide minimum flows).

66. *See* CASE & ALWARD, *supra* note 1, at 11–12.

67. A. Dan Tarlock & Sarah B. Van de Wetering, *Growth Management and Western Water Law from Urban Oases to Archipelagos*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 163, 169 (1999).

68. *Id.*

69. *See* Arizona v. California, 373 U.S. 546, 600–01 (1963) (holding that Native American water rights were based on acres, not number of residents).

70. *See generally* Judith V. Royster, *A Primer on Indian Water Rights: More Questions than Answers*, 30 TULSA L.J. 61 (1994) (arguing the importance of "[r]ecognizing and accounting for Indian rights to water" in Oklahoma).

71. *See generally* Mark Squillace, *Water Transfers for a Changing Climate*, 53 NAT. RESOURCES J. 55, 56 (2013) ("The need to reform current law as it relates to water transfers is especially urgent because of the anticipated impacts of climate change.").

72. Hall, *supra* note 3, at 243.

73. *Id.*

74. PETER H. GLEICK, U.S. GLOBAL CHANGE RESEARCH PROGRAM, WATER: THE POTENTIAL CONSEQUENCES OF CLIMATE VARIABILITY AND CHANGE FOR THE WATER RESOURCES OF THE UNITED STATES 81 (2000), *available at* http://www.gcrio.org/NationalAssessment/water/water.pdf (noting that while irrigation accounts for 39 percent of U.S. withdrawals, it makes up 81 percent of consumptive uses).

75. Hall, *supra* note 3, at 254.

B. Water Compacts Do Not Easily Adapt to Changing Times

Interstate water compacts are characterized by their permanence.[76] States cannot unilaterally nullify, withdraw, or amend their commitments under a compact.[77] Compact permanence can be traced back to the Supreme Court's interpretation of the Contract Clause[78] in *Green v. Biddle*.[79] In that case, the Court justified extending the Contract Clause to compacts because they retain contract qualities.[80] Initially, states saw permanent allocations as a positive aspect of the compact mechanism; it provided investors with the security needed to encourage economic development.[81] The benefits of compact permanence may still be attractive to many states, especially those benefitting from changing times. Nonetheless, such permanence results in inflexibility as water demands change over time.

The issues facing New Mexico illustrate the problems that can spawn from compact permanence.[82] The Pecos River Compact—which allocates water between New Mexico and Texas—provides an example.[83] In 1987, when a critical habitat designation required new minimum flow requirements,[84] only New Mexico's share of the river was burdened.[85] Prior to these flow requirements, New Mexico distributed its water in short bursts, minimizing evapotranspiration and seepage losses.[86] However, since this distribution method did not meet the new minimum flow requirements, New Mexico had to replace it with a more continuous flow system.[87] Distributing water continuously increased transit losses. This unanticipated burden only affected New Mexico because Texas, as a downstream state, was guaranteed a quantity

76. *See* Grant, *supra* note 27, at 120–23 & n.24 (citing FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 40 (1961) (noting "the interstate compact is the instrument best suited for the establishment of permanent arrangements among the states")).

77. Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 3 (1997); *see* State *ex rel.* Dyer v. Sims, 341 U.S. 22, 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified . . . .").

78. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

79. Green v. Biddle, 21 U.S. 1, 92 (1823).

80. *Id.* (explaining that the terms compact and contract are synonymous).

81. Grant, *supra* note 27, at 108 n.26 (quoting M.C. Hinderlider & R.I. Meeker, *Interstate Water Problems and Their Solution*, 90 TRANSACTIONS AM. SOC'Y CIV. ENGINEERS 1035, 1049 (1927)) (concluding that compacts were preferred to litigation as they are "not susceptible [to] arbitrary change or revocation or modification without the consent of the contracting parties, which tends for greater stability as against Court decisions which are susceptible of reversal or such modifications as may seem meet and proper to the Court").

82. *See* Pecos River Compact, Pub. L. No. 81-91, ch. 184, 63 Stat. 159 (1949); Rio Grande Compact, Pub. L. No. 76-96, ch. 155, 53 Stat. 785 (1939).

83. *See* Pecos River Compact, 63 Stat. at 160.

84. *See* Endangered and Threatened Wildlife and Plants; Notropis simus pecosensis (Pecos Bluntnose Shiner), 52 Fed. Reg. 5295, 5297 (Feb. 20, 1987) (to be codified at 50 C.F.R. pt. 17).

85. Grant, *supra* note 27, at 110–12.

86. *Id.* at 111.

87. *Id.*

of water under the compact, regardless of New Mexico's new statutory obligations.[88] While interstate water marketing is not likely to directly change new statutory burdens, it would allow those encumbered to seek water transfers from across state lines to offset negative impacts.

C. Options for States Facing Outdated Compacts

States facing outdated compacts have few and rather bleak options for compact modification. A state dissatisfied with interstate allocations can appeal to Congress,[89] seek a more favorable allocation from the Supreme Court, or attempt renegotiation. None of these avenues present states with an easy path to successful compact modification.

First, states could hypothetically appeal to Congress, but the roadblocks would be similar to those faced when seeking initial congressional apportionment. Mostly, water disputes are regional, rather than national. Thus, a majority of representatives would not have a direct stake in the dispute. Assuming the other signatory states do not support congressional reapportionment, it is hard to imagine unaffected representatives approving the reallocation. The fear of setting political precedent would be great, and the fear of being on the receiving end of a future reallocation would be even greater.[90] These reasons are perhaps why Congress has only apportioned water twice and neither was a modification of an existing compact.[91]

Second, dissatisfied states could also seek modification under the federal common law doctrine of equitable apportionment. The first major hurdle to this approach would come from compact permanence and the general notion that states cannot revoke a compact unilaterally.[92] If a dissatisfied state cannot withdraw from a compact, it can only argue for modification based on the compact's express terms.[93] At least one commentator has proposed a method for unilateral state revocation based on the reserved rights doctrine.[94] Under this theory, a state's withdrawal would involve it exercising an essential

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88. *See id.* at 111–12.

89. *See* Hasday, *supra* note 77, at 16. The author noted:

> If a compact falls seriously out of favor with enough people, there is a chance that Congress will free the states from their outdated accord. Moreover, unlike elsewhere in the compact jurisprudence, the law is clear on Congress' ability to alter or entirely preempt compacts to which it has agreed, whether or not the original compact legislation specifically reserves that right.

Id. (footnotes omitted).

90. *See* JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 720 (3d ed. 2000).

91. *See id.*; Arizona v. California, 373 U.S. 546, 565 (1963); Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, § 204, 104 Stat. 3289, 3295–3304 (1990).

92. *See supra* notes 76–80 and accompanying text.

93. *See* Texas v. New Mexico, 462 U.S. 554, 564 (1983) (holding that courts can only order relief that is consistent with a compact's express terms).

94. *See* Grant, *supra* note 27, at 109.

sovereign power for the purpose of promoting its citizens' economic welfare.[95] Even if a state successfully withdrew from a compact, obstacles associated with Supreme Court decisions remain problematic.[96] Accordingly, states seeking modification of water compacts by virtue of equitable apportionment face many barriers.

Finally, compact renegotiation is possible, but unlikely. In the common scenario of one state being advantaged by changing times, there is simply no incentive for it to give up benefits to its detriment.[97] Disadvantaged states are in a weak position to modify water compacts.

In sum, dissatisfied states suffer from compact permanence, outdated allocations, and the unavailability of unilateral modification or renegotiation. Thus, where compacts govern the source, water marketing may be the only hope for states requiring cross-border reallocations.

III. THE MARKET AS A USEFUL MECHANISM FOR REALLOCATING COMPACTED WATER

Currently, water reallocation presents the most practical means for supplying water to new or expanding users. Water markets are particularly appealing in the West, where the prior appropriation doctrine has long allowed users to transfer water rights.[98] Because appropriative water rights are essentially unlimited in duration,[99] reallocation becomes necessary to keep water from remaining stuck in its initial allocation.[100] In practice, economically efficient reallocation generally consists of transferring water from low value agricultural uses to higher-valued domestic uses.[101]

A. Pros and Cons of Water Markets

Water markets contain major benefits over other allocation methods.[102] A prominent study noted that the major advantages of water markets are:

> (1) they provide for flexible reallocation over time in response to economic, demographic, and social-value changes; (2) they involve only "willing seller-willing buyer" transactions; (3) due to the nature of "willing seller-

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95. *See id.* at 138–39.

96. *See id.* at 171–73.

97. *See id.* at 178.

98. Squillace, *supra* note 71, at 56.

99. *See* Arizona v. California, 283 U.S. 423, 459 (1931).

100. Gould, *supra* note 4, at 457–58.

101. Squillace, *supra* note 71, at 57–58; *see also* Charles W. Howe et al., *Innovative Approaches to Water Allocation: The Potential for Water Markets*, 22 WATER RESOURCES RES. 439, 439 (1986) ("It is ludicrous that Southern California should incur a cost in excess of $450 per acre-foot for additional water while irrigators in the Central Valley continue to irrigate thousands of acres of crops which are in surplus nationally.").

102. For more information about water markets, see TERRY L. ANDERSON & PAMELA SNYDER, WATER MARKETS: PRIMING THE INVISIBLE PUMP (1997); Andrew P. Morriss, *Real People, Real Resources, and Real Choices: The Case for Market Valuation of Water*, 38 TEX. TECH L. REV. 973, 974 (2006); Andrew P. Morriss et al., *Principles for Water*, 15 TUL. ENVTL. L.J. 335, 336 (2002).

> willing buyer" transactions, they provide security of tenure of property rights; (4) by providing market evidence of the value of water, they continually confront the water user with the real "opportunity cost" of the water being used, regardless of the often-distorted prices charged by water distribution agencies; and (5) the transaction costs of market transfers can be kept low under the right circumstances.[103]

Functioning intrastate water markets have been in existence for many years.[104] One well-known example is the Northern Colorado Water Conservancy District in Colorado.[105] The District allocates water based on tradable ownership shares.[106] Both agricultural and urban users can purchase shares in this active market so long as they can demonstrate that the water will be put to beneficial use.[107] The District currently serves a vast geographic area, delivering approximately 210,000 acre-feet of water per year to more than 800,000 people.[108]

Opponents of water markets contend that water is unique and not well suited for marketplace transactions. Some of the main arguments against water markets are based on physical constraints, minimal supply leading to seller monopolies, exclusion of externalities in the purchase price, and the fact water has an essential place in the integrated natural community.[109] Specifically at issue with interstate reallocation is the potential for physical barriers. Water can be difficult to transfer and may require new infrastructure, which generally uses a lot of energy. Nonetheless, moving water over great distances has become possible.[110] When water managers are exploring options for cross-border transfers, these concerns would have to be accounted for. Under marketing theory, transfers would only take place when the price, including transportation costs, is the most economically efficient option.

Despite these criticisms, a marketing approach's greatest strength may be

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103. Howe, *supra* note 11, at 358–59 (summarizing Howe et al., *supra* note 101).

104. Howe, *supra* note 11, at 359 (noting that Colorado has a 100-year history of trading water rights).

105. *Id.* (citing DANIEL TYLER, THE LAST WATER HOLE IN THE WEST: THE COLORADO-BIG THOMPSON PROJECT AND THE NORTHERN COLORADO WATER CONSERVANCY DISTRICT (1992)).

106. *Id.*

107. *Id.*

108. Squillace, *supra* note 71, at 79 (citing N. WATER, 2010 WATER QUALITY REPORT: FLOWING SITES EXECUTIVE SUMMARY 4 (2010)).

109. These arguments have been debated at length. For a more in-depth discussion, see, for example, Victor Brajer et al., *The Strengths and Weaknesses of Water Markets as They Affect Water Scarcity and Sovereignty Interests in the West*, 29 NAT. RESOURCES J. 489 (1989); Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 ENVTL. L. 27, 30–33 (1996); Joseph W. Dellapenna, *The Importance of Getting Names Right: The Myth of Markets for Water*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 317 (2000).

110. *See* City of El Paso v. Reynolds, 563 F. Supp. 379, 391 (D.N.M. 1983) (noting that "from a purely engineering standpoint, it is now possible to transport water over enormous distances"); Charles W. Howe, *Economic, Legal, and Hydrologic Dimensions of Potential Interstate Water Markets*, 67 AM. J. AGRIC. ECON. 1226, 1227 (1985) ("There is no reason why states that share no stream or aquifers in common could not or should not consider transferring water by canal or pipeline."); Beck & Anderson, *supra* note 5, at 14–75 ("[I]t became clear that practical limitations to moving water, such as mountain ranges, were no deterrence to the long-distance movement of water by human enterprise.").

that it remains one of the only viable methods for reallocating water governed by compacts.

B. Cross-Border Transfer Restrictions

Water policy developed in a piecemeal fashion throughout the twentieth century. States, which exert broad control over water within their borders through their police powers, formed individualized policies and regulations regarding water resources.[111] Since the turn of the twentieth century, state legislatures have exercised their police powers by restricting water exports. In 1908, the Supreme Court validated a water embargo in *Hudson County Water Co. v. McCarter*.[112] In that case, the Court held that New Jersey's characterization of its water as a state-owned resource justified the embargo.[113] Through the case, the Court set the stage for several decades of similar legislation. *Hudson County* resulted in the general perception that anti-export laws were constitutionally valid. Many states followed suit, and by the early 1980s, state water embargoes were common.[114]

Export prohibitions make interstate transfers impossible and constitute a major legal barrier to interstate water markets. For water markets to function, rights must be transferrable.[115] Removing obstructions to the free transfer of water rights is necessary for marketing to become an effective solution.[116]

IV. FREEING THE MARKET WITH THE DORMANT COMMERCE CLAUSE

Interstate water markets are not without hope: the Dormant Commerce Clause should preclude states from enacting export prohibitions. Indeed, throughout the twentieth century, the Supreme Court routinely invalidated discriminatory state statutes aimed at treating in-state and out-of-state users differently; specifically, the Court overturned statutes that benefitted the former and burdened the latter.[117]

Under the Articles of Confederation, states were not barred from enacting protectionist regulations. Protectionism pitted states against one another,

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111. *See* Davis & Pappas, *supra* note 15, at 183.

112. Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349 (1908).

113. *Id.* at 354.

114. *See* Edward B. Schwartz, *Water As an Article of Commerce: State Embargoes Spring a Leak under* Sporhase v. Nebraska, 12 B.C. ENVTL. AFF. L. REV. 103, 105–06 & n.20 (1985) (citing to statutes such as: ARIZ. REV. STAT. ANN. § 45-153B (1956); COLO. REV. STAT. § 37-81-101 (Supp. 1980); IDAHO CODE ANN. § 42-408 (1977); KAN. STAT. ANN. § 82a-726 (1977); MONT. CODE ANN. § 85-1-121 (1979); NEB. REV. STAT. §§ 46-233.01, -613.01 (1978); NEV. REV. STAT § 533.520 (1979); N.M. STAT. ANN. § [72-12-19] (1979) [mistakenly cited as section 537.810]; OKLA. STAT. ANN. tit. 82, § 1085.2.2 (West Supp. 1980); OR. REV. STAT. § 537.810 (1979); S.D. CODIFIED LAWS § 46-1-13 (1980) [cited as S.D. COMP. LAWS]; UTAH CODE ANN. § 73-2-8 (Supp. 1979); WASH. REV. CODE ANN. §§ 90.03.300, 90.16.110, 90.16.120 (1962); WYO. STAT. ANN. § 41-3-105 (1977)).

115. *See* J.W. Milliman, *Water Law and Private Decision-Making: A Critique*, 2 J.L. & ECON. 41, 46 (1959).

116. Gould, *supra* note 4, at 459.

117. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994).

undermined the formation of a cohesive union,[118] and caused "anarchy and commercial warfare."[119] Recognizing "the tendencies toward economic Balkanism that had plagued relations among . . . the States," the Framers sought to prevent states from enacting barriers to trade by granting Congress alone the power to regulate trade among the states.[120] The resulting Commerce Clause achieves this goal in one brief sentence: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . ."[121] Courts have found an implicit variation of the doctrine, the so-called Dormant Commerce Clause, which prevents states from creating legislation that interferes with Congress's right to regulate interstate commerce.

A. Natural Resources and the Commerce Clause

The Supreme Court has frequently used the Commerce Clause to invalidate natural resource export restrictions.[122] In *West v. Kansas Natural Gas Co.*, the Court considered an Oklahoma statute that discriminated against interstate commerce of natural gas.[123] The statute at issue limited natural gas exports across Oklahoma's state lines.[124] Oklahoma argued it had the right—by means of its general police powers—to conserve resources for future generations, and that, in and of itself, justified the statute.[125] Unpersuaded, the Court saw natural gas as property subject to the Commerce Clause:

> [W]hen the gas becomes property, takes from it the attributes of property, [] the right to dispose of it; indeed, [Oklahoma] selects its market, to reserve it for future purchasers and use within the state, on the ground that the welfare of the state will thereby be subserved. The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation.[126]

The Court believed that, if validated, the statute would hinder mutually

118. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 807 (1976).

119. *See* City of El Paso v. Reynolds, 563 F. Supp. 379, 381 (D.N.M. 1983) ("It was the anarchy and commercial warfare between the states which emerged after the Revolutionary War that led to the Constitutional Convention. Having experienced the rivalries and disruptions caused by economic barriers and retaliations, the necessity for centralized regulation of commerce among the states was obvious to the Founders." (citing H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533–34 (1949))).

120. Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

121. U.S. CONST. art. I, § 8, cl. 3.

122. *See, e.g.*, *Hughes*, 441 U.S. 322 (striking down a prohibition on transporting minnows out of state); *H. P. Hood*, 336 U.S. 525 (denial of a milk distribution license); West v. Kan. Natural Gas Co., 221 U.S. 229 (1911) (natural gas export restriction).

123. 221 U.S. at 250.

124. *Id.*

125. *Id.* at 251.

126. *Id.* at 254–55.

beneficial trade between the states. "Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals . . . . 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."[127]

The *West* analysis emerged as the prevailing approach to Commerce Clause challenges to state regulation of natural resource exports.[128] Subsequently, in *Hughes v. Oklahoma*, the Court expressly rejected a general natural resources exception to Commerce Clause review.[129] While constitutional tests have evolved,[130] the general principle has remained with the Court that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders."[131]

B. Sporhase*, Water, and the Commerce Clause*

In due time, the Court extended its Commerce Clause jurisprudence to water.[132] As state water embargoes fit squarely within the Court's definition of economic protectionism, the Court simply had to find the right facts to continue its trajectory of invalidating protectionist statutes involving natural resources, this time regarding water. *Sporhase* provided that opportunity.

In *Sporhase*, the Court shattered the longstanding belief that anti-export water laws were constitutional. [133] At issue in *Sporhase* was a Nebraska statute requiring permits for the withdrawal of water destined for out-of-state export.[134] Preliminarily, the Court determined water qualified as an "article of commerce," thus subjecting it to Commerce Clause scrutiny.[135] The Court next applied the Commerce Clause test as stated in *Hughes v. Oklahoma*, holding the permit's reciprocity requirement failed to meet strict scrutiny.[136] It then concluded that Nebraska's claimed conservation and preservation rationale was

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127. *Id.* at 255–56.

128. *See* Hughes v. Oklahoma, 441 U.S. 322, 330 (1979).

129. *See id.* at 335.

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

131. City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978).

132. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982); *see also* City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex.) (holding that a Texas statute violated the Commerce Clause by requiring legislative permission before water could be exported from an underground source in Texas for use in another state), *aff'd*, Carr v. City of Altus, 385 U.S. 35 (1966) (affirming without opinion).

133. *See Sporhase*, 458 U.S. at 960.

134. *Id.* at 958.

135. *Id.* at 953–55.

136. *Id.* at 957–58. While the Court began its analysis by announcing it would apply the *Pike v. Bruce Church* test—a test normally reserved for facially neutral statutes—it later concluded Nebraska's reciprocity requirement "operate[d] as an explicit barrier to commerce between the two States." *Id.* at 957. In light of this determination, the Court applied the strict scrutiny test stated in *Hughes v. Oklahoma* to invalidate Nebraska's reciprocity requirement. *Id.* at 957–58 (citing Hughes v. Oklahoma, 441 U.S. 332, 336 (1979)).

not narrowly tailored.[137] Furthermore, the Court noted, "even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State" under Nebraska's law.[138] Accordingly, the Court's desire to limit interstate transfer prohibitions seemed clear.

Nonetheless, state legislation burdening interstate commerce can be upheld if an exception to the standard Dormant Commerce Clause analysis applies.[139] Exceptions can come from congressional consent or a state interest.[140] First, because the Commerce Clause grants Congress the power to regulate commerce, Congress can authorize states to "impose otherwise impermissible burden[s] on commerce."[141] Second, states can attempt to define an interest sufficient to excuse Commerce Clause scrutiny. But, this state interest exception lacks clearly defined parameters.[142] One way states can obtain a sufficient interest, for example, is by acting as "a market participant, rather than as a market regulator."[143] Essentially, when a state itself participates in an interstate transaction, it can choose what parties it wishes to deal with, unrestrained by the Commerce Clause.[144]

In *Sporhase*, Nebraska argued for both exceptions. The Court quickly dealt with the state interest argument based on Nebraska's alleged state ownership of water; explaining that the argument was premised upon an outdated "legal fiction" and that state ownership alone does not absolutely remove the water from Commerce Clause scrutiny.[145] In support of its congressional consent argument, Nebraska presented interstate compacts and thirty-seven statutes.[146] According to the Court, the cited material only demonstrated deference to state water law and failed to indicate that Congress wished to remove federal constitutional constrains on state laws.[147] The Court held that Dormant Commerce Clause implications are "ingredients of the *valid* state law to which Congress has deferred."[148] In few words, the Court concluded congressional consent must be "expressly stated."[149] In later opinions, the Supreme Court clarified that congressional consent must also be

137. *Id.*

138. *Id.* at 958.

139. *See* Olen Paul Matthews & Michael Pease, *The Commerce Clause, Interstate Compacts, and Marketing Water across State Boundaries*, 46 NAT. RESOURCES J. 601, 623–26 (2006).

140. *Id.*

141. *Sporhase*, 458 U.S. at 958 (finding that Congress had not done so with the statutes in question); *see also* New England Power Co. v. New Hampshire, 455 U.S. 331, 339–40 (1982).

142. Matthews & Pease, *supra* note 139, at 624.

143. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 93 (1984).

144. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 439 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).

145. *Sporhase*, 458 U.S. at 957.

146. *See id.* at 958–59. The groundwater at issue was not subject to a compact apportionment. *Id.* at 959.

147. *Id.* at 959–60.

148. *Id.* at 960.

149. *Id.* (quoting New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982)).

"unmistakably clear," "affirmatively contemplate[d],"[150] and "unambiguous."[151]

In the thirty years since *Sporhase*, uncertainty over the constitutionality of water embargoes has plagued water law.[152] In particular, states were unsure whether *Hudson County* was overruled,[153] whether protectionist statutes could be constitutional, and how water compacts factored into the equation.[154] The Supreme Court recently had an opportunity to clarify this ambiguity in *Tarrant Regional Water District v. Herrmann*.[155] Unfortunately, the Court neglected to do so.

V. HOW *TARRANT REGIONAL WATER DISTRICT V. HERRMANN* WILL UNNECESSARILY THREATEN INTERSTATE WATER MARKETS

A. Factual Background and Dispute

Tarrant Regional Water District, the petitioner in this case, brought suit in an attempt to secure additional water for the citizens it served.[156] Tarrant chose a site within Oklahoma because it claimed that this location provided the closest practical source of water for both immediate and long-term needs.[157] The case revolved around the Red River Compact (the Compact),[158] which was signed by the four states sharing the Red River: Texas, Oklahoma, Louisiana, and Arkansas.[159] Congress approved the Compact in 1980.[160]

As a state agency, Tarrant provides water to more than 1.7 million people in North Central Texas.[161] By 2060 this population is expected to double.[162]

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150. S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984). The Court noted:

> There is no talismanic significance to the phrase "expressly stated," however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine.

Id. at 91–92.

151. Maine v. Taylor, 477 U.S. 131, 139 (1986).

152. *See* Davis & Pappas, *supra* note 15, at 179; Harnsberger et al., *supra* note 15, at 758; Arthur H. Chan, *Policy Impacts of* Sporhase v. Nebraska, 22 J. ECON. ISSUES 1153, 1157 (1988).

153. *See, e.g.*, Schwartz, *supra* note 114, at 130 (noting that "[t]he extent of the discrimination which will be permitted under the *Sporhase* decision . . . is unclear").

154. *See* Douglas L. Grant, *State Regulation of Interstate Water Export*, *in* 3 WATERS AND WATER RIGHTS § 48.03 (Amy K. Kelley ed., 2013).

155. Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120 (2013).

156. *See id.* at 2125.

157. Brief for Petitioner at 13, *Tarrant*, 133 S. Ct. 2120 (No. 11-889), 2013 WL 648740, at *13.

158. Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980).

159. 133 S. Ct. at 2125.

160. 94 Stat. at 3305.

161. Amended Complaint at ¶ 2, Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2009 WL 3922803, at *1 (W.D. Okla. 2009); *see also* 133 S. Ct. at 2128 (providing that Tarrant's territory includes the cities of Fort Worth, Arlington, and Mansfield).

162. Amended Complaint, *supra* note 161, at ¶ 13.

Tarrant first attempted to purchase water from Oklahoma in 2000 during a severe regional drought.[163] After negotiations to purchase the water failed, Tarrant tried applying for a water resource permit from the Oklahoma Water Resources Board (OWRB). Notably, Tarrant now argued it had a right to the water under the Compact, and sought to export it from inside Oklahoma, resulting in a cross-border diversion.[164] Oklahoma had an array of strict water export laws[165] that led the state's attorney general to announce that out-of-state users were "unrealistic" permit applicants.[166] Due to the unlikely outcome of its permit application,[167] Tarrant concurrently filed suit in federal district court.[168]

Tarrant sought a declaratory judgment holding Oklahoma's statutes unconstitutional and an injunction to prevent the OWRB from applying the statutes to its permit application.[169] Tarrant argued that the Compact, as federal law, preempted Oklahoma's statutes and that Oklahoma's statutes violated the Commerce Clause by preventing interstate commerce of water.[170] The district court granted summary judgment to the OWRB on both of Tarrant's claims and the Tenth Circuit affirmed.[171] The Supreme Court granted Tarrant's petition for writ of certiorari.[172] At issue was Texas's right to import water located within Oklahoma.[173] *Tarrant* presented the Supreme Court with two federalism questions: (1) how do federal interstate water compacts relate to the preemption of state water laws, and (2) how do water compacts fit into the *Sporhase* legacy?

B. The Supreme Court's Analysis

The Court rejected both of Tarrant's claims by focusing on the Compact's express terms. Primarily, the Court devoted its attention to the preemption argument, and after applying contract law, held that the Compact did not require Oklahoma to export water to Texas.[174]

The preemption issue centered on the parties' contrasting interpretations of section 5.05(b)(1) of the Compact.[175] Tarrant argued that the provision

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163. 133 S. Ct. at 2128.

164. *Id.* at 2128–29.

165. *See, e.g.*, OKLA. STAT. ANN. tit. 82, §§ 105.12A(D), 1085.22, 1085.2(2), 1324.10(B) (West 2014).

166. 133 S. Ct. at 2129.

167. *See* Amended Complaint, *supra* note 161, at ¶ 22 ("Under Oklahoma law, Defendants acting in their official capacities as the governing board members of OWRB are required to follow an Attorney General Opinion until a court determines otherwise." (citing Hendrick v. Walters, 865 P.2d 1232, 1243 (Okla. 1993); Tarrant Reg'l Water Dist. v. Sevenoaks, 545 F.3d 906, 909 n.2 (10th Cir. 2008))).

168. 133 S. Ct. at 2129.

169. Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222, 1228–29 (10th Cir. 2011).

170. 133 S. Ct. at 2129.

171. *Id.*

172. *Id.*

173. *Id.* at 2126.

174. *Id.* at 2137.

175. *See id.* at 2126–27. The section provided:

established a borderless resource that all signatory states could access, regardless of state boundaries.[176] On the other hand, the OWRB contended the provision established an equal opportunity for excess water use, but only within each state's borders.[177] Because the provision did not mention cross-border rights, determining the Compact's intent became the key to resolving the dispute.[178] Tarrant argued that, as federal law, the Compact should preempt Oklahoma's statutes.[179]

Three considerations persuaded the Court that cross-border rights were not granted in the Compact: the principle that "[s]tates do not easily cede their sovereign powers," the fact that other compacts explicitly mentioned cross-border rights, and "the parties' course of dealing."[180] First, the Court noted when "deciding a question of title to a bed of navigable water within a State's boundaries [it] must . . . begin with a strong presumption against defeat of a State's title."[181] With this principle in mind, the Court held it was unlikely that Oklahoma would have intended to give up its sovereign rights through anything short of "a clear indication of such devolution."[182] Second, the Court examined other compacts to determine the typical trade usage.[183] The Court concluded that when compacts permit cross-border relationships, they typically contain express language to this effect.[184] Third, the Court looked at the parties' course of dealing under the Compact.[185] It noted that prior to Tarrant filing suit in 2007, no state had pressed for a cross-border diversion under the Compact.[186] Furthermore, Tarrant attempted to purchase water from Oklahoma in 2000, "a strange offer if [it] believed it was entitled to demand such water without payment."[187] Accordingly, the Court determined, "[t]he Compact creates no cross-border rights in Texas."[188] The Court concluded its preemption analysis by holding that the Compact supported Oklahoma's statutes. Tarrant's preemption argument therefore failed.[189]

The Court quickly dealt with Tarrant's remaining Dormant Commerce

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> (1) The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second [hereinafter CFS] or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 [CFS].

Id. at 2127.

176. *Id.* at 2129.
177. *Id.* at 2130.
178. *Id.*
179. *Id.*
180. *Id.* at 2132.
181. *Id.* (citations omitted) (internal quotation marks omitted).
182. *Id.* at 2133.
183. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (1981) (explaining that "usage of trade" can become a relevant factor when interpreting a contract)).
184. *Id.* at 2134.
185. *Id.* at 2135.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 2136.

Clause argument.[190] Tarrant contended that Oklahoma's statutes impermissibly burdened interstate commerce by preventing out-of-state exports of "unallocated" water.[191] The Court read the Compact differently. It held that no water was left unallocated, and unless and until another state called for an accounting, Oklahoma was allocated the water at issue.[192] Thus, in order for Texas to have a justiciable claim, an accounting must reveal that Oklahoma was using more than its 25 percent share.[193] The Court ended its opinion with a general holding that "Oklahoma's laws [do not] run afoul of the Commerce Clause."[194]

C. The Supreme Court Should Have Looked More Closely at the Dormant Commerce Clause Argument

Despite being a well-reasoned opinion, *Tarrant* essentially avoided a Commerce Clause analysis and did not address the practical implications of its holding—the unnecessary restriction on interstate water marketing. Overall, *Tarrant* correctly construed the ambiguous compact language and arrived at the proper outcome: Texas did not have a right to access water within Oklahoma. Nonetheless, Oklahoma's statutes should not have received blanket validation. From a practical perspective, these statutes stand to prevent willing buyers and sellers from transferring water across state boundaries. Extending beyond the Red River Compact, though, *Tarrant* stands to validate similar water export restrictions under other compacts.[195] Because water compacts govern more than 95 percent of the available interstate surface freshwater in the United States,[196] *Tarrant* may serve as a significant impediment to interstate water markets.

The Supreme Court erred in *Tarrant* by not distinguishing between initial allocations to states and future reallocations by those holding water rights.[197] This distinction extends from *Sporhase*, which, when read narrowly, only applies to the commerce that occurs when one who owns a water right transfers that right across state lines.[198] It does not apply when a state initially allocates water rights to those who seek to put water to use.[199] Had the Court made this distinction, it could have rejected Tarrant's claim while preserving the interstate water market. To do so, water distribution under compacts must be broken down into at least two distinct steps.

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190. *See id.*
191. *Id.*
192. *Id.* at 2137.
193. *Id.*
194. *Id.*
195. *See infra* Conclusion.
196. Hall, *supra* note 3, at 239.
197. *Cf.* Frank J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347, 351 (1985).
198. *See* Trelease, *supra* note 197, at 351.
199. *See id.*

First, the compact allocates water to the state. Under this step, water is not appropriated to specific users but remains in the state's general control. Common principles of equity and state sovereignty dictate that a state may place restraints upon water at this stage; limiting distribution in a way that guarantees the state receives the primary economic benefits of first use.[200] These benefits include property taxes, severance taxes, and state income taxes.[201] Even if water is transferred across state lines, the primary economic benefits remain with the state of origin.[202] In contrast, the Commerce Clause should prevent states from keeping secondary benefits or "multiplier effects" stimulated by the use of the natural resource within the state of origin.[203] Allowing a state to retain all secondary benefits would frustrate the Commerce Clause's clear purpose of preventing economic protectionism.

Second, states distribute their allocated water among public and private users. Once these users have obtained water rights, states' ability to restrict reallocation through economically protectionist statutes should be limited.[204] In other words, once water is placed in purely private ownership it should be allowed to move freely across state lines.[205] Thus, after the first step, state water law should treat both interstate and intrastate reallocations similarly, without burdening the former to benefit the latter. This scheme would properly leave water on the list of natural resources protected by the Commerce Clause.[206] Similar to other natural resources that have received Supreme Court scrutiny—such as netted shrimp,[207] seined minnows,[208] natural gas,[209] and felled trees[210]—once water has been reduced to a property interest it should remain subject to Commerce Clause constraints.[211]

In *Tarrant*, the Court could have rejected Texas's claim without using such broad language. A narrower approach, distinguishing between initial allocations and future allocations, would have allowed the Court to rule in favor of Oklahoma while keeping interstate water marketing a viable option. For instance, the Court could have first held that Oklahoma's statutes were exempt from Commerce Clause scrutiny with regards to the initial water allocations made under the Compact. Next, the Court could have specified that once individual users possessed water rights, Oklahoma's statutes must treat

200. *Cf. id.* at 361.

201. *See id.* at 357–60.

202. *See id.* at 359.

203. *See id.* These "multiplier effects" would yield additional tax benefits from resales of the natural resource and may lead to future development within the state of origin. *See id.* at 358–59.

204. *See id.*

205. *See id.* at 351.

206. *See id.* at 359.

207. *See* Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

208. *See* Hughes v. Oklahoma, 441 U.S. 322 (1979).

209. *See* West v. Kan. Natural Gas Co., 221 U.S. 229 (1911); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

210. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984).

211. *See* Trelease, *supra* note 197, at 359.

out-of-state and in-state purchasers the same. Thus, those holding private water rights would be free to negotiate transactions across state boundaries, unencumbered by economically protectionist statutes. The result would have upheld state sovereign rights and allowed interstate market-based reallocations. Unfortunately, the Court did not make this distinction, casually writing water markets out of the picture.

D. The Court Should Not Have Upheld Oklahoma's Statutes So Broadly

In *Tarrant*, the Court did not apply any constitutional tests.[212] Had it made the distinction between initial allocations and future reallocations, applying these tests may have been unnecessary to achieve the narrowed holding for which this Note advocates. Nonetheless, Oklahoma's statutes should not have survived constitutional muster so broadly.

Oklahoma's statutes facially discriminated against interstate commerce. Statutes discriminate when they burden out-of-state users to the benefit of in-state users. The statutes at issue required only out-of-state users to obtain legislative approval to receive a permit,[213] created a separate permit review process that only applied to out-of-state users,[214] and required that "[w]ater use within Oklahoma . . . be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state."[215] While facially discriminatory statutes are "virtually per se invalid,"[216] it would have remained possible for Oklahoma to survive this "strictest scrutiny."[217] But it seems unlikely Oklahoma could have demonstrated sufficient local benefits or the unavailability of nondiscriminatory methods. In fact, local communities and water districts stood to benefit from the $15 to $60 million per year Texas would have paid for the water rights.[218]

Because the balancing test for facially discriminatory statutes is so difficult for defending states to satisfy, Oklahoma's best argument would have been congressional consent. According to the Court's jurisprudence, the central questions should have been: Was congressional consent "expressly stated,"[219] an "unambiguous statement,"[220] "unmistakably clear," and "affirmatively

212. *See* Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120 (2013).

213. OKLA. STAT. ANN. tit. 82, § 105.12A(D) (West 2014).

214. § 105.12(F).

215. § 1086.1(A)(3).

216. *See* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994); *see also* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

217. Maine v. Taylor, 477 U.S. 131, 141, 151–52 (1986) (upholding a facially discriminatory state ban on the importation of baitfish because it promoted the legitimate purpose of protecting Maine's fish from out-of-state baitfish parasites and was the least discriminatory means available, as there was no method for testing for baitfish parasites).

218. Nicholas Andrew, *Interstate Water Transfers and the Red River Shootout*, 41 TEX. ENVTL. L.J. 181, 182 (2011).

219. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 960 (1982).

220. 477 U.S. at 139.

contemplated?"[221] Specifically, did Congress consent to an otherwise impermissible burden on interstate commerce?

Congress only read the Compact's express terms before ratification. Though a federal facilitator was present, members of Congress were not substantially involved in the negotiations.[222] According to the legislative history, members were ordered to read the Compact three times before passing it.[223] Aside from engrossed readings of the Compact's express terms, the legislative history does not indicate that Congress contemplated or discussed specific aspects of the Compact or potential burdens to interstate commerce.[224] Consequently, congressional consent must have been based on the express terms of the Compact.

After examining the express terms, the Court concluded that the Compact's treatment of cross-border diversions was ambiguous, but after applying contract law, held that they were unauthorized.[225] By so holding, the Court's logic would seem to cut against an argument in favor of Oklahoma, insofar as consent being an "unambiguous statement."[226] The Compact did, however, contain express terms deferring to state law. For example, section 2.01 stated:

> Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact.[227]

Under this section, deference to state law appeared "expressly stated."[228] Conversely, authority to burden interstate commerce did not. The analysis's crux, therefore, would be determining whether broad deference to state law is sufficient to survive Commerce Clause scrutiny. The constitutional bar should have been set high enough that boilerplate language like this falls short.

Some compacts do contain the "unambiguous statement" required to constitutionally restrict reallocations.[229] These compacts go beyond the typical

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221. S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984) ("[F]or a state regulation to be removed from the reach of the dormant commerce clause, congressional intent must be unmistakably clear.").

222. *See* Brief of Olen Paul Matthews & Michael Pease as Amici Curiae in Support of Petitioners at 25, Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120 (2013) (No. 11-889), 2013 WL 936611, at *25.

223. 126 CONG. REC. 27046 (daily ed. Sept. 24, 1980).

224. *See id.* at 27046–50.

225. *Tarrant*, 133 S. Ct.at 2137.

226. Maine v. Taylor, 477 U.S. 131, 139 (1986).

227. Red River Compact, Pub. L. No. 96-564, § 2.01, 94 Stat. 3305, 3306 (1980).

228. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 960 (1982).

229. *See* Snake River Compact, Pub. L. No. 81-464, art. IV, 64 Stat. 29, 31 (1950) (specifying that Wyoming cannot divert water outside the Snake basin without Idaho's consent and Idaho cannot divert water from the Salt River basin without Wyoming's consent); Yellowstone River Compact, Pub. L. No. 82-231, art. X, 65 Stat. 663, 669 (1951); Klamath River Basin Compact, Pub. L. No. 85-222, art. III(B)(2)(a), 71 Stat. 497, 499 (1957) (prohibiting diversions from the upper Klamath River basin);

allocation of water and expressly authorize the signatory states to constrain or prevent water transfers. For instance, one of these provisions came before the Ninth Circuit in *Intake Water Co. v. Yellowstone River Compact Commission*.[230] In that case, the court upheld a clause stating, "[n]o waters shall be diverted from the Yellowstone River Basin without unanimous consent of all the signatory states."[231] Without much hesitation, the court concluded that Congress had approved this specific language, immunizing it from Commerce Clause attack.[232] This case provided a clear example of the type of "unmistakably clear"[233] language required for congressional consent. It remains noteworthy that none of these compacts restrict exports across state lines.

In dicta, *Sporhase* left open the possibility for states to limit exports based on citizen health concerns.[234] Though *Sporhase* had been the only case—and practically speaking remains the only case—in which the Court analyzed water diversion restrictions under the Commerce Clause, the District Court of New Mexico provided guidance on the viability of *Sporhase*'s dictum in *City of El Paso v. Reynolds*.[235] In that case, the city of El Paso, Texas, brought suit after being denied a permit to import water from New Mexico.[236] The court invalidated the facially discriminatory statute, holding, "a state may discriminate in favor of its citizens only to the extent that water is essential to human survival. Outside of fulfilling human survival needs, water is an economic resource."[237] New Mexico argued its future human welfare needs required the export prohibition.[238] Reasoning that such welfare needs extended beyond health to economic uses, the court held that any future shortages would be caused by state policies promoting new uses of water for economic activity.[239] The facts before the court were particularly harmful to New Mexico's argument. Specifically, future public health and safety demands were estimated at 220,000 acre-feet per year, while renewable water supply was estimated at 2.2 million acre-feet per year.[240] In essence, the court in *El Paso*

Kansas-Nebraska Big Blue River Compact, Pub. L. No. 92-308, art. V, § 5.4, 86 Stat. 193, 197 (1972) (requiring approval of compact administration to export water from the basin); Goose Lake Basin Compact, Pub. L. No. 98-334, art. III(C), 98 Stat. 291, 292 (1984).

230. Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568 (9th Cir. 1985).

231. *Id.* at 569.

232. *Id.* at 570 (citing Intake Water Co. v. Yellowstone River Compact Comm'n, 590 F. Supp. 293, 296–97 (D. Mont. 1983)).

233. S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984).

234. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 958 (1982) ("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."). However, this dicta's "demonstrably arid" phrase suffers from ambiguity.

235. City of El Paso v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

236. *Id.* at 381.

237. *Id.* at 389 (interpreting H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949)).

238. *Id.*

239. *Id.* at 389–90.

240. *Id.* at 389.

followed *Sporhase*'s logic, concluding "[a]t the present time the most economically productive use of this excess water is across the New Mexico-Texas state line."[241]

Similar to New Mexico, Oklahoma only allocated a small percentage of its total renewable water supply.[242] Any future shortages, therefore, would likely be due to new water uses for economic activity. According to *El Paso*, public welfare arguments based on future needs beyond human survival should fail.[243] Thus, under this interpretation, Oklahoma would have been unable to successfully rely on this argument.

Oklahoma could have also potentially argued that anti-export statutes were so common at the time of the Compact's signing that they were presumed to be a legitimate part of state law. While the courts have not contemplated this argument, it deserves consideration. For example, by 1980, when the Compact was signed, fourteen of the twenty-three Western states restricted water exports by statute.[244] However, if Oklahoma had put forth this argument the facts present would have likely limited its potential success. First, Oklahoma was the only signatory state to have an export restriction when the Compact was enacted. Second, while Compact negotiations were underway, Texas became the first state to have an anti-export water statute invalidated by the Commerce Clause.[245] In *City of Altus v. Carr*, an Oklahoma city challenged a Texas statute because it required that out-of-state users obtain legislative approval prior to obtaining an export permit.[246] The court cited to Supreme Court Commerce Clause cases and held that the statute placed an unreasonable burden on interstate commerce.[247] At issue in *Tarrant* was Oklahoma's version of that same statute. In light of this, an Oklahoma argument based on the presumed legitimacy of anti-export state laws would have likely failed.

Furthermore, based on changed times and the lack of other reallocation

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241. *Id.* at 391. The Honorable C.J. Bratton continued:

> Municipal and industrial water uses are more economically productive than other uses. For example, they will support seventy times as many people as water applied to irrigated agriculture. El Paso is the economic hub of an interstate region which includes southern New Mexico; it is the major trade center and contains the area's principal employers. If El Paso were in New Mexico defendants probably would agree with plaintiffs that the most beneficial and economically productive use of the Hueco and Mesilla Bolson ground water is in El Paso for the simple reason that what is good for El Paso is good for the entire region, including southern New Mexico.

Id.

242. Amended Complaint, *supra* note 161, at ¶ 8 ("OWRB reports that the approximate total allocated water use in Oklahoma is 2.6 million acre feet per year, only about 2.6% of the estimated 34 million acre-feet of unused water flowing *out* of the state each year through Oklahoma's two major river basins, the Red River and Arkansas River.").

243. *See City of El Paso*, 563 F. Supp. at 389.

244. *See* Schwartz, *supra* note 114, at 105–06.

245. *See* City of Altus v. Carr, 255 F. Supp. 828, 840 (W.D. Tex.), *aff'd*, Carr v. City of Altus, 385 U.S. 35 (1966).

246. *Id.* at 830.

247. *Id.* at 839–40 (citing Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kan. Natural Gas Co., 221 U.S. 229 (1911)).

options,[248] arguments based on the presumed legitimacy of state water embargoes should not be upheld. States do not have the power to unilaterally burden commerce; only Congress may do so.[249] In *Sporhase*, the Court seemingly agreed when concluding, "the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement [is not] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce."[250]

Accordingly, when applying Supreme Court jurisprudence with the Commerce Clause's intent in mind, Oklahoma's export restrictions should not have received blanket constitutional immunity.

E. Tarrant *Stands to Needlessly Repress the Developing Interstate Water Market*[251]

Water transfer impediments arise from the slowness with which institutions respond to economic and social value changes.[252] Laws, regulations, and administrative procedures regularly fall behind the changing economic, demographic, and technological times, resulting in outdated patterns of inefficient water use.[253] Large quantities of interstate water could be transferred to more efficient uses, thereby providing benefits to everyone involved.

Interstate transfers were likely to become more common where rivers form state borders. For instance, interstate marketing was destined to take place on the Red River, if not for Oklahoma's export restrictions. The city of Irving, Texas, had contracted with the city of Hugo, Oklahoma, to purchase water from across state lines.[254] While the required permit application was pending, Hugo and Irving filed suit against the OWRB seeking declaratory judgment that Oklahoma's export restrictions violated the Commerce Clause.[255] In a two-to-one decision in *City of Hugo v. Nichols*, the Tenth Circuit quashed this interstate reallocation.[256] The case was vacated for lack of federal jurisdiction,

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248. *See supra* Part III.

249. *See* Matthews & Pease, *supra* note 139, at 653 ("Regardless of the intent of the states signing a compact, it is the intent of Congress that is the key. The Commerce Clause can only be burdened by Congress, not the states.").

250. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 960 (1982). However, the Court also noted that "the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by [the Court's] equitable apportionment decrees but also by the negotiation and enforcement of interstate compacts." *Id.* at 956 (citations omitted). The Court failed to define these "certain circumstances," but the most logical examples come from restrictions expressly contained under compacts. *See supra* notes 229–233 and accompanying text.

251. While the majority of scholarly work on water marketing was published during the 1980s, the principles remain valid today.

252. Howe, *supra* note 11, at 360.

253. *See id.* at 360–61.

254. City of Hugo v. Nichols, 656 F.3d 1251, 1253–54 (10th Cir. 2011), *cert. denied*, City of Hugo v. Buchanan, 132 S. Ct. 1744 (2012).

255. *Id.* at 1254.

256. *Id.*

based on the court's interpretation of the doctrine of political subdivision standing.[257] *City of Hugo* shows that some cities were willing to negotiate interstate reallocation transactions, and but for anti-export statutes, they were likely to take place.

Additionally, river development often occurs in a way that requires interstate reallocation. Typically, cities located in lower basins develop earlier and continue to develop faster than upper-basin cities.[258] This "divergent growth pattern" results in lower basins requiring additional water above and beyond initial allocations. [259] Upper basins often become the most practical supply, as using the shared river reduces transmission costs.[260] The Colorado River provides a good example, with lower basin demands coming primarily from the Metropolitan Water District of Southern California.[261] A 1985 quantitative study of the Colorado River Basin indicated that large quantities of upper-basin water were available at relatively low prices.[262] Beyond the Colorado River, however, there is generally a lack of substantive information regarding available water and pricing. Nonetheless, this development pattern and example seems to support the need for interstate water marketing.

F. But What About Oklahoma?

Marketing should, and will, continue to play a large role in the reallocation of water. Despite the advertised economic benefits, many have vehemently protested adopting water marketing. Some object due to the real and perceived existence of losses that can occur when areas from which water is taken—the areas of origin—are insufficiently compensated.[263] For markets to remain equitably sound, these areas must be assured that the purchase price of water adequately includes all associated costs.[264] Ideally, compensation would reflect actual costs incurred by the area of origin, with payment going to those suffering the losses.[265] While a preliminary study of five Southwestern water markets concluded that they worked well at efficiently reallocating water

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257. *Id.*

258. Howe, *supra* note 110, at 1227 ("This pattern stems from the obvious differences in factor endowment and location.").

259. *Id.*

260. *See id.*

261. *Id.*

262. *Id.* at 1230.

263. Howe, *supra* note 11, at 361.

264. *See* Lawrence J. MacDonnell & Charles W. Howe, *Area-of-Origin Protection in Transbasin Water Diversions: An Evaluation of Alternative Approaches*, 57 U. COLO. L. REV. 527, 542 (1986). The authors noted:

> Losses to the area of origin are likely to take four main forms: (1) current and future losses of net income directly associated with *diversions and consumptive uses* that are curtailed because of a water transfer; (2) current and future losses of *instream* values; (3) losses of incomes in activities *economically linked* to those diversions and instream values; and (4) losses which accrue to society at large in the area of origin.

Id.

265. *See id.* at 547.

between agriculture, cities, and industry,[266] the author noted that the prices could better reflect all external costs.[267]

To achieve the potential benefits, while mitigating the shortcomings, markets need to be "strengthened through institutional reform and constrained where [they] fail[] to account for important social values."[268] Of course, concerns are not limited to simply economic motivations. Many view water as more than a commodity; indeed, humans require water as a matter of basic survival. But beyond basic survival needs, some communities view water as a resource that provides identity and existence.[269] These values should not be brushed aside lightly. They require substantial attention, and creative solutions, to adequately address the equities involved.[270]

Aside from the view that water is a priceless natural resource, states like Oklahoma probably worry about intrusions into their inherent state sovereignty. The Supreme Court has concluded that control over land and water within a state's borders remains a quintessential element of state sovereignty.[271] However, this general proposition has been limited in scope[272] and must be balanced with the federal government's constitutional powers. By advocating for a narrowed holding, distinguishing between initial allocations to states and future reallocations by private users, this Note strikes a balance between state sovereignty concerns and a system of national commerce.

Achieving maximum efficiency requires flexibility, a feature most compacts lack. Water law should allow allocations to respond as demands and values change.[273] In 1965, the late Frank Trelease, a leader in water law, succinctly said:

> No system of water rights should result in a rigidity that will hamper future generations, nor impose upon those generations a water use pattern suitable only for a bygone age. A water use law should be flexible enough so that today's lack of omniscience or prescience will not prevent the correction of mistakes. It must grow with the times. The water rights it creates must be flexible enough to enable shifts from use to use. While it may be permissible to assume that the use to which water is first put is the most desirable and economic at the time, it is fallacious to presume that such a

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266. Bonnie Colby Saliba, *Do Water Markets "Work"? Market Transfers and Trade-Offs in the Southwestern States*, 23 WATER RESOURCES RES. 1113, 1113 (1987).

267. *Id.*

268. Howe, *supra* note 11, at 368.

269. Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 14 (2003) (citing INT'L JOINT COMM'N, PROTECTION OF THE WATERS OF THE GREAT LAKES, FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES 6 (2000)).

270. Many commentators have debated this and proposed innovative solutions. *See, e.g.*, MacDonnell & Howe, *supra* note 264, at 536; Howe et al., *supra* note 101, at 440.

271. *See* California v. United States, 438 U.S. 645, 658, 663 (1978).

272. *See, e.g.*, *id.* ("[Each state] may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State." (quoting Kansas v. Colorado, 206 U.S. 46, 94 (1907))).

273. MacDonnell & Howe, *supra* note 264, at 536.

> use would be the best for all time. While we may wish to encourage water resource development today for its immediate benefits, getting the best use possible under present conditions, in years to come we may find that new or different uses promise greater benefits.[274]

CONCLUSION

Tarrant will not prevent states from attempting future cross-border transfers. The pressure on today's urban water managers to secure new water supplies is simply too great and will only increase with time. While the success of any attempted cross-border transfers will necessarily depend on the facts, *Tarrant*, at a minimum, stands to add an additional hurdle. Twelve out of seventeen Western states currently restrict interstate water transfers.[275] These twelve states are parties in twenty-two out of twenty-three Western water allocation compacts.[276] With these statistics in mind, it appears *Tarrant*'s

274. Trelease, *supra* note 29, at 30.

275. *See* Douglas L. Grant, *The Future of Interstate Allocation of Water*, *in* 29 ROCKY MTN. MIN. L. INST. 977, 1002–04 (1983); ARIZ. REV. STAT. ANN. §§ 45-291 to -294 (West 2014); COLO. REV. STAT. ANN. §§ 37-81-101 to -104 (West 2014); IDAHO CODE ANN. § 42-401 (West 2014); KAN. STAT. ANN. §§ 82a-726, 82a-1502 to -1504 (West 2014); MONT. CODE. ANN. §§ 85-2-311, -316 (West 2013); NEB. REV. STAT. ANN. § 46-613.01 (West 2013); NEV. REV. STAT. ANN. §§ 533.515 to 533.524 (West 2013); N.M. STAT. ANN. § 72-12B-1 (West 2014); OKLA. STAT. ANN. tit. 82, § 105.12A(D) (West 2014); OR. REV. STAT. ANN. §§ 537.810–537.870 (West 2014); S.D. CODIFIED LAWS §§ 46-1-13, 46-5-20.1 (West 2014); UTAH CODE ANN. § 73-3a-108 (West 2014); WASH. REV. CODE ANN. §§ 90.03.300, 90.16.120 (West 2014); WYO. STAT. ANN. § 41-3-115 (West 2014). A thirteenth state—North Dakota—arguably restricts out-of-state transfers by defining "beneficial use" as a "use of water for a purpose consistent with the best interests of the people of the state." N.D. CENT. CODE ANN. § 61-04-01.1 (West 2013).

276. *See* La Plata River Compact, Pub. L. No. 68-346, 43 Stat. 796 (1925) (Colorado and New Mexico); South Platte River Compact, Pub. L. No. 69-37, 44 Stat. 195 (1926) (Colorado and Nebraska); Colorado River Compact, ch. 42, § 13(a), 45 Stat. 1057, 1064 (1928) (Arizona, California, Colorado, Nevada, New Mexico, Wyoming, and Utah); Rio Grande Compact, Pub. L. No. 76-96, 53 Stat. 785 (1939) (Colorado, New Mexico, and Texas); Republican River Compact, Pub. L. No. 78-60, 57 Stat. 86 (1943) (Colorado, Kansas, and Nebraska); Belle Fourche River Compact, Pub. L. No. 78-236, 58 Stat. 94 (1944) (South Dakota and Wyoming); Upper Colorado River Basin Compact, Pub. L. No. 81-37, 63 Stat. 31 (1949) (New Mexico and Texas); Pecos River Compact, Pub. L. No. 81-91, 63 Stat. 159 (1949) (New Mexico and Texas); Arkansas River Compact, Pub. L. No. 81-82, 63 Stat. 145 (1949) (Colorado and Kansas); Snake River Compact, Pub. L. No. 81-464, 64 Stat. 29 (1950) (Colorado and Kansas); Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (Montana, North Dakota, and Wyoming); Canadian River Compact, Pub. L. No. 82-345, 66 Stat. 74 (1952) (New Mexico, Oklahoma, and Texas); Klamath River Basin Compact, Pub. L. No. 85-222, 71 Stat. 497 (1957) (California and Oregon); Costilla Creek Compact, Pub. L. No. 88-198, 77 Stat. 350 (1963) (Colorado and New Mexico); Arkansas River Compact, 80 Stat. 1409 (1966) (Kansas and Oklahoma); Animas-La Plata Project Compact, Pub. L. No. 90-537, § 501(c), 82 Stat. 885, 897–98 (1968) (Colorado and New Mexico); Upper Niobrara River Compact, Pub. L. No. 91-52, 83 Stat. 86 (1969) (Nebraska and Wyoming); Kansas-Nebraska Big Blue River Compact, Pub. L. No. 92-308, 86 Stat. 193 (1972) (Kansas and Nebraska); Arkansas River Basin Compact of 1970, Pub. L. No. 93-152, 87 Stat. 569 (1973) (Arkansas and Oklahoma); Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980) (Arkansas, Louisiana, Oklahoma, and Texas); Bear River Compact, Pub. L. No. 96-189, 94 Stat. 4 (1980) (Idaho, Utah, and Wyoming). The Oregon-California Goose Lake Compact was included in this list as it could be argued that because existing water rights "are hereby recognized" the compact does apportion water. *See* Goose Lake Basin Compact, Pub. L. No. 98-334, art. III(A), 98 Stat. 291, 292 (1984). However, interstate water apportionment was not a stated purpose. *See* OR. REV. STAT. ANN. § 542.520 (West 2014)

practical implications will reach a majority of Western water supplies. While the actual effects are of course unknown, one thing seems clear: assessing the validity of water embargoes just became even more complex.

(California and Oregon). The Sabine River Compact is the only Western water compact whose signatory states do not restrict water exports. *See* Pub. L. No. 83-578, 68 Stat. 690 (as amended Pub. L. No. 87-418, 76 Stat. 34 (1962)) (Louisiana and Texas).

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.