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Note

Sporhase v. Nebraska: The Muddying of Commerce Clause Waters

Alan D. Greenberg†

"Water is the most serious long-range problem now confronting the nation—potentially more serious than the energy crisis."

Water consumption in the United States has risen dramatically, with twice as much water from underground sources removed annually in 1977 as was removed thirty years earlier. Although eastern states face problems of antiquated municipal water systems and polluted water sources, the western states confront more serious water problems. In the West, booming agriculture, great increases in population, and limited water resources have led to disputes over rivers and streams and to significant overdrafting of groundwater resources. 

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1. Sheets, Water: Will We Have Enough to Go Around?, U.S. NEWS & WORLD REPORT, June 29, 1981, at 34 (quoting Gerald D. Seinwill, acting director of the Water Resources Council, a federal agency which completed a study of the nation's water supplies).
2. Sheets, supra note 1, at 34.
4. The "western states" refers to the 17 westernmost contiguous states and Alaska and Hawaii. See W. Hutchins, I WATER RIGHTS IN THE NINETEEN WESTERN STATES 1 (1971).
5. West Central Kansas had 250 irrigation wells in 1950; in 1981 there were 2,850. Sheridan, The Underwatered West, ENVIRONMENT, March, 1981, at 6, 8-9. In Arizona thousands of acres of desert have been turned into productive agricultural lands. Id. Between 1950 and 1975 the quantity of groundwater used annually for irrigation in the Western States increased from 18 million acre feet to 56 million acre feet. G. Murray & E. Reeves, ESTIMATED USE OF WATER IN THE UNITED STATES IN 1975 12 (1977).
6. The population of the western states burgeoned in the 1970s. Between 1970 and 1978 the population of Phoenix increased by 33%, that of Las Vegas by 38%, and those of Albuquerque and El Paso each by 23%. Sheridan, supra note 5, at 7.
7. Sheets, supra note 1, at 36. The United States currently overdrafts groundwater tables by 26%. In other words, for every 100 gallons taken out, only 74 are replaced. Id. at 35. The Ogallala Acquifer, stretching from Texas to Nebraska and supplying drinking water for 2 million people and irrigation water for 11 million acres of arid land, is falling at a rate.
Energy related developments such as mining, electric power production and coal slurry pipelines increase the pressures on scarce water resources.\(^8\)

Recognizing the importance of water to their citizens and their economies, the western states have undertaken conservation measures. Groundwater withdrawals and uses are extensively regulated.\(^9\) Almost all the western states have declared water to be the property of the state,\(^10\) and have erected barriers to exports of water.\(^11\)

Although state regulation of water resources in general is a legitimate and traditionally important power of the states,\(^12\) export restrictions raise Commerce Clause concerns. In *Sporhase v. Nebraska*\(^13\) the Supreme Court invalidated as an impermissible burden on commerce a Nebraska law prohibiting the export of groundwater to any state not permitting the import of its water into Nebraska.\(^14\) Although the holding of *Sporhase* strikes a blow to state laws aimed at preserving water resources, extraordinary *dicta* in the opinion suggest that under certain conditions, state laws regulating the export of water may be upheld even though they burden commerce. By acknowledging potentially ex-of three feet per year. The acquifer, 58 feet thick in 1930, is now less than 8 feet thick in some areas. Sheridan, supra note 5, at 9. Some researchers believe the supply of water from the acquifer will disappear in 40 years. Id.

8. Although the West contains vast quantities of accessible coal, shipping coal by rail to power plants is prohibitively expensive. A more economical alternative, coal slurry pipelines, transports a mixture of water and pulverized coal in pipelines similar to those used for oil. Coal slurry pipelines require massive quantities of water, however. A proposed slurry pipeline from Wyoming to Arkansas will require 6.5 billion gallons of water per year. Sheets, supra note 1, at 35.

Power plants near coal mines also would require significant quantities of water. The proposed Intermountain Power Project, which is to be the largest coal-fired electricity generating plant in the United States, offered neighboring farmers $1,750 an acre foot for their water, five times the current price. Id.


14. Id. at 3465.
tensive state powers to regulate water, the Court leaves unsettled the application of standard Commerce Clause analysis to state regulation of interstate transfers of water. Further, by focusing on the importance of Nebraska's ownership of water, Sporhase partially revives the state ownership exemption from Commerce Clause scrutiny.

This Note examines the Sporhase opinion and the validity of state efforts to regulate interstate transfers of water. Part I discusses the development of the state ownership exemption from Commerce Clause analysis, Part II summarizes the Sporhase opinion, and Part III analyzes the decision.

I. THE STATE OWNERSHIP DOCTRINE

The Privileges and Immunities Clause and the Commerce Clause of the United States Constitution limit efforts by states to regulate resources within their borders. Both clauses were intended to prevent a state from preferring its own economic well-being to that of the nation as a whole. The Privileges and Immunities Clause, designed to "help fuse into one Nation a collection of independent sovereign states," provides that "[t]he citizens of each state shall be entitled to all the Privileges and Immunities of citizens in the several States." The Commerce Clause grants Congress the power "to regulate Commerce among the several States." Recognizing the Framers' intention to create a unified national market and to avoid "economic Balkanization" of the Union, federal courts have found a dormant congressional authority in the Commerce Clause grant of power. This dormant authority restricts the scope of permissible state regulation, even in the absence of Congressional regulation.

15. U.S. CONST., art. 4, § 2.
16. U.S. CONST., art I, § 8, cl. 3.
17. See generally infra text accompanying note 21. The same article of the Articles of Confederation contained the Commerce Clause and the Privileges and Immunities Clause. See Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 379-80 (1978), suggesting that the two clauses share a common purpose.
22. The language of the Commerce Clause does not explicitly prohibit state regulations that affect interstate commerce. The courts, however, have interpreted the clause's self-executing affirmative grant of power as prohibiting regulations of interstate commerce even if Congress has chosen not to act. This interpretation accords with the Clause's primary goal of establishing a unified national economy. NOWAK, supra note 21, at 266-91. For a further discussion of the implications of this "dormant" power of the Commerce Clause, see Dowling, Interstate Commerce and State Power, 27 VA. L. REV. 1 (1940); Schenken & Anson,
Demands of national economic unity often conflicted with state efforts to develop and regulate their internal economies. A way to balance state and federal interests in natural resources was needed. Federal courts in the nineteenth century responded by developing a “state ownership” doctrine that exempted state regulation of certain natural resources from Commerce Clause scrutiny.\(^{23}\) Using principles derived from Roman and early European law,\(^{24}\) the courts reasoned that the sovereign power of a state to preserve its resources allowed the state to grant its citizens preferential access to resources possessed by the state or by no individual.\(^{25}\)

The seminal case for the state ownership doctrine, *McCready v. Virginia*,\(^{26}\) involved a state attempt to deny noncitizens the use of oyster beds.\(^{27}\) Prior case law had established that land submerged under tidewaters belonged to the states.\(^{28}\) Virginia thus possessed a property right in the oyster beds in question. Stating that the Privileges and Immunities Clause guaranteed only general rights of citizenship, the Supreme Court upheld the law as based on a property right bestowed by Virginia on its citizens, rather than on a denial to noncitizens of a general citizenship right.\(^{29}\)

In 1896, in *Geer v. Connecticut*,\(^{30}\) the Supreme Court extended the state ownership doctrine to unpossessed resources. *Geer* upheld a state law that allowed nonresidents to take wild game, reduce it to possession, and buy and sell it intrastate, but that denied them the right to remove it from the state.\(^{31}\) The Court held that wild game, traditionally regarded as part of the *res communes*, or unpossessed resources owned by none and common to all,\(^{32}\) was also the common property of the state.\(^{33}\) Because the state in its sovereign capacity owned wild game on behalf of its citizens, it could qualify the ownership interest of any-

\(^{23}\) See, e.g. *Geer*, in which the U.S. Supreme Court surveyed ancient Greek, Roman, French, and English authorities. 161 U.S. at 522-28.


\(^{25}\) Id.

\(^{26}\) 94 U.S. 391 (1877).

\(^{27}\) Id. at 394. For a case with similar facts see Corfield v. Coryell, *supra* note 23.

\(^{28}\) 94 U.S. at 394.

\(^{29}\) Id. at 395-96. The *McCready* court analogized state discrimination in the use of oyster beds to permissible state discrimination in favor of its own citizens in the sale of state lands or in the use of state lands for agriculture. Id. at 396. The Court denied a Commerce Clause attack on the statute, holding that the Clause did not apply because the statute regulated production, not transport. Id. This interpretation of the Commerce Clause has since been rejected. Nowak, *supra* note 21, at 303-304.

\(^{30}\) 161 U.S. 519 (1896).

\(^{31}\) Id.

\(^{32}\) Id. at 525.

\(^{33}\) Id. at 527-29.
one reducing game to possession. Thus, a state interested in conserving a state resource could prevent the resource from becoming an article of interstate commerce subject to Commerce Clause scrutiny.

In 1908 the Court further extended the state ownership doctrine to water, another element of the res communes. In *Hudson County Water Co. v. McCarter*, the Court upheld New Jersey’s authority to prohibit the export of its water to another state. The Court cited *Geer* in shielding the statute’s discriminatory effects from Commerce Clause scrutiny.

The states unsuccessfully attempted to extend the conservation rationale underlying the state ownership doctrine to restrictions on commerce in privately owned resources. Two years after *Hudson County*, in *West v. Kansas Natural Gas Co.*, the Court struck down an Oklahoma statute that effectively prohibited the interstate transfer of natural gas. The Court found that gas, unlike wild game, was not a good free in nature. Instead, it became the property of the overlying landowner who reduced it to possession. The overlying landowner was free to sell to intrastate or interstate buyers, and therefore the law burdening interstate sales was subject to Commerce Clause restrictions. The Court concluded that as the only purpose of the statute was to further the commercial interests of Oklahoma, the statute imposed an impermissible burden on interstate commerce.

Although *Kansas Natural Gas Co.* did not deal with state owned resources, it presaged a trend in which the Court focused on whether state regulation of a natural resource was discriminatory rather than on whether the state owned the resource. The initial assault on the state

34. *Id.* at 529.
35. *Id.* at 532. The opinion did not discuss the Privileges and Immunities Clause. Nebraska used a similar argument that groundwater was not an article of commerce. See infra text accompanying notes 96-98.
36. 209 U.S. 349 (1908). *Hudson County* involved water used for human consumption. The Court explicitly distinguished irrigation issues in its discussion and holding. *Id.* at 356.
37. *Id.* at 357.
38. 221 U.S. 229 (1911).
39. *Id.* at 249-260.
40. *Id.* at 253. "Goods ferae naturae are available for all to reduce to possession, and all may be prevented from taking such goods." *Id.* The Court noted that surface proprietors have an exclusive right to reduce to possession gas and oil beneath their lands. Deprivation of this right by the state constitutes a taking of property. *Id.*
41. *Id.*
42. *Id.* at 255.
43. *Id.* at 255, 262.
44. See *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (invalidating a scheme preferring citizens in the allocation of natural gas); *Foster Packing Co. v. Haydel*, 278 U.S. 1 (1928) (invalidating a requirement of local processing of shrimp caught in state waters); *Toomer v. Witsell*, 334 U.S. 385 (1948) (invalidating discriminatory licensing for shrimping within a three mile maritime belt off the coast of the state); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating a statute prohibiting importation of solid wastes in order to
ownership doctrine came in the context of state ownership of game, with *Toomer v. Witsell*.\(^\text{45}\) In *Toomer*, the Court characterized the Geer state ownership theory as a nineteenth century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."\(^\text{46}\) The Court appeared to abandon the state ownership theory entirely in *Hughes v. Oklahoma*,\(^\text{47}\) at least for purposes of Commerce Clause analysis.\(^\text{48}\) In striking down an Oklahoma statute that restricted interstate commerce in minnows, the Court in *Hughes* expressly overruled *Geer* and subjected state regulation of wild animals to the same evenhandedness test applied to other state laws under Commerce Clause scrutiny: the *Bruce Church* test.\(^\text{49}\)

Under the *Bruce Church* test of evenhandedness, a state regulation that operates evenhandedly to effectuate a legitimate local interest and that only incidentally burdens commerce will be upheld if its burden is not disproportionate to the local benefits obtained.\(^\text{50}\) If the legislation is facially discriminatory, however, the Court applies the strictest scrutiny to any purported local purpose and to the absence of nondiscriminatory alternatives.\(^\text{51}\) The *Bruce Church* approach, the Court stated, makes "ample allowance for preserving in ways not inconsistent with the Commerce Clause, the legitimate state concerns for the conservation and protection of wild animals underlying the 19th Century fiction of state ownership."\(^\text{52}\)

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\(^\text{45}\) 334 U.S. at 385.
\(^\text{46}\) Id. at 402.
\(^\text{47}\) 441 U.S. 322 (1979).
\(^\text{48}\) *But see id.* at 341-44 (Rehnquist, J., dissenting) (arguing that the ownership doctrine was merely shorthand for legitimate state interest in natural resources, which justified the measure in question).
\(^\text{49}\) 441 U.S. at 336.
\(^\text{50}\) *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), articulated the general rule for evaluating permissible burdens on interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Id.* at 142.

\(^\text{51}\) 441 U.S. at 336-37. The Court stated that facial discrimination against citizens of other states by itself may be a fatal defect. *Id.* at 337. See also *Philadelphia v. New Jersey*, 437 U.S. at 626-27.

\(^\text{52}\) 441 U.S. at 335-36.
The application in Hughes of the Bruce Church test to laws regulating game raised the question of whether the test also applied to water laws. Both game and water traditionally had been regarded as state owned under the theory that each were part of the res communes. In City of Altus v. Carr, a federal district court invalidated on Commerce Clause grounds a Texas statute prohibiting interstate export of water. Because Texas law considers groundwater to be the property of the overlying landowner, City of Altus was not directly applicable to the laws of other western states, which consider water public property in which citizens share usufructuary rights. Despite the uncertainty that City of Altus created as to the validity of export restrictions, the western states maintained their export regulations.

One of these restrictions, an export reciprocity statute, was challenged in Sporhase v. Nebraska. Sporhase thus squarely presented the Court with the opportunity to determine the validity of state claims of ownership of water resources and the applicability of the Bruce Church evenhandedness test to state water export restrictions. The Court nonetheless failed to clarify either issue. The majority opinion at one point declares the state ownership doctrine a fiction yet revives it later to justify preferential regulations. In addition, the opinion recites the Bruce Church standard while condoning discriminatory state legislation.

II.
THE SPORHASE OPINION

Nebraska sued to enjoin Joy Sporhase and Delmar Ross, the appellants in Sporhase, from transferring water from Nebraska to Colorado. The appellants owned land in Colorado that they irrigated with water drawn from a well on their adjacent land in Nebraska. The previous owners of the Nebraska land registered the well with the state of Nebraska, as required by Nebraska law, but neither they nor the appellants ever applied to the Nebraska Department of Water Resources for a permit to transfer the groundwater across the state line.

55. *Id.* at 840. The court emphasized that Texas law recognizes water withdrawn from underground sources as personal property. *Id.*
56. W. Hutchins, *supra* note 4, at 137.
57. 102 S. Ct. at 3458.
58. *Compare id.* at 3461 with *id.* at 3463.
59. *Id.* at 3463.
60. *See generally, id.* at 3464-67.
61. *Id.*
62. *Id.*
63. *See id.* at 3458, n. 2.
Nebraska law required a permit for interstate transfer of water; permits could be issued only if the requested withdrawal was reasonable, not contrary to conservation, and not otherwise detrimental to the public welfare. In addition, the permit was to be granted only if the destination state allowed its water to be transferred into Nebraska. Because Colorado prohibited the export of its water, appellants would have been unable to obtain a permit under these standards, even if they had applied.

The appellants challenged the Nebraska statute as restricting interstate transportation of groundwater in violation of the Commerce Clause. The Nebraska District Court rejected this defense and granted the injunction. The Nebraska Supreme Court affirmed the District Court decision, holding that because Nebraska law did not permit groundwater to become a "market item freely transferable for value among private parties," groundwater was not an article of commerce. The Nebraska court cited the United States Supreme Court decision in Hudson County to support its holding that Nebraska had constitutionally valid authority under its police powers to forbid or condition the interstate transfer of water. The Nebraska Supreme Court distinguished West v. Kansas Natural Gas Co. and Hughes v. Oklahoma as concerned with resources that have "historically been market items, reducible to private possession and freely exchangeable for value." The court also expressed reluctance to apply Commerce Clause rules to a resource essential to human survival.

The Supreme Court reversed the Nebraska Supreme Court decision. Justice Stevens, writing for a 7-2 majority, found Nebraska groundwater to be an article of commerce and therefore subject to the

64. NEB. REV. STAT. § 46-613.01 (1978).
65. Id.
66. See COLO. REV. STAT. § 37-81-103 (Supp. 1982).
67. 102 S. Ct. at 3458, n. 2
68. Id.
69. State ex rel Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614, 616 (1981). Nebraska's modified reasonable use doctrine entitles the landowners to appropriate subterranean waters found under their land, but does not allow them to extract water in excess of a reasonable and beneficial use upon the land owned, especially if a non-overlying use injures others who have substantial rights to the waters. Olson v. City of Wahoo, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933). Because the rule generally precludes a landowner from withdrawing water to sell to others, it prevents groundwater from becoming an article of commerce.
70. 208 Neb. at 710, 305 N.W.2d at 619
71. Id. at 709, 305 N.W.2d at 619.
72. Id. at 709-10, 305 N.W.2d at 619. For a discussion of the facts of West v. Kansas Natural Gas Co. and Hughes v. Oklahoma see supra text accompanying notes 38-49.
73. 208 Neb. at 710, 305 N.W.2d at 619.
74. Id. at 710-12, 305 N.W.2d at 619-20.
constraints of the Commerce Clause. The Court acknowledged that Nebraska landowners, except in limited situations, were not permitted to sell their groundwater in intrastate commerce, but nevertheless rejected the argument that this prohibition removed Nebraska's groundwater statute from Commerce Clause scrutiny. The Court also noted that Nebraska based its groundwater export restrictions on the theory that the state owned the water in question, but ruled that this claim of ownership no longer sufficed to remove goods from Commerce Clause scrutiny, in light of the overruling of Geer by Hughes.

Nor did the Court accept Nebraska's position that because water is essential for human survival, state regulation of water should be treated differently than that of other natural resources subject to Commerce Clause scrutiny. Indeed, the Court concluded that the very importance and scope of groundwater problems made it untenable to place Nebraska's groundwater regulations beyond the scope of the Commerce Clause; doing so would put a national problem beyond the reach of Congress.

Having concluded that groundwater is an article of commerce, the Court applied standard Commerce Clause analysis, that is, the Bruce Church nondiscrimination test. The Court recognized that Nebraska's efforts to conserve and preserve its diminishing groundwater supply reflected a legitimate and highly important local public interest. This interest, the Court found, was furthered by the first three permit requirements, which required that withdrawals of groundwater be reasonable, not contrary to conservation, and not otherwise detri-

75. 102 S. Ct. at 3463.
76. Id. at 3462-63.
77. Id. The Court pointed out that Nebraska allowed commerce in groundwater conducted by municipal utilities, thus implicitly recognizing that water was an article of commerce. Id. at 3462, citing Metropolitan Utilities District v. Merritt Beach Co., 173 Neb. 783, 140 N.W.2d 626 (1966). Although a landowner may not transfer water from an underground aquifer to another user, Nebraska law permits municipal utilities to purchase land, and withdraw groundwater to sell to municipal customers.

An alternative means of recognizing the commercial nature of groundwater is to acknowledge that the purchase price of land includes the acquisition of water. In Merritt Beach, the utility purchased land solely to obtain access to water. 179 Neb. at 786-87, 140 N.W.2d at 630. Hence the difference in purchase prices of tracts of land with and without available groundwater should represent the value of water rights.

In tax cases, courts have recognized the implicit purchase of water in the purchase of land. For example, in United States v. Shurbet, 347 F.2d 103 (5th Cir. 1965), the court allocated a purchase price between land and water and allowed the landowner to take a depletion deduction reflecting his cost basis in the groundwater. Id. at 108-09.
mental to the public welfare.\textsuperscript{83} Notwithstanding the application of the statute only to interstate, not intrastate transfers, the Court concluded that these three provisions worked evenhandedly because the state imposed “severe withdrawal and use restrictions on its own citizens.”\textsuperscript{84}

The Court also was reluctant to condemn state efforts “to conserve and preserve for its own citizens this vital resource in times of severe shortage.”\textsuperscript{85} The Court cited four reasons which, taken together, support a state’s preferential treatment of its citizens: 1) the police power of a state to regulate use of water resources to protect the health of its citizens; 2) the legal relevance of state boundaries in water allocation; 3) the claim of public ownership by a state; and 4) the idea that state-required conservation, by assuring a continued water supply, made water, in a sense, a publicly produced good.\textsuperscript{86}

The Court nevertheless held that Nebraska had failed to demonstrate a sufficiently close fit between the fourth permit requirement—reciprocity of water exports between Nebraska and the destination state—and its goal of conserving and preserving groundwater.\textsuperscript{87} The reciprocity clause, discriminatory on its face, evoked the “strictest scrutiny” of the Court.\textsuperscript{88} Applying this standard of review, the Court found the Nebraska statute insufficiently tailored to Nebraska’s conservation goals, because the statute did not allow the use most conducive to conservation if that use was in an adjoining state that prohibited the export of water to Nebraska.\textsuperscript{89} The Court suggested that such a reciprocity statute might be valid, however, if the state as a whole suffered a water shortage that it sought to alleviate by intrastate transfers of water from areas of abundance to areas of scarcity, and if the statute created a situation where the import and export of water from the state were roughly balanced.\textsuperscript{90} The Court also hinted that a demonstrably arid state, in the interests of conservation, might be able to justify even a total ban on the exportation of water without violating the Commerce

\textsuperscript{83}. \textit{Id.} at 3464.
\textsuperscript{84}. \textit{Id.}
\textsuperscript{85}. \textit{Id.}
\textsuperscript{86}. \textit{Id.} at 3464-65.
\textsuperscript{87}. \textit{Id.} at 3465.
\textsuperscript{88}. \textit{Id.}
\textsuperscript{89}. \textit{Id.} The Court noted that even though the supply of water in a particular well may be abundant or even excessive, and even though the most beneficial use of that water would be in another state, under the Nebraska statute the water could not be shipped into the neighboring state if that state did not permit its water to be used in Nebraska. \textit{Id.}
\textsuperscript{90}. \textit{Id.} Presumably, the showing of an inadequate water supply increases the need for, and therefore the benefits from, a reciprocity provision. Requiring intrastate transfers guarantees that abundant supplies are placed in beneficial use in the state rather than simply hoarded to prevent beneficial applications in other states. Finally, a balance in transfers indicates that the state is motivated by a concern for maintaining water supplies and not by protectionism.
Clause. But because Nebraska could not show a significant relationship between its reciprocity provision of the statute and the evidence of a goal of conservation, the Court invalidated the reciprocity clause. The Court then remanded the case to the Nebraska Supreme Court to determine whether the invalid reciprocity clause was severable from the valid conservation provisions.

III. ANALYSIS

Nebraska argued that groundwater was an exceptional resource which should not be subject to Commerce Clause scrutiny. Although the Court did not agree that water should be so sheltered, it did depart from traditional Commerce Clause analysis by treating water differently from other resources. This part of the article examines the wisdom of the Court’s position, looking first at the article of commerce analysis, then at the Court’s treatment of the beneficial use provisions, and concluding with a discussion of the Court’s analysis of water export barriers.

A. The Article of Commerce Issue

Nebraska argued the threshold issue in Sporhase—whether the Commerce Clause should apply at all—with a novel twist; in addition to arguing that the Commerce Clause was inapplicable because of state ownership of the groundwater involved, Nebraska also claimed that no “commerce” took place in water. Thus there was no article of commerce to which the Commerce Clause applied. This argument has an intuitive appeal, because Nebraska property law does not grant landowners absolute ownership of groundwater; landowners possess only the right to extract as much subsurface water as they reasonably and beneficially can use on their overlying land. As Justice Rehnquist pointed out in his dissent, “It is difficult, if not impossible, to conclude that ‘commerce’ exists in an item that cannot be reduced to possession

91. *Id.*
92. *Id.* Nebraska also argued that even if the law burdened interstate commerce, Congress had authorized the burden. Citing numerous statutes and interstate compacts, Nebraska claimed that congressional deference to state water law constituted a recognition of the “supremacy” of state water law. The court quickly dismissed this argument, observing that this deference did not indicate that Congress intended to remove constitutional restraints on such laws. *Id.* at 3465-66.
93. *Id.* at 3467.
95. 102 S. Ct. at 3463. *But see id.* at 3468 (Rehnquist, J. dissenting).
under state law."  

This argument thus relies, in part, on a factual claim that no commerce takes place in groundwater in Nebraska. However, this claim conflicts with the fact that some commerce in groundwater exists. Municipal utilities in Nebraska may withdraw groundwater from rural areas and sell it to their urban customers. This recognition by Nebraska that groundwater is an object of commerce in one context weakens the argument that groundwater is not an object of commerce in other contexts.

Even if Sporhase had squarely presented a situation in which no commerce in groundwater took place, Nebraska's argument conflicts with the basic theory underlying the Commerce Clause. Nebraska's argument implies that a state, to avoid Commerce Clause scrutiny of its water regulations, not only must declare state ownership of all water within its borders, but also must preclude any commercial activity in that water. This leads to an anomaly: if a state regulates a resource but allows some commerce, its regulation is subject to constitutional scrutiny, but if it takes the more drastic step of prohibiting all commerce in the resource, it is safe from Commerce Clause analysis. This result, which allows states to prohibit interstate commerce if they are able to prohibit intrastate commerce, thwarts the underlying intent of the Commerce Clause, the prevention of "economic Balkanization" of the Union.

The argument that untraded water is not an article of commerce not only conflicts with basic premises of the Commerce Clause, but also ignores modern interpretations that hold that the Commerce Clause reaches beyond articles of commerce to articles or activities that merely affect commerce. Thus, even if groundwater itself is not an article of commerce, groundwater regulations should be subject to Commerce Clause scrutiny because groundwater problems will limit future agricultural and energy development, areas of national concern traditionally falling within the scope of the Commerce Clause.

97. 102 S. Ct. at 3468 (Rehnquist, J. dissenting). Justice Rehnquist all but ignored the fact that Nebraska did not preclude all commercial activity related to groundwater; the state permits transfers for municipal use. Id. at 3468-69.
98. 102 S. Ct. at 3462.
99. See supra note 21 and accompanying text.
100. Even if an activity is "local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." Wickard v. Filburn, 317 U.S. 111, 125 (1942). See NOWAK, supra note 21, at 165-67.
B. Burden on Commerce Analysis

In upholding the first three provisions of the Nebraska statute because they represented counterparts to Nebraska's in-state restrictions, the Supreme Court erroneously assumed that exported water was not subject to the in-state restrictions. The Court also cited four "realities" of water which purportedly supported a state in preferring its own citizens in the use of scarce state water resources. None of the four, however, are compelling enough to justify discriminatory regulations. Although the Sporhase holding appears to limit state efforts to control water resources, the Court went out of its way to indicate its approval of state water management efforts. As a result, the opinion exacerbates the current legal confusion surrounding the state ownership doctrine and Commerce Clause restrictions on water resource regulations.

1. Beneficial use provisions

Justice Stevens opened his discussion by examining the first three provisions of the Nebraska statute. These "beneficial use" provisions require that the withdrawal of groundwater be reasonable, not contrary to the conservation and use of groundwater, and not otherwise detrimental to the public welfare. The Court, however, was not in a position to judge the validity of these provisions because the appellants never had requested an interstate transfer permit, and so the provisions

Ground Water Law and Administration, 59 NEB. L. REV. 917, 918 (1980). The groundwater in dispute in Sporhase was withdrawn from a multistate acquifer, confirming the significant federal interest in the area. See Sporhase, 102 S. Ct. at 3463. The Ogallala acquifer, which supplies parts of Colorado, Nebraska, Texas, New Mexico, Kansas, and Oklahoma, currently is drafted at rates some experts believe will exhaust it within 40 years. Sheets, supra note 1, at 35.

Justice Rehnquist's dissent did not question Congressional power to regulate groundwater under the Commerce Clause, but instead distinguished that power from the impact of negative Commerce Clause powers. 102 S. Ct. at 3467 (Rehnquist, J., dissenting). Justice Rehnquist argued that "the authority of Congress under the power to regulate interstate commerce may reach a good deal farther than the mere negative impact of the Commerce Clause in the absence of any action by Congress." Id. The Court, however, has explicitly rejected any such distinction between the reach of the Commerce Clause when relied on to restrict state legislation and when used to justify federal control or regulation. Philadelphia v. New Jersey, 437 U.S. 617, 621-23 (1978). See Hughes v. Oklahoma, 441 U.S. 322, 326 (1979). As if anticipating the current problems, Philadelphia held that no object of interstate trade should be excluded from Commerce Clause protection by definition at the outset. 437 U.S. 617, 622. Because the groundwater in Sporhase crossed state lines, 102 S. Ct. at 3458, its regulation necessarily invoked Commerce Clause scrutiny.

102. Id. The three provisions required that the withdrawal of groundwater be reasonable, not contrary to the conservation and use of groundwater, and not otherwise detrimental to the public welfare. NEB. REV. STAT. § 46-613.01 (1978).

103. 102 S. Ct. at 3464-65.

104. 102 S. Ct. at 3463.
never had been applied. Nevertheless, the Court examined the provisions, on the mistaken assumption that they operated to place the out-of-state groundwater user on an equal footing with the in-state user. Justice Stevens then discussed four “realities” of water which, he asserted, supported discriminatory regulation.

a. Provisions as counterparts

Justice Stevens used the Bruce Church standard for evaluating evenhanded state regulation to assess the beneficial use provisions. This is surprising, because the statute expressly applies only to out-of-state transfers. The Court, however, viewed the beneficial use provisions as counterparts to the “severe withdrawal and use restrictions” Nebraska imposed on its own citizens. The statute thus prevented “uncontrolled” interstate water transfers, and achieved evenhandedness in regulation.

The Court’s concern with “uncontrolled” transfers in the absence of the challenged statute is unfounded, because Nebraska’s other groundwater statutes regulate all groundwater withdrawals, whether the ultimate use is in or out of state. By regulating all groundwater withdrawals, the state presumably assures a reasonable and beneficial use. Thus, the beneficial use provisions of the export statute would be invoked only in situations where they provided a more restrictive conservation standard than the in-state regulatory scheme, in which case they would no longer apply evenhandedly. The beneficial use provisions therefore are either redundant or violative of the Commerce Clause requirement of evenhanded regulation.

Because the beneficial use provisions are facially discriminatory, the Court should have applied the Hughes test of strict scrutiny as it did to the reciprocity provision. Under this analysis, the Court then should have strictly scrutinized the purported purpose of the provisions to determine whether the provisions were closely tailored to furthering that purpose, and whether nondiscriminatory alternatives existed that pro-

106. Id. at 3464-65.
107. Id. at 3463.
109. 102 S. Ct. at 3467.
111. In examining state legislation, the Court does not limit its inquiry to the words of the statute or characterizations of the statute provided by the state legislature or courts. The Court deems the practical impact and application of a statute to be incorporated into the statute, and therefore looks beyond such language and characterizations. Lacoste v. Louisiana Department of Conservation, 263 U.S. 545, 550 (1924); cf. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).
moted the purpose equally well. The Court, however, desired to sus-
tain the beneficial use provisions, and in its second set of reasons for
upholding the provisions displayed a willingness to depart from the
evenhandedness standard as applied to water regulations.

b. Water as a unique resource

A second ground the Court used to support the beneficial use pro-
visions was that water is an exceptional resource. The Court cited four
"realities" which distinguish water from other resources: 1) a state's po-
lice power interest in providing water for the health of its citizens; 2) a
state's reliance on state boundaries in water allocation; 3) a state's
claim of public ownership; and 4) a state's conservation requirements
which made water, in a sense, a publicly produced good.

These factors reflect the importance western states place on water
and the traditionally local nature of water resource regulation. Each
state determines its own water rights doctrines and adopts appropriate
rules for water use, because effective water law must reflect the geo-
graphic and hydrologic characteristics of the area to be regulated.
The federal government, when involved in water cases, has tradition-
ally deferred to state water law in settling water use issues.

These reasons, however, cannot justify preferential regulation. A
state's conservation and preservation interests can support a regulatory
scheme requiring all water users to make reasonable and beneficial use
of their supplies. But these goals can be reached easily without dis-
criminating against interstate commerce. The Court's four "realities"
do not have the force to withstand the strict scrutiny the Court should
apply to a state's preferential treatment of its own citizens.

The Court first recognized that protection of the health of state
citizens is at the core of a state's police powers. The Commerce
Clause was not intended to thwart state legislation related to the health,
life, and safety of its citizens even though the legislation might indi-
rectly affect the commerce of the country. The Court agreed with the
appellee that water is a unique public good, essential to life, and thus a
legitimate subject of police power regulation. The appellee argued

112. Id. See Nowak, supra note 21, at 284-89.
113. 102 S. Ct. at 3464-65.
114. "The history of the relationship between the Federal government and the States in
the reclamation of the arid lands of the Western States is both long and involved, but
through it runs the consistent thread of purposeful and continued deference to state water
115. Id. at 648-89.
116. See supra note 114.
117. 102 S. Ct. at 3464.
119. See Brief of Appellee, supra note 94, at 11-12.
in addition, however, that the regulations should be examined differently than those of other public resources such as game, gas, and minnows. 120

This argument must fail. The power of a state to shelter its people from menaces to health and safety is limited by the requirement that the state not “retard, burden, or constrict the flow of ... commerce for [its] economic advantage.” 121 Water export restrictions have little impact on human health because most water is used in agriculture and industry. 122 Current anti-export statutes thus are better viewed as designed for the health of a state’s economy rather than the health of a state’s citizens.

Although most water is used in agriculture and industry, the fact that water transfers by municipalities serving human needs constitute a significant percentage of total transfers arguably strengthens the Court’s police power justification for state regulation of transfers. 123 Most of the western states permit municipalities to transport water to obtain necessary supplies. 124 A number of court challenges to water export statutes other than Sporhase involved municipal acquisitions. 125 This fact nevertheless does not justify discriminatory regulation, because evenhanded regulations can protect the state’s police power interests equally well.

 Interstate municipal transfers should be governed by an evenhandedness standard. If an in-state city can obtain water from a nearby in-state acquirer, the policies underlying the Commerce Clause

120. *Id.* at 12.
122. Eighty-three percent of the water supplies in the United States are used in agriculture. SOIL CONSERVATION SERVICE, U.S. DEP’T OF AGRICULTURE, supra note 101, at 21. Agriculture accounts for 87 percent of water used in Nebraska. Aiken, supra note 101, at 918. Denying the appellant a permit to export water in effect takes land out of agricultural production in Colorado to allow water to be stored for future agricultural use in Nebraska.
123. Aiken, supra note 101, at 986-88.
124. Most of the western states have established a hierarchy of uses, with municipal or domestic water use receiving the highest priority. See, e.g. NEV. CONST. art. XV, § 6; KAN. STAT. ANN. § 82a-707(b) (1977); WYO. STAT. ANN. § 41-3 (1977). Preferences take a number of forms: the preferred use may be given power of condemnation; the State may withdraw water from appropriation and reserve it for preferred uses; or a rule may differentiate between substantially simultaneous applicants by priority of use. See Trelease, *Preferences to the Use of Water*, 27 ROCKY MTN. L. REV. 133-43 (1955).
require that a city in a neighboring state also have access to the acquifer under the same conditions unless the health of the citizens in the acquifer state are endangered. Most western states, including Nebraska, recognize domestic and municipal uses as priorities and give them preference over agricultural and other uses. Export restrictions work to favor opposite priorities, for example, allowing a state to favor its agriculture over the health of a city in a neighboring state.

An evenhanded system of allocation does not necessarily give out-of-state citizens the freedom to raid water destined for municipal, industrial, and agricultural uses in a neighboring state, or to foil a neighboring state's conservation efforts. Under an evenhanded system of allocation, out-of-state and in-state users must meet the same standards. If an in-state city would be denied a permit to transfer from a water supply used by another city, to withdraw unreasonably large amounts of water, or to withdraw water from a basin which is already fully appropriated, then the out-of-state city will also be denied a permit. The evenhanded application of a permit system provides a non-discriminatory means of meeting a state's conservation and preservation goals.

A second factor cited by the Court to justify export restrictions was "the legal expectation that under certain circumstances each state may restrict water within its borders." This expectation arises from two water dispute resolution methods which use state borders to allocate water resources. First, on a joint motion from the states involved, the Supreme Court may adjudicate the diversion rights of an interstate stream and through an equitable apportionment decree divide the water between the states involved. Second, using interstate compacts, states may negotiate a "treaty" to divide the waters of an interstate

126. See supra note 124. Cities can use their powers of eminent domain to acquire needed water supplies. 4 WATERS AND WATER RIGHTS at 84-88 (R.E. Clark ed. 1970 & Supp. 1978). The power to condemn for municipal use may be inapplicable if the water is to be supplied to large commercial enterprises. Id.

Oregon permits out-of-state municipalities, with certain limitations, to acquire title to any land or water right within Oregon, by purchase or condemnation, which lies in any watershed from which the municipal corporation obtains or desires to obtain its water supply. OR. REV. STAT. § 537.870 (1981). See also WASH. REV. CODE ANN. § 90.16.110 (1962) (similar provision).

127. A permit system like Nebraska's, which requires that diversions for municipal use be reasonable, for a public purpose, beneficial, not against public policy, and in the public interest applies to both in-state and out-of-state cities. See NEB. REV. STAT. §§ 46-639 to 46-642 (1978).

128. Thus, the city of Altus is likely to be able to obtain water from an unused acquifer which contains the only economically available quality groundwater while El Paso can be prevented from appropriating fourteen percent of New Mexico's total depletable supply of groundwater. Brief of Amicus at — State of New Mexico, Sporhase v. Nebraska, 102 S. Ct. 3457 (1982) (available Oct. 31, 1983 on Lexis, Genfed library, Briefs file).

129. 102 S. Ct. at 3464.

130. See e.g., Wyoming v. Colorado, 353 U.S. 953 (1957) in which 49,375 acre feet of the
stream or basin.131 After Congressional and state approval is obtained, the compact becomes the law of each of the state parties.132 These instances of the use of state boundaries in regulation involve the allocation of interstate water resources, and include a branch of the federal government and all states with interests in the water in the allocation process.

A statute which restricts exports, on the other hand, is a unilateral decree by one state establishing its border as a line for allocating its resources. In the case of a total embargo, no method exists for the neighboring state to contest the decision. Unlike an interstate compact, a reciprocity statute allows a neighboring state to decide if it wants to recognize the state line as an allocation line only on a take it or leave it basis. A reciprocity statute affords none of the negotiations that furnish the conditions and restrictions contained in every interstate compact. Moreover, as the Court remarked later in the opinion, Congressional approval of interstate compacts does not indicate an intent to remove federal constitutional constraints from state water laws.133 The Court hence was mistaken in its citation of equitable apportionment decrees and interstate compacts as justifying the use of state boundaries in allocating water resources by unilateral state action.

The third rationale advanced by the Court to justify water export restrictions was Nebraska's claim to public ownership of groundwater.134 Although the Court initially found the ownership claim to be a legal fiction insufficient to prevent Commerce Clause scrutiny, it subsequently held that claims of state ownership "may support a limited preference for its own citizens in the utilization of the resource."135 The Court found Nebraska's ownership claim logically more substantial than claims to public ownership of other resources.136 Yet the Court ignored the fact that public ownership is little more than a label for state power to conserve and regulate state resources, and by itself is insufficient to justify departure from an evenhandedness standard.

The Court, by citing Hicklin v. Orbeck137 to support its public ownership rationale, confuses state ownership based on possession with

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131. See e.g., South Platte River Compact, Colo. Rev. Stat. § 37-65-101 (1973), allocating between Colorado and Nebraska the waters of the South Platte River. Nebraska is a party to seven water compacts with its neighboring states. Neb. Rev. Stat. App. §§ (F), (G), (K), (P), (Q), (R), and (V) (1979).


133. 102 S. Ct. at 3465-66.

134. Id. at 3464.

135. Id.

136. Id.

state claims to unpossessed resources. *Hicklin* involved the constitutionality of a statute that required companies involved in the production of state-owned oil and gas to employ qualified Alaskan residents in preference to nonresidents.\(^{138}\) Although the Court found the statute in *Hicklin* to be invalid, it recognized a state's ability to prefer its own citizens in the utilization of a state-owned resource.\(^{139}\)

Unlike Alaska's ownership of oil and gas, Nebraska's claim of groundwater ownership is a legal fiction. Alaska received title to the relevant land from the federal government, and therefore possessed full rights to the land and the minerals on and below it.\(^{140}\) State proclamations of ownership of water, in contrast, embody none of the legal and factual rights associated with the concept of ownership, such as use, purchase and sale.\(^{141}\) If a state as "owner" decides to use the water one of its citizens currently uses, it would be required to pay compensation for taking property.\(^{142}\) One water resources commentator has reasoned that "we usually mean by 'state ownership' that in a crowded world the social interest in the use and conservation of water resources has become more important than some individual interests."\(^{143}\)

Nebraska's ownership claims are simply an alternate expression for its police power; the Court was mistaken to analyze the ownership claims and state police powers separately.\(^{144}\) Claims of ownership are superfluous in a discussion of water, because a state may regulate the use of water without owning it, in the same manner that it regulates the use of land it does not own.\(^{145}\) In light of *Hughes*, states do not enjoy any greater regulatory power over a resource by claiming ownership than they would without making such a claim. Yet the Court refers to Nebraska's claim as "logically more substantial than claims to public ownership of other natural resources,"\(^{146}\) presumably stressing the importance of a state's police power interest in water conservation. Under

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\(^{138}\) *Id.* at 520.

\(^{139}\) *Id.* at 533-34.

\(^{140}\) *Id.* at 528, n.11.

\(^{141}\) Trelease, *Government Ownership and Trusteeship of Water*, 45 Calif. L. Rev. 638, 638-9 (1957). The purpose of the concept of ownership is to provide a convenient label to express these legal and factual rights. *Id.*

\(^{142}\) *See* 1 Waters and Water Rights 83 (R.E. Clark ed. 1970 & Supp. 1978). Each valid right to the use of water is a real property right, under the protective aegis of federal and state constitutional guarantees which prohibit the deprivation of private property without due process of law. *Id.* *See also* *id.* at 88-96.

\(^{143}\) Trelease, *supra* note 141, at 653 (1957).

\(^{144}\) The Court refers to a state's interest in conserving and preserving scarce resources and its claim to public ownership as separate justifications. 102 S. Ct. at 3463.

\(^{145}\) Trelease, *supra* note 141, at 639. Trelease concludes that whether "we say 'alakazam' or 'state ownership' or 'state holds in trust' ... no magical solution is provided for difficult problems of adjusting the relations of an individual to the state or of the state to the federal government in the complex field of development of water resources." *Id.* at 654.

\(^{146}\) 102 S. Ct. at 3464.
the *Bruce Church* test, the importance of water may justify greater burdens on commerce in regulation of water than natural gas but, as argued above, this special importance does not justify a departure from the Commerce Clause standard of evenhandedness.

The ownership issue also arose in the fourth reason cited by the Court to support Nebraska's conservation efforts. Because Nebraska's groundwater regulations result in the continued availability of groundwater, Justice Stevens stated that water exhibited "some indicia of a good publicly produced and owned" which entitled the state to "favor its own citizens in times of shortage." Justice Stevens supported this view with *Reeves v. Stake*, a case distinguishable from *Sporhase* because it involved property actually owned by a state.

In *Reeves*, the Court applied its recently enunciated rule that state proprietary activity is exempt from Commerce Clause scrutiny. The state of South Dakota built and operated a cement plant and effectively limited sales of cement from the plant to South Dakota residents. The Court upheld this practice because South Dakota was acting in a proprietary rather than a regulatory capacity and was a market participant selling a manufactured product rather than a natural resource. In citing *Reeves* to support discrimination in the allocation of water resources, Justice Stevens overlooked these two significant factors distinguishing the statute in *Reeves* from that in *Sporhase*.

In controlling its water resources, Nebraska acts in a regulatory, not a proprietary, capacity and allocates a natural resource, not a manufactured product. Nebraska did not participate in the market for water; in fact, Nebraska claimed no market for groundwater existed. Nor did Nebraska invest state funds, construct costly physical plants, or create additional resources through its regulation program. The pol-

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147. In *West v. Kansas Natural Gas Co.* , the Court did distinguish natural gas regulations from water regulations, but on the *Hudson County* ground that the greater importance of water justified the use of the police power of the state to preserve "one of the great foundations of public welfare and health." 221 U.S. at 259. State ownership considerations were not a factor.

148. *See supra* text accompanying notes 110-112.

149. 102 S. Ct. at 3464-65.


151. *Id.* at 436-40.

152. The plant, which for more than fifty years sold cement to both residents and non-residents, instituted a resident preference policy in response to a cement shortage 1978. The policy prevented Reeves, a Wyoming contractor and past customer, from purchasing cement. *Id.* at 431-34.

153. *Id.* at 432-33, 436-440, and 443-44.


155. The issue of equating conservation with resource creation also was raised in *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978), which involved Privileges and Immunities and Equal Protection challenges to Montana's hunting license scheme. Montana charged nonresidents 7½ to 25 times more than residents for the opportunity to hunt
icies underlying the Reeves exemption from Commerce Clause scrutiny do not support preferential allocation of groundwater by Nebraska. As a resource regulator, Nebraska cannot prefer its residents under the language in Reeves.

2. Export barriers

Following his discussion of the four "realities" supposedly justifying the discriminatory application of the first three conditions of Nebraska's groundwater statute, Justice Stevens invalidated the statute's fourth provision, the reciprocity requirement. Rather than simply concluding that the clause was not the least discriminatory means of furthering the state's purpose, Justice Steven's opinion discussed in dicta the factors necessary to establish a close means-ends relationship between an anti-export statute and a conservation and preservation purpose. These dicta, which are likely to influence strongly lower courts hearing challenges to other water embargo statutes, represent a departure from traditional doctrine.

elk. Id. at 374. The Court held that elk hunting was not a fundamental right under the Privileges and Immunities Clause and therefore a distinction between residents and nonresidents, in an effort to conserve state resources, would not interfere with or frustrate the purposes of the formation of the Union. Id. at 387-88.

In an effort to explain Baldwin without resorting to what a number of commentators believe is an empty distinction between fundamental and nonfundamental activities, see Varat, State "Citizenship" and Interstate Equality, 48 U. CHI. L. REV. 487, 509-16 (1981) and Note, Hughes v. Oklahoma and Baldwin v. Fish & Game Commission: The Commerce Clause and State Control of Natural Resources, 66 VA. L. REV. 1145, 1153-56 (1980). Professor Tribe suggests that the "elk should be treated constitutionally as if they were the property of the state" because state efforts to preserve them are equivalent to resource creation. L. TRIBE, CONSTITUTIONAL LAW 38 (Supp. 1979). This conception of conservation, however, only works with reproducible resources. Because elks currently saved will mate, the state can claim that more elk will be available in the future because of its present efforts. Conservation of nonreproducible resources like water does not create additional supplies for future use.

The Baldwin decision, though permitting discrimination, does not provide support for discrimination in water resources. Under the Baldwin analysis, Nebraska might not need to show state ownership to regulate resources, since Montana was allowed to discriminate without "owning" its elk. Nebraska, however, would have to make the almost impossible showing that restricted access to water would not interfere with a person's fundamental rights as a citizen of the United States, which includes the right to pursue a livelihood. Given Nebraska's emphasis on the uniqueness and importance of water, the state would have difficulty meeting Baldwin's exception to evenhandedness by arguing that there is no fundamental right to water.

156. A state as a market participant should be put on the same footing as all private market participants since all may choose their vendors and customers freely. Reeves, 447 U.S. at 438-39. A state which spends its citizens' resources on state programs should, as a return on investment, be able to grant preferences. States will not undertake "effective and creative programs for solving local problems" if they will be required to share their resources with other states. Id. at 441. None of these policies apply to Nebraska's conservation efforts.

157. 102 S. Ct. at 3465.

158. Id.
a. Reciprocity provisions

Justice Stevens first found that the reciprocity clause failed the initial hurdle of the Hughes test for facially discriminatory regulation, in that it was insufficiently tailored to furthering Nebraska's interests in groundwater conservation. He then suggested three conditions under which a reciprocity statute might pass the constitutional test of a "close fit" between means and ends. If the state could show that "the State as a whole suffers a water shortage, that the intrastate transfer of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining states would roughly compensate for any exportation to those states, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision." This language raises a number of new problems, for it seems to overlook the requirement that states justify such a discriminatory statute "in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."

A reciprocity provision is constitutionally suspect. That the provision is a response to another state's unreasonable burden on commerce cannot constitutionally justify it. Instead, such a provision must further a particular state policy—in this case, conservation. But the fit between the reciprocity provision and Nebraska's interest in conservation is loose, at best; conservation is furthered only to the extent that neighboring states erect the barriers which will trigger the export restriction. Furthermore, if some areas of the state are rich in water and do not require conservation policies, they will be prevented from transferring water to a neighboring arid state which has restricted its water exports. In such a case, nondiscriminatory alternatives that spread the burdens of conservation to both residents and nonresidents can be enacted in place of a reciprocity statute.

Justice Stevens tried to fit the reciprocity provision to the local purpose in part by conditioning the validity of reciprocity statutes on the occurrence of intrastate transfers of water from areas of abundance to areas of shortage. This condition runs counter to well-settled Commerce Clause doctrine that bars a state from permitting an intrastate market in a resource to exist while at the same time restricting

159. Id.
160. Id.
163. Id.
164. 102 S. Ct. at 3465. Interstate transfers assure that water is being used efficiently instate rather than being hoarded. See supra text following note 163.
interstate commerce in the resource. The Commerce Clause thus prohibits hoarding of its coal by Pennsylvania and hoarding of natural gas by Oklahoma. Yet Steven’s opinion suggests that water short states may, in certain circumstances, hoard their water. Moreover, Justice Steven’s dictum fails to address the second prong of the Hughes test—whether the state purpose could be advanced without discriminating against interstate commerce. The Court thus appears to have created sub silentio an exception to the nondiscriminatory requirement in the case of groundwater.

b. Export bans

Justice Stevens continued by theorizing that in a “demonstrably arid” state an absolute ban on the exportation of water would be permissible. An outright ban at first glance appears more difficult to justify than a reciprocity clause. In fact, a ban can be more easily tied to conservation and preservation than can a reciprocity provision that only furthers conservation if a neighboring state restricts its transfers. However, when based on the aridity of a state, an outright ban works contrary to the constitutional goal that “the people of the several states must sink or swim together.” The Commerce Clause is most strongly implicated when the supply of goods is insufficient to meet demand and states turn to protectionism. Yet the Court’s formulation operates in reverse, permitting protectionism as supplies diminish. By hypothesizing valid water embargo and reciprocity statutes, the Court has implicitly created a new Commerce Clause standard to apply to water resources.

3. An appropriate standard

Application in future cases of Steven’s analysis in Sporhase is likely to further muddy the waters of Commerce Clause doctrine, because the analysis involves questions of a technical, rather than judi-

166. Id. at 255.
167. Compare City of Altus v. Carr, which invalidated a Texas statute that “prohibit[ed] interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant . . . [and that] [o]bviously had little relation to the cause of conservation.” 255 F. Supp. at 840. Although Justice Stevens envisioned a more restricted water market than that of Texas, his analysis nevertheless abandoned evenhanded water regulation.
168. 441 U.S. at 336.
169. 102 S. Ct. at 3465.
171. In making this judgment the Court should have explicitly created an exception to the Bruce Church test, rather than citing it as the rule and formulating standards which do not meet it.
cial, nature. The Court stated that water regulations must be narrowly tied to a conservation and preservation rationale, but nowhere defined those terms. The Court further required a state imposing restrictions to demonstrate the state's aridity, but again failed to indicate what qualifies as "demonstrably arid." Evaluations of conservation efficiency and aridity are difficult, and not particularly within the professional expertise of courts. At a minimum, to advance a credible showing of aridity justifying imposition of a reciprocity requirement or export ban, the state should be required to identify laws that regulate in-state water use to promote conservation, such as strict regulation of water withdrawals or attempts to curtail existing withdrawals of water. This, however, simply reintroduces into the analysis an evenhandedness inquiry in a different form.

The fairest and most easily administered standard for evaluating water export restrictions is that of evenhandedness in application against residents and nonresidents. Evenhanded regulations further the state purpose of conservation effectively and in a nondiscriminatory manner, and can be easily evaluated by a court using well developed Commerce Clause doctrines such as the one set forth in *Bruce Church*. If intrastate transfers are prohibited, exports in effect would be banned providing burdens are reasonable in light of local benefits. If intrastate transfers take place under a watchful regulatory eye, the same scrutiny could be applied to interstate transfers. Conservation and efficient use of resources would be promoted as states find it in their self-interest to limit in-state users so as to prevent uncontrolled interstate transfers. Interference with commerce will still exist with evenhanded regulation, but given the importance of state authority over water resources, courts are likely to find local benefits to outweigh the burdens imposed.

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172. 102 S. Ct. at 3465.
173. *Id.*
174. Simply pointing to a lack of available water should not be sufficient to show aridity, because common law allocation systems do not promote the most efficient use of water. Such systems allow users to withdraw all the water they can use or have historically used and therefore unavailable resources may reflect excessive use rather than inadequate resources. *See* Gaffney, *Economic Aspects of Water Resource Policy*, 28 AM. J. ECON. AND SOCIOLOGY 131, 137-41 (1969).
175. The weighing of burdens and benefits is crucial. Otherwise a state possessing plentiful water resources throughout its territory could prohibit intrastate transfers relatively easily thereby preventing interstate transfers without greatly furthering permissible local public interests.
176. The issue of coal slurry pipelines can be resolved in this way without protectionism. A state, by prohibiting all slurry pipelines, will have enacted an evenhanded regulation, but one whose burdens on interstate commerce are significant. A court, however, could find the state interest in conserving its water resources more significant than the burdens on commerce and thus uphold the statute under the *Bruce Church* approach. *See e.g.* MONT. CODE ANN. § 85-2-104 (1981), which makes a legislative finding that slurry pipelines are detri-
CONCLUSION

In *Sporhase*, the Supreme Court attempted to balance the Commerce Clause goal of national unity with the traditionally strong local interest in water resource regulation. Water law is most efficient when made at the local level, and is a legitimate exercise of the police power of the state. Thus each state determines its own water rights doctrines with little interference from the federal government.

Neither the presence of detailed state regulatory programs nor the importance of the resource justifies a departure from standard constitutional analysis. The Court can recognize the legitimacy of state water law by requiring all nonresidents to comply with standards a state establishes for its citizens. Resident preferences justified on the grounds of conservation and preservation goals invite the strictest scrutiny of the court. By implying that courts may decline this invitation when reviewing water laws, the Supreme Court in *Sporhase* provided little guidance to those who must draft and enforce such laws, and added confusion to an already unsettled state ownership doctrine.

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mental to the conservation and protection of water resources, and not a beneficial use of water.