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The Dormant Commerce Clause and Water Export: Toward A New Analytical Paradigm

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THE DORMANT COMMERCE CLAUSE AND WATER EXPORT: TOWARD A NEW ANALYTICAL PARADIGM

Christine A. Klein*

Facing water shortages, states struggle with competing impulses, desiring to restrict water exports to other states while simultaneously importing water from neighboring jurisdictions. In 1982, the Supreme Court weighed in on this issue through its seminal decision, Sporhase v. Nebraska ex rel. Douglas. Determining that groundwater is an article of commerce, the Court held invalid under the dormant Commerce Clause a provision of a Nebraska statute limiting water export. The issue has again come into the national spotlight, as the Tarrant Regional Water District of Texas has challenged Oklahoma legislation limiting water exports, and as Wind River L.L.C. of Nevada has contested the denial of its application for a permit to acquire water from Arizona.

This Article examines the dormant Commerce Clause as it applies to water export. It argues that Sporhase asked the wrong question, transplanting a relevant issue from the context of the affirmative Commerce Clause — whether water is an article of commerce — into the context of the Clause’s dormant aspect. Observing that the U.S. Supreme Court has not addressed the issue of water export regulation directly for more than twenty-five years, this paper suggests three ways in which the Court can bring its water cases into doctrinal harmony with its modern dormant Commerce Clause jurisprudence. In so doing, this Article develops a new analytical paradigm, the “water continuum,” that respects the nuances of state water law and recognizes that not all water has the same constitutional status.

Introduction	131
I. Regulating Water Export: Sporhase v. Nebraska	134
A. The Dormant Commerce Clause and Water Export	134
B. Sporhase v. Nebraska	135
II. The Legacy of Sporhase	137
A. Asking the Wrong Question	137
B. Overriding State Water Law	139
C. Focusing on Scarcity	141
D. Creating a Regulatory Void	141
III. Calming the Waters: Toward a New Analytical Paradigm	143
A. Asking the Right Question	144
B. Recognizing Nuance: The Water Continuum	146
C. Shrinking the Dormant Commerce Clause: United Haulers v. Oneida-Herkimer	148
Conclusion: Suckers, Suckers Everywhere	151
Appendix: Water, Trash, and the Commerce Clause	152

INTRODUCTION

Facing water shortages, states struggle with competing impulses, desiring to restrict water exports to other states while simultaneously importing water from neighboring jurisdictions. In 1982, the Supreme Court weighed

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in on this issue through its seminal decision, *Sporhase v. Nebraska ex rel. Douglas*.¹ Determining that groundwater is an article of commerce, the Court held a provision of a Nebraska statute limiting water export invalid under the dormant Commerce Clause.² States, particularly in the West, have enacted legislation that restricts the out-of-state export of water resources.³ Should such regulation be encouraged as valid conservation measures, or should it be rejected as undesirable economic protectionism?⁴

In 2001, the issue came to a boiling point in an unlikely place — the water-rich Great Lakes region, home to one-fifth of the planet's useable fresh water. Long fearful that others coveted their precious water supplies, the Great Lakes states reacted with alarm when they were faced with two major water export proposals in rapid succession, developed by the Nova Group and by Nestlé Waters. In a memorable bit of political theater, billboards protesting the threatened exports began to appear along Michigan's interstate highways, featuring a map of the state framed by larger-than-life cut-outs of a Texas cowboy, a Utah skier, a California surfer, and a New Mexico man wearing a large sombrero. All were guzzling Great Lakes water through giant straws. Issuing a fierce warning to all such would-be water exporters, the billboard proclaimed, "*Back Off Suckers!*"⁵

State legislation inspired by such blatant protectionist impulses would likely be unconstitutional. But Congress came to the rescue, giving federal approval to the Great Lakes states' water export restrictions that might otherwise violate the dormant Commerce Clause.⁶

More "suckers" continue to appear, particularly in the West. Among them, a Texas regional water district is eager to dip its straw into Oklahoma's Red River system,⁷ and a Nevada water utility thirsts for Arizona ground-

¹ 458 U.S. 941 (1982).

² *Id.* at 953–54.

³ See, e.g., COLO. REV. STAT. § 37-81-101 (2004); NEB. REV. STAT. § 46-613.01 (2010). See also Richard S. Harnsberger et al., *Interstate Transfers of Water: State Options After Sporhase*, 70 NEB. L. REV. 754, 845–72 (1991) (describing in Appendix water export statutes of the western states as of 1991).

⁴ Soon after *Sporhase*, commentators considered its impact on water resources. See, e.g., A. Dan Tarlock, *So It's Not "Ours" — Why Can't We Still Keep It? A First Look at Sporhase v. Nebraska*, 18 LAND & WATER L. REV. 137 (1983); Charles E. Corker, *Sporhase v. Nebraska ex rel. Douglas: Does the Dormant Commerce Clause Really Limit the Power of a State to Forbid (1) the Export of Water and (2) the Creation of a Water Right for Use in Another State?*, 54 U. COLO. L. REV. 393 (1983); Stephen F. Williams, *Free Trade in Water Resources: Sporhase v. Nebraska ex rel. Douglas*, 2 SUP. CT. ECON. REV. 89 (1983); Robert Currey-Wilson, Note, *Do Oregon's Water Export Regulations Violate the Commerce Clause?*, 16 ENVTL. L. 963 (1986).

⁵ See CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 929 (2d ed. 2009) (containing photograph of highway billboard); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 118–23 (2003) (describing Michigan dispute).

⁶ See Great Lakes-St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, 122 Stat. 3739 (2008). See also Water Resources Development Act of 1986, 42 U.S.C. § 1962d-20(d) (1986) (giving the Governor of each state bordering the Great Lakes the authority to veto proposed out-of-basin exports by other Basin states).

⁷ See *Tarrant Reg'l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2010 WL 2817220 (W.D. Okla. 2010) (dismissing amended complaint); *Tarrant Reg'l Water Dist. v. Herrmann*,

water.⁸ Should these would-be suckers back off, or should they be encouraged to covet their neighbors' water?

The dormant Commerce Clause has particular relevance in the context of state efforts to regulate so-called "water export," the appropriation of water in one state for use in another. Importantly, the mechanics of water appropriation vary from state to state in accordance with each state's water allocation laws. Thus, as considered in this Article, the regulation of water export involves the regulation of water rights issued by each state, with potential accompanying limitations on the place of use. Conversely, water export would exclude the case where the withdrawal and initial use of water occur within the borders of a single state — perhaps the bottling of water for use in soft drinks, beer, or simply drinking water — even if the final product is subsequently marketed throughout the nation.

The most relevant guidance of the U.S. Supreme Court comes from *Sporhase v. Nebraska*,⁹ holding invalid under the dormant Commerce Clause a provision of Nebraska law restricting the interstate export of groundwater.¹⁰ But the *Sporhase* opinion, more than a quarter-century old, fails to reflect significant developments in the Court's evolving Commerce Clause jurisprudence.

This Article examines the dormant Commerce Clause as it applies to water export, identifying factors that have influenced the courts' legal opinions. Observing that the U.S. Supreme Court has not addressed the issue directly for more than twenty-five years, this Article argues that courts should no longer rely on *Sporhase's* water-as-article-of-commerce mantra. Instead, this Article suggests a new analytical paradigm, the "water continuum," that respects the nuances of state water allocation law. Finally, this Article examines how the Court's dormant Commerce Clause jurisprudence has evolved in cases involving natural resources other than water — specifically, landfill space — and suggests that the Court should bring its evaluation of state water regulations into doctrinal harmony with its modern dormant Commerce Clause jurisprudence.

No. CIV-07-0045-HE, 2009 WL 3922803 (W.D. Okla. 2009) (dismissing dormant Commerce Clause challenge to Oklahoma statutes restricting water export, and granting leave to amend complaint to assert claims based on water not subject to Red River Compact).

⁸ See Complaint at 2–7, *Wind River Resources LLC v. Frisby*, No. 2:08-cv-00653-KJD-GWF (D. Nev. May 21, 2008). See also Application for a Permit to Transport Water Out of State, No. 07A-TR001-DWR (Ariz. Office of Admin. Hearings Oct. 30, 2007), available at http://www.azwater.gov/AzDWR/Legal/WindRiverResources/documents/Administrative_Law_Judge_Decision.pdf (describing Wind River's plan to sell groundwater to the public utility serving Mesquite, Nevada).

⁹ 458 U.S. 941 (1982).

¹⁰ *Id.* at 960.

I. REGULATING WATER EXPORT: *SPORHASE v. NEBRASKA*A. *The Dormant Commerce Clause and Water Export*

The Constitution enumerates the affirmative commerce power of the federal government in a brief sentence: “Congress shall have Power . . . [t]o regulate Commerce . . . among the several States”¹¹ Although the Commerce Clause addresses only the authority of the *federal* government, the U.S. Supreme Court has read into the clause an implied limitation on *state* regulation. In the 1824 decision *Gibbons v. Ogden*,¹² Chief Justice John Marshall addressed perhaps the easiest circumstance under which the federal Commerce Clause invalidates state regulation: when the latter creates an actual conflict with an exercise of the federal commerce authority.¹³ In that case, Chief Justice Marshall invalidated under the Supremacy Clause a New York statute that purported to regulate the licensing of steamboats in the waters of New York in direct contravention of a federal navigation license.¹⁴ Beyond its narrow holding, *Gibbons* suggested in dicta that in some circumstances states may lack the authority to regulate interstate commerce, even in the absence of conflicting federal legislation.¹⁵ Through that suggestion, the Chief Justice entangled the Court in an uncertain enterprise, one with which it has struggled for almost two centuries.

In the aftermath of *Gibbons* and similar early cases, the courts have invoked the so-called “negative” or “dormant” Commerce Clause doctrine to invalidate state regulations that interfere unduly with interstate commerce, even if Congress has not affirmatively legislated in the area addressed by state law. The courts’ avowed purpose is to prohibit “economic protectionism,” defined as “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”¹⁶

The analysis involves two steps. First, the court determines whether a state regulation discriminates against interstate commerce either on its face or in practical effect.¹⁷ If so, then the court will apply the strict scrutiny test articulated in *Hughes v. Oklahoma*,¹⁸ under which “the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of alternatives adequate to preserve the local interests

¹¹ U.S. CONST. art. I, § 8, cl. 3.

¹² 22 U.S. (9 Wheat.) 1 (1842).

¹³ *Id.* at 230.

¹⁴ *Id.*

¹⁵ *Id.* at 212; *see also* *New Jersey v. New York*, No. 120, 1997 WL 291594, at *19–20 (U.S. Mar. 31, 1997).

¹⁶ *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192–93 (1994).

¹⁷ *See* *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007); *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994) (defining discrimination as “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter”).

¹⁸ 441 U.S. 322 (1979).

at stake.”¹⁹ Second, if a nondiscriminatory state statute nevertheless burdens interstate commerce, the court will apply the more lenient test articulated in *Pike v. Bruce Church*:²⁰ “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”²¹

In the context of water export, the Supreme Court gave its early imprimatur to the states’ efforts to keep water within their boundaries. In 1908, *Hudson County Water Co. v. McCarter*²² held New Jersey’s ban on water export constitutional.²³ In that case, the ban limited the riparian water rights of the East Jersey Water Company, precluding it from piping water from the Passaic River for use across state lines in Staten Island, New York.²⁴ Recognizing the regulation of water resources as a power that is uniquely within the purview of the states, Justice Holmes asserted, “[It] appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of . . . a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.”²⁵

B. *Sporhase v. Nebraska*

Although states relied upon *Hudson County* and enacted legislation similar to that of New Jersey, the Court changed course dramatically through its 1982 decision *Sporhase v. Nebraska*.²⁶ In that case, the Court invalidated a portion of a Nebraska export restriction,²⁷ implicitly overruling *Hudson County*. The facts of *Sporhase* provided a sympathetic backdrop supporting the Court’s holding. Appellants Joy Sporhase and Delmer Moss owned a farm that straddled the Colorado-Nebraska border. Their home was located on the Colorado side of the border, but they sought to irrigate the entire tract with water withdrawn from a well on the Nebraska portion of their property.²⁸ Despite the modest scope of Sporhase’s and Moss’s plan to transport water across state lines, the Nebraska Attorney General sought a permanent injunction against the proposed interstate groundwater transport, alleging that the transfer would violate a Nebraska statute.²⁹ In defense, Sporhase

¹⁹ *Id.* at 336.

²⁰ 397 U.S. 137 (1970).

²¹ *Id.* at 142.

²² 209 U.S. 349 (1908).

²³ *Id.* at 357–58.

²⁴ *Id.* at 353.

²⁵ *Id.* at 356.

²⁶ 458 U.S. 941 (1982).

²⁷ *Id.* at 960.

²⁸ *Id.* at 944.

²⁹ *Id.*

and Moss challenged the constitutionality of the Nebraska anti-export statute under the dormant Commerce Clause.³⁰

The relevant Nebraska law required interstate groundwater exporters to acquire a permit from the Nebraska Department of Water Resources. In general, the permit could be issued only if:

- 1) "The withdrawal of the ground water requested is reasonable";
- 2) The withdrawal "is not contrary to the conservation and use of ground water";
- 3) The withdrawal "is not otherwise detrimental to the public welfare";³¹ *and*
- 4) "The state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska" ("reciprocity provision").³²

The Court supported the first three statutory conditions, holding that they were not discriminatory on their face, contrary to *Hughes v. Oklahoma*, and that they did not impermissibly burden interstate commerce under the *Pike v. Bruce Church* test.³³ However, the Court held that the fourth requirement — the reciprocity provision — was facially discriminatory.³⁴ Because Colorado law at the time also forbade interstate water export, Nebraska's reciprocity provision worked as an "explicit barrier to commerce between the two States."³⁵

The Court analyzed the offending reciprocity requirement under the test of *Hughes v. Oklahoma*.³⁶ Several factors supported Nebraska's claim that its facially discriminatory legislation advanced a "legitimate local purpose."³⁷ The *Sporhase* Court noted with approval that Nebraska had established critical control areas in which conservation measures were imposed, including the installation of flow meters, adherence to well-spacing standards, conformity to maximum per acre irrigation application, and the limitation of *intrastate* groundwater transfers.³⁸ As the Court explained, "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State."³⁹

Despite those efforts, the Court held the reciprocity provision unconstitutional because it was not narrowly tailored to promote water conservation.⁴⁰ Three factors were particularly harmful to Nebraska's case, casting

³⁰ *Id.*

³¹ *Id.* at 955–56 (internal quotations omitted) (quoting Neb. Rev. Stat. § 46-613.01 (1978)).

³² *Id.* at 957 (internal quotations omitted) (quoting Neb. Rev. Stat. § 46-613.01 (1978)).

³³ *Id.* at 954, 956–57.

³⁴ *Id.* at 957–58.

³⁵ *Id.* at 957.

³⁶ 441 U.S. 322, 336 (1979).

³⁷ *Sporhase*, 458 U.S. at 954–56.

³⁸ *Id.* at 955.

³⁹ *Id.* at 955–56.

⁴⁰ *Id.* at 957–58.

doubt on the sincerity of Nebraska's argument that the ban was designed to promote conservation and not to discriminate against interstate commerce in groundwater. According to the Court:

If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision.⁴¹

The Court concluded with important guidance for states desiring to regulate water exports: "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."⁴² Because Nebraska had not made a sufficient showing, the reciprocity provision was held unconstitutional.⁴³

II. THE LEGACY OF SPORHASE

Sporhase raised as many questions as it answered. In its wake, lower courts struggled with water export issues and identified numerous factors of potential significance. The Appendix analyzes each of those opinions in table form, identifying the most important factors guiding the courts' decisions.

A. Asking the Wrong Question

Instead of considering whether the challenged Nebraska statute posed an impermissible burden on interstate commerce, *Sporhase* first evaluated whether groundwater itself is an article of commerce. Concluding in the affirmative, the Court held that Nebraska's export restriction impermissibly burdened the free flow of that commodity in the interstate market. The *Sporhase* line of analysis — adopted by subsequent courts⁴⁴ — has proved

⁴¹ *Id.* at 958.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See, e.g.*, Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2009 WL 3922803, at *3 (W.D. Okla. 2009) (concluding that "water" is an article of commerce); Starkey v. U.S. Dep't of Interior, 238 F. Supp. 2d 1188, 1195 (S.D. Cal. 2002) (concluding that "water" is an article of commerce); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 196 (2001) (Stevens, J., dissenting) (citing *Sporhase* for the conclusion that "water" is an article of commerce); Nova Chems., Inc. v. GAF Corp., 945 F. Supp. 1098, 1105 (E.D. Tenn. 1996) (concluding that "ground water" is an article of commerce); United States v. Alcan Aluminum Corp., Nos. 87-CV-920, 91-CV-1132, 1996 WL 637559, at *5 (N.D.N.Y. 1996) (concluding that "ground water" is an article of commerce); Ponderosa Ridge LLC v. Banner Cnty., 554 N.W.2d 151, 159 (Neb. 1996) (concluding that "water" is an

to be unhelpful and misleading at best. Arguably, it has posed the wrong question altogether.

The *Sporhase* majority failed to maintain a consistent focus for its inquiry, shifting from a consideration of *groundwater* to a consideration of simply *water*. At the beginning of its opinion, the Court framed the question as “whether *ground water* is an article of commerce and therefore subject to congressional regulation”⁴⁵ But in summary, the Court broadened its language beyond the facts of the case and concluded that “water” is an article of commerce⁴⁶ — presumably including both surface and subsurface supplies. Numerous courts have repeated that conclusory statement, often with little or no analysis.⁴⁷

Sporhase bolstered the conclusion that Nebraska groundwater is an article of commerce by observing that Nebraska permitted in-state economic transactions transferring groundwater from rural to urban areas.⁴⁸ The Court considered such transfers to be commercial in nature, supporting the classification of groundwater as an article of commerce, even though required payments were fees for distribution services and did not reflect the market price of the water itself.⁴⁹ The Court also noted that the *Sporhase/Moss* well withdrew water from the Ogallala aquifer,⁵⁰ an underground formation underlying portions of eight states.⁵¹ The aquifer’s interstate character, the Court asserted, “confirms the view that there is a significant federal interest in conservation as well as in fair allocation of this diminishing resource.”⁵²

Ironically, the motivation behind the *Sporhase* Court’s question — and its subsequent invalidation of a portion of Nebraska’s export ban — was a desire to *support* governmental regulation of groundwater, albeit in the context of *federal* regulation. The Court worried:

[A]ppellee’s claim that Nebraska ground water is not an article of commerce goes too far: it would not only exempt Nebraska ground water regulation from burden-on-commerce analysis, it would also curtail the affirmative power of Congress to implement its own

article of commerce); *Cooper Indus., Inc. v. Agway, Inc.*, No. 92-CV-0748, 1996 WL 550128, at *10 (N.D.N.Y. 1996) (concluding that “ground water” is an article of commerce); *United States v. NL Indus., Inc.*, 936 F. Supp. 545, 557–58 (S.D. Ill. 1996) (concluding that “ground water” is an article of commerce); *Okla. Water Res. Bd. v. Tex. Cnty. Irrigation and Water Res. Ass’n, Inc.*, 711 P.2d 38, 54 (Okla. 1984) (concluding that “groundwater” is an article of commerce); *City of El Paso v. Reynolds*, 563 F. Supp. 379, 388 (D.N.M. 1983) (concluding that “water” is an article of commerce).

⁴⁵ *Sporhase*, 458 U.S. at 943 (emphasis added). See also *id.* at 943–44 (rejecting conclusion of the Nebraska Supreme Court that under state law, groundwater is not “a market item freely transferable for value among private parties, and therefore [is] not an article of commerce”), quoting *State ex rel. Douglas v. Sporhase*, 305 N.W.2d 614, 616 (Neb. 1981).

⁴⁶ *Sporhase*, 458 U.S. at 954.

⁴⁷ See cases cited *supra* note 44.

⁴⁸ *Sporhase*, 458 U.S. at 951.

⁴⁹ *Id.* at 951–52.

⁵⁰ See *id.* at 953.

⁵¹ See *The Ogallala Aquifer*, HIGH PLAINS UNDERGROUND WATER CONSERVATION DISTRICT NO. 1, http://www.hpwd.com/the_ogallala.asp (last visited Nov. 19, 2010).

⁵² *Sporhase*, 458 U.S. at 953.

policies concerning such regulation Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.”⁵³

In dissent, Justices Rehnquist and O’Connor were motivated by the opposite concern — a desire to *limit* federal regulation of groundwater in future cases.⁵⁴ Recognizing the imperfect fit between the facts of *Sporhase* and the majority’s article-of-commerce analysis, the dissent chastised the majority for “first quite gratuitously undertak[ing] to answer the question of whether the authority of Congress to regulate interstate commerce . . . would enable it to legislate with respect to ground-water overdraft in some or all of the States.”⁵⁵ Instead, the dissent asserted, “The question actually involved in [*Sporhase* was] whether [the Nebraska export restriction] runs afoul of the unexercised authority of Congress to regulate interstate commerce.”⁵⁶

B. *Overriding State Water Law*

The allocation of water rights varies considerably throughout the nation, with each state establishing its own regulatory regime. For the allocation of surface water, most western states follow some version of the prior appropriation doctrine,⁵⁷ whereas eastern states have generally adopted the riparian doctrine.⁵⁸ To complicate matters more, the states rarely regulate groundwater under the same rules as surface water. Instead, the right to use groundwater is determined under a variety of complex doctrines, including the English rule, the American rule, the correlative rights doctrine, and the appropriation doctrine.⁵⁹ The *Sporhase* Court carefully considered the nuances of the Nebraska water laws that governed the disputed water rights. In reaching its conclusion, however, the Court ultimately brushed aside those subtleties and reversed the Nebraska Supreme Court’s interpretation of its own water laws.⁶⁰

The Nebraska Supreme Court indicated that the common law “correlative rights doctrine” governed the withdrawals at issue in *Sporhase*.⁶¹ Under that doctrine, all landowners above a common aquifer share the *use* (or *usu-fruct*) of the underlying water, generally in rough proportion to the amount of overlying acreage owned.⁶² As explained by the Nebraska Supreme

⁵³ *Id.* at 953–54.

⁵⁴ *See id.* at 961–65 (Rehnquist, J., dissenting).

⁵⁵ *Id.* at 961–62.

⁵⁶ *Id.* at 962.

⁵⁷ CHRISTINE A. KLEIN ET AL., *NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES* 843 (2d ed. 2009).

⁵⁸ *Id.*

⁵⁹ DAVID H. GETCHES, *WATER LAW IN A NUTSHELL*, 268–71 (4th ed. 2009).

⁶⁰ *Sporhase*, 458 U.S. at 941.

⁶¹ *See id.* at 950.

⁶² GETCHES, *supra* note 59, at 269.

Court, and duly noted by both the *Sporhase* majority⁶³ and dissent,⁶⁴ the right to use groundwater was strictly qualified by the state:

[T]he owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole⁶⁵

In light of the significant degree of control maintained by the state over groundwater, the Nebraska Supreme Court concluded that under state law, groundwater was not “a market item freely transferable for value among private parties, and therefore [is] not an article of commerce.”⁶⁶ Ultimately, the Nebraska Court rejected the dormant Commerce Clause challenge to Nebraska’s water export restriction.⁶⁷

The *Sporhase* majority observed that landowners in other states enjoyed much stronger property rights in groundwater than the qualified use right recognized by Nebraska. States such as Texas, the Court noted, followed the English rule of groundwater use:

[The] rule . . . was that an owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property.⁶⁸

The Court concluded, “Since ground water, once withdrawn, may be freely bought and sold in States that follow this rule, in those States ground water is appropriately regarded as an article of commerce.”⁶⁹

Sporhase recognized that Nebraska landowners, in contrast to Texans, “[have] no comparable interest in ground water.”⁷⁰ It also acknowledged that Nebraska’s greater ownership interest in groundwater “may not be *irrel-*

⁶³ *Sporhase*, 458 U.S. at 949–50.

⁶⁴ *Id.* at 964 (Rehnquist, J., dissenting) (“As with almost all of the Western States, Nebraska does not recognize an absolute ownership interest in ground water, but grants landowners only a right to *use ground water on the land from which it has been extracted.*”).

⁶⁵ *Douglas v. Sporhase*, 305 N.W.2d 614, 617 (Neb. 1981) (quoting *Olson v. City of Wahoo*, 248 N.W. 304, 308 (Neb. 1933)) *rev’d sub nom.*, *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

⁶⁶ *Id.* at 616.

⁶⁷ *Id.* at 614.

⁶⁸ *Sporhase*, 458 U.S. at 949 (quoting *City of Altus v. Carr*, 255 F. Supp. 828, 833 n.8 (W.D. Tex. 1966)).

⁶⁹ *Id.* at 949–50.

⁷⁰ *Id.* at 950.

evant to Commerce Clause analysis.”⁷¹ Moreover, *Sporhase* noted Congress’s traditional deference to state water law.⁷² Nevertheless, *Sporhase* rejected the Nebraska Supreme Court’s interpretation. In a line of analysis more appropriate to the affirmative rather than dormant aspect of the Commerce Clause,⁷³ *Sporhase* concluded that Nebraska groundwater is an article of commerce. To hold otherwise, the Court feared, “would . . . curtail the affirmative power of Congress to implement its own policies concerning such regulation,” potentially requiring any such congressional regulation to be “more limited in Nebraska than in Texas and States with similar property laws.”⁷⁴

C. Focusing on Scarcity

Sporhase suggested that a showing of threatened scarcity might bolster the constitutionality of export restrictions. The Court noted that the arid western states’ “asserted superior competence . . . in conserving and preserving scarce water resources [is] not *irrelevant* in the Commerce Clause inquiry,” making it more likely that the states’ export restrictions would be deemed reasonable.⁷⁵ Further, it would not necessarily be fatal to a state’s case that it faced no imminent water shortage. As the Court explained, “[G]iven [Nebraska’s] conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage.”⁷⁶ Providing an important hint to future regulators, the Court concluded, “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.”⁷⁷

D. Creating a Regulatory Void

Despite *Sporhase*’s solicitude for the federal regulation of water — unhindered by state protectionist legislation — Congress failed to regulate water to the outer limits of its Commerce Clause authority. Moreover, in the post-*Sporhase* era, the Supreme Court placed severe limits on the scope of the federal commerce power. As a result, the protection of water resources

⁷¹ *Id.* at 951 (emphasis added); *see also id.* at 953 (“Nor is appellee’s claim to public ownership without significance.”).

⁷² *Id.* at 953, 958–60.

⁷³ *See supra* Part II.A.

⁷⁴ *Sporhase*, 458 U.S. at 953.

⁷⁵ *Id.* at 953 (emphasis added).

⁷⁶ *Id.* at 957.

⁷⁷ *Id.* at 958. Such a showing would help to satisfy the *Hughes v. Oklahoma* requirement that legislation be narrowly tailored to achieving legitimate local purposes. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

suffered, falling into a regulatory gap.⁷⁸ *Sporhase* cast a constitutional cloud on state regulation, whereas subsequent Supreme Court cases chilled federal regulatory efforts.

In 1991, a prominent constitutional law text observed, “after nearly 200 years of government under the Constitution, there are very few judicially enforced checks on the commerce power.”⁷⁹ Just four years later, in *United States v. Lopez*,⁸⁰ the Court caught the legal community by surprise when it invalidated a federal statute that purported to prohibit firearms within school zones, finding that such legislation exceeded Congress’s authority to regulate under the affirmative aspect of the Commerce Clause.⁸¹ The Court asserted, “The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”⁸² The Court admitted that its prior cases took substantial steps toward “convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the states The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.”⁸³ *Lopez* marked the end of a sixty-year period during which the Court had rejected virtually every Commerce Clause challenge to federal legislation brought before it.

When *Sporhase* invalidated Nebraska’s groundwater export restrictions in 1982, the affirmative Commerce Clause power was thought to be nearly unlimited. Since that time, the scope of federal authority has been shrinking.⁸⁴ In particular, the Court has demonstrated less appetite for congressional regulation of water, suggesting a potential whittling away of *Sporhase*’s sweeping statement that “water is an article of commerce.”⁸⁵ In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,⁸⁶ the Court invalidated a regulation purporting to exert federal authority over wetlands frequented by interstate migratory birds.⁸⁷ Although the case was decided on narrow statutory grounds, the Court’s constitutional dicta cast doubt on the future of federal efforts to protect land and water resources. Specifically identifying land and water use as areas within “the

⁷⁸ See Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 5 (2003).

⁷⁹ GERALD GUNTHER, CONSTITUTIONAL LAW 93 (12th ed. 1991).

⁸⁰ *United States v. Lopez*, 514 U.S. 549 (1995).

⁸¹ *Id.* at 551.

⁸² *Id.* at 566.

⁸³ *Id.* at 567.

⁸⁴ See, e.g., Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After Lopez and Morrison*, 11 WM. & MARY BILL RTS. J. 403, 405 (2002); Diane McGimsey, *The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CALIF. L. REV. 1675, 1706 (2002); Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 767 (1996); John P. Frantz, *Recent Developments, The Reemergence of the Commerce Clause as a Limit on Federal Power: United States v. Lopez*, 115 S.Ct. 1624 (1995), 19 HARV. J.L. & PUB. POL’Y 161, 169 (1995).

⁸⁵ *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982).

⁸⁶ 531 U.S. 159 (2001).

⁸⁷ *Id.* at 162.

States' traditional and primary power,"⁸⁸ the Court hinted, "These arguments [that the commerce power allows the federal government to regulate migratory birds and the ponds and wetlands upon which they depend] raise significant constitutional questions."⁸⁹

In 2006, the Court provided an additional signal of the unsettled state of its Commerce Clause jurisprudence, at least with respect to the federal regulation of water, wetlands, and land use. In *Rapanos v. United States*,⁹⁰ the Court considered the scope of the Army Corps of Engineers' authority to regulate wetlands.⁹¹ The Court was unable to muster a majority, instead handing down a plurality opinion of four Justices, two concurrences, and two dissents. Although the opinion was confined to statutory interpretation of the Clean Water Act, the Justices expressed their constitutional views in dicta. Emphasizing that the regulation of land and water use are "quintessential state and local" powers, the plurality warned that the Corps's broad interpretation of its statutorily-delegated jurisdiction "stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power."⁹² Dissenting Justices Stevens, Souter, Ginsburg, and Breyer disagreed, arguing, "There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries."⁹³

This contraction of the affirmative Commerce Clause, without a concomitant adjustment of the dormant Commerce Clause, threatens to violate the Court's repeated admonition, "The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation."⁹⁴ If this admonition is ignored, then it is likely that the regulation of water resources will be frustrated, with courts invalidating state regulation under the dormant Commerce Clause and striking federal regulation under the affirmative Commerce Clause.

III. CALMING THE WATERS: TOWARD A NEW ANALYTICAL PARADIGM

This Part suggests three analytical adjustments that could bring the Court's evaluation of state water regulations into doctrinal harmony with modern dormant Commerce Clause jurisprudence.

⁸⁸ *Id.* at 174.

⁸⁹ *Id.* at 173.

⁹⁰ 547 U.S. 715 (2006).

⁹¹ *Id.* at 716.

⁹² *Id.* at 738.

⁹³ *Id.* at 803-04 (Stevens, J., dissenting) (quoting *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941)).

⁹⁴ *E.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979); *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 574 (1997).

A. Asking the Right Question

First, the Court should confine its focus to the challenged state regulation's impact on interstate commerce. This inquiry should displace *Sporhase's* conclusory and unhelpful emphasis upon whether or not water is an article of commerce.

In determining whether legislation exceeds the affirmative commerce authority, the Supreme Court has identified three categories of activity generally susceptible to congressional regulation:

- 1) Use of the channels of interstate commerce;
- 2) The instrumentalities of interstate commerce, or persons or things in interstate commerce; and
- 3) Activities that substantially affect interstate commerce.⁹⁵

Sporhase held that groundwater is an "article of commerce," presumably subjecting it to federal regulation under the second category.⁹⁶ As the Court explained, "Ground water overdraft is a national problem and Congress has the power to deal with it on that scale."⁹⁷

The *Sporhase* dissent complained that the majority had answered the wrong question — transplanting the question of whether the affirmative Commerce Clause authorizes federal regulation into a case where the question was whether the dormant Commerce Clause invalidates state regulation.⁹⁸ As the dissent explained, "The issue presented by this case, and the only issue, is whether the existence of the Commerce Clause of the United States Constitution by itself, in the absence of any action by Congress, invalidates some or all of [the challenged Nebraska statute]."⁹⁹ In the dissent's view, the two questions are "quite distinct."¹⁰⁰ Moreover, the dissent argued that the affirmative and dormant aspects of the Commerce Clause are not equal in scope, asserting that "the authority of Congress under the power to regulate interstate commerce may reach a good deal further than the mere negative impact of the Commerce Clause in the absence of any action by Congress."¹⁰¹ Thus, the majority's conclusion that groundwater is an article of commerce had little relevance to the primary issue of the case: whether or not Nebraska's water export laws were constitutional. As a result of asking the wrong question — and posing a one-size-fits-all answer that ignored the nuances of Nebraska water law and conflated surface and groundwater — the *Sporhase* Court stacked the deck against state regulation.

In dormant Commerce Clause litigation involving the regulation of natural resources other than water, the Supreme Court has begun to ask more

⁹⁵ *E.g.*, *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (summarizing categories of activity traditionally recognized as within the scope of the federal commerce power).

⁹⁶ *Sporhase v. Nebraska*, 458 U.S. 941, 953–54 (1982).

⁹⁷ *Id.* at 954.

⁹⁸ *Id.* at 961–62 (Rehnquist, J., dissenting).

⁹⁹ *Id.* at 961.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 961–62.

appropriate questions. Particularly instructive is a line of cases determining the constitutionality of state regulation of the solid waste disposal industry. Just as Nebraska claimed that the water export ban challenged in *Sporhase* was intended to promote water conservation,¹⁰² so also do the states claim that their waste disposal regulations are designed to conserve landfill space or to encourage recycling efforts.

In the first two cases discussed below — decided in 1978 and 1992, respectively — the Supreme Court prominently considered whether garbage is an article of commerce, reminiscent of its 1982 consideration of the nature of groundwater in *Sporhase*. But by 1994, the Court had begun to move from the “wrong” question posed by the *Sporhase* majority to the more pertinent question suggested by Justice Rehnquist’s dissent in *Sporhase*.¹⁰³

In *City of Philadelphia v. New Jersey*,¹⁰⁴ for example, a New Jersey statute prohibited the importation of most “solid or liquid waste which originated or was collected outside the territorial limits of the State.”¹⁰⁵ Private landfill operators in New Jersey (desiring to attract business from out-of-state customers) and cities in other states that wished to dispose of their waste in New Jersey brought a dormant Commerce Clause challenge against the import restriction.¹⁰⁶ The New Jersey Supreme Court first determined that the subject waste did not constitute “commerce” because it was valueless, and that the state law therefore did not impermissibly interfere with interstate commerce.¹⁰⁷ The U.S. Supreme Court reversed, finding that the out-of-state waste was indeed an article of commerce, and New Jersey’s banning of its importation therefore violated the dormant Commerce Clause.¹⁰⁸

In subsequent cases, the Supreme Court continued to afford constitutional significance to the commercial status of waste. In 1992, a decade after *Sporhase*, the Supreme Court stated unambiguously in *Fort Gratiot Sanitary Landfill v. Michigan Dep’t of Natural Resources*,¹⁰⁹ “Solid waste, even if it has no value, is an article of commerce.”¹¹⁰ Explaining its rationale, the Court said, “[W]hether the business arrangements between out-of-state generators of waste and the Michigan operator of a waste disposal site are viewed as ‘sales’ of garbage or ‘purchases’ of transportation and disposal services, the commercial transactions unquestionably have an interstate character.”¹¹¹ Therefore, restrictions on the interstate import or export of such waste were more likely to violate Congress’s prerogative under the Com-

¹⁰² *Id.* at 954–57.

¹⁰³ *See supra* Part II.A.

¹⁰⁴ 437 U.S. 617 (1978).

¹⁰⁵ *Id.* at 618.

¹⁰⁶ *Id.* at 619.

¹⁰⁷ *Id.* at 621–22.

¹⁰⁸ *Id.* The U.S. Supreme Court concluded that it made no constitutional difference whether the “scarce natural resource was itself the article of commerce [or] . . . the scarce resource [available landfill space] and the article of commerce [out-of-state-waste] are distinct.” *Id.* at 628.

¹⁰⁹ 504 U.S. 353 (1992).

¹¹⁰ *Id.* at 359.

¹¹¹ *Id.*

merce Clause.¹¹² In dissent, Justice Rehnquist questioned the majority's logic, confessing that he was "baffled by the Court's suggestion that this case might be characterized as one in which garbage is being bought and sold."¹¹³ Rather, Justice Rehnquist continued, "There is no suggestion that petitioner is making payment in order to have garbage delivered to it. Petitioner is, instead, being paid to accept the garbage of which others wish to be rid."¹¹⁴

By 1994, the Court had begun to refine its dormant Commerce Clause analysis, at least in the context of garbage disposal. In *C & A Carbone, Inc. v. Town of Clarkstown*,¹¹⁵ the Court considered the constitutionality of a "flow control" ordinance adopted by a town in New York.¹¹⁶ Under that ordinance, all nonhazardous solid waste within the town's borders was required to pass through a particular transfer station within the town. Although the favored transfer station was ostensibly private, the operator had contracted to sell the facility to the town for one dollar at the end of five years.¹¹⁷ Contrary to its analysis in *City of Philadelphia*¹¹⁸ and *Fort Gratiot Sanitary Landfill*,¹¹⁹ the Court considered whether the challenged ordinance had an impermissible effect on interstate commerce, and not whether the regulated waste was itself an article of commerce. As the Court explained, "[W]hat makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it."¹²⁰ Despite this departure from its previous analyses, the Court came to a similar conclusion: the challenged ordinance placed an impermissible burden on commerce.¹²¹

B. Recognizing Nuance: The Water Continuum

As a second analytical correction, the Court should pay careful attention to the context of water disputes, rather than carelessly confusing surface and groundwater, and otherwise ignoring the relevant factual background.

¹¹² *Id.* (holding unconstitutional the waste import restrictions of Michigan's Solid Waste Management Act that prohibited private landfills from accepting most solid waste from out-of-county sources).

¹¹³ *Id.* at 369 (Rehnquist, J., dissenting).

¹¹⁴ *Id.* Two years later in dissent, Justice Rehnquist made a similar argument in *Or. Waste Systems, Inc. v. Dep't of Env't'l Quality*, 511 U.S. 93, 112 (1994) (Rehnquist, C.J., dissenting) ("While I understand that solid waste is an article of commerce, it is not a commodity sold in the marketplace; rather it is disposed of at a cost to the State. Petitioners do not buy garbage to put in their landfills; solid waste producers pay petitioners to take their waste." (citation omitted)).

¹¹⁵ 511 U.S. 383 (1994).

¹¹⁶ *Id.* at 386.

¹¹⁷ *Id.* at 386-87.

¹¹⁸ *City of Philadelphia v. New Jersey*, 437 U.S. 617.

¹¹⁹ *Fort Gratiot Sanitary Landfill v. Mich. Dep't of Natural Res.*, 504 U.S. 353 (1992).

¹²⁰ *C & A Carbone, Inc.*, 511 U.S. at 390-91.

¹²¹ *Id.*

The *Sporhase* article-of-commerce analysis was hampered by the Court's inability, or unwillingness, to appreciate the nuances of state water law. Further, the Court gave but scant attention to the physical nature of water itself, carelessly interchanging "water" and "groundwater."¹²² As a result, the Court's rationale was awkward. After declaring water an article of commerce, and after rejecting the Nebraska Supreme Court's interpretation of its own water law, the U.S. Supreme Court was forced to take an analytical step backward. Admitting that the difference among state regulatory regimes might have constitutional significance, the Court weakly concluded that Nebraska's greater ownership interest in groundwater than other states "may not be *irrelevant* to Commerce Clause analysis."¹²³ Rather than affording monolithic constitutional status to all water, the Court should consider the legal, geographic, and hydrogeological nuances of water under the facts of each case, before determining whether state regulation thereof impermissibly burdens interstate commerce.

In undertaking this analysis, it would be helpful to recognize what this Article calls "the water continuum." At one end of the spectrum, challenged state legislation might regulate water *qua* natural resource, remaining in its natural streamcourse or aquifer as an environmental, aesthetic, and recreational amenity. At the other end of the spectrum, challenged state legislation might regulate water *qua* commodity, incorporated into products ranging from baby food to cleaning supplies to bottled beverages.

By placing water in its proper place on the continuum, courts can more easily ask appropriate questions. For example, courts could begin by first considering whether the regulated water occurs *in situ*, or whether it has been reduced to a "water right" under state law through diversion or application to beneficial use. Notably, water rights are *usufructuary* in nature, giving owners the right to *use* a particular quantity of water in a particular way, but failing to convey the actual ownership of specific molecules of water. As Justice Rehnquist stated in his *Sporhase* dissent:

[A] State may so regulate a natural resource as to preclude that resource from attaining the status of an "article of commerce" for the purposes of the negative impact of the Commerce Clause. It is difficult, if not impossible, to conclude that "commerce" exists in an item that cannot be reduced to possession under state law and in which the State recognizes only a usufructuary right. "Commerce" cannot exist in a natural resource that cannot be sold, rented, traded, or transferred, but only *used*.¹²⁴

If a water right is involved, is it a new appropriation (subject to the state's initial allocation criteria) or the change of an existing water right (generally prohibited from harming existing water users)? Another set of

¹²² *Sporhase v. Nebraska*, 458 U.S. 941, 943, 954 (1982).

¹²³ *Id.* at 951 (emphasis added).

¹²⁴ *Id.* at 963 (Rehnquist, J., dissenting).

questions revolves around whether the relevant water rights affect surface water or groundwater. In the case of surface water rights, are the parameters of those rights determined under riparianism (giving the holder tort-like liability protection) or under the prior appropriation doctrine (giving the holder a precise, permanent right enforceable under property law)? Alternatively, if the state water rights pertain to groundwater, are the contours of those rights determined in accordance with the ownership of overlying land (under the absolute ownership doctrine, the reasonable use doctrine, or the correlative rights doctrine) or in temporal order (under the prior appropriation doctrine)? Justice Rehnquist found this distinction constitutionally significant in his *Sporhase* dissent, arguing:

Nebraska so regulates ground water that it cannot be said that the State permits any "commerce," intrastate or interstate, to exist in this natural resource. As with almost all of the Western States, Nebraska does not recognize an absolute ownership interest in ground water, but grants landowners only a right to *use ground water on the land from which it has been extracted*.¹²⁵

Finally, although the right to *use* water invariably arises under state allocation laws, a different set of concerns arises after that water has been incorporated into a product. At that point, water has been severed from the common pool, and may be subject to traditional property rights rather than mere *usufructuary* rights.

Together, such questions under the "water continuum" paradigm allow courts to determine with precision the impacts of state regulation on interstate commerce.

C. *Shrinking the Dormant Commerce Clause: United Haulers v. Oneida-Herkimer*

As a third refinement to its dormant Commerce Clause analysis of water, the Supreme Court should restrict the scope of the doctrine as applied to water regulation, at least in cases where states are engaged in legitimate conservation efforts. As guidance, the Court should look to the evolution of its landfill cases, drawing on the 2007 decision in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*.¹²⁶ Further, the Court could draw on the "water continuum" paradigm to help it determine the factual contexts in which such analytical restriction would be appropriate.

After *Sporhase*, the Court continued to strike down state laws purporting to regulate or restrict the interstate transport of natural resources. In 2007, however, the Court signaled that it may be reconsidering its position, at least where the beneficiaries of protective legislation are local govern-

¹²⁵ *Id.* at 964.

¹²⁶ 550 U.S. 330 (2007).

ments, rather than private industries.¹²⁷ In *United Haulers*, the Court sustained a county waste disposal ordinance virtually identical to that struck down in *C & A Carbone* thirteen years earlier.¹²⁸ In *United Haulers*, the Court considered a dormant Commerce Clause challenge to a county flow control ordinance that required all solid waste collected within the county to pass through a particular processing facility.¹²⁹ The favored facility was a state-created public benefit corporation, owned and operated by the county government.¹³⁰

United Haulers may represent a sea change in dormant Commerce Clause jurisprudence. Two factors are particularly significant. First, the Supreme Court demonstrated a growing solicitude for health and safety regulations, particularly those that promote recycling efforts and other environmentally protective measures. Noting that waste disposal is a traditional function of local governments, the Court asserted, “[I]t simply does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.”¹³¹ Laws favoring local government “may be directed toward any number of legitimate goals unrelated to protectionism.”¹³² Among such non-protectionist and legitimate goals, the Court specifically lauded efforts to “create enhanced incentives for recycling and proper disposal of other kinds of waste,” which the Court believed would confer “significant health and environmental benefits” upon local citizens.¹³³ The Court concluded, “The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values.”¹³⁴ The opinion represents a radical departure from the *Sporhase* article-of-commerce analysis. The *United Haulers* majority did not discuss whether or not garbage is an article of commerce, instead confining itself to the issue of the impacts of the county ordinance on commerce. Only dissenting Justices Alito, Stevens, and Kennedy clung to the *Sporhase* question, beginning their analysis with recitation of the mantra from *Fort Gratiot*, “Solid waste, even if it has no value, is an article of commerce.”¹³⁵

Even more importantly, the Court diminished the scope of the dormant Commerce Clause by carving out a significant new exemption for regulation by public (as opposed to private) entities. All the Justices acknowledged that the factual circumstances of *United Haulers* are remarkably similar to

¹²⁷ See, e.g., Dan T. Coenen, *Where United Haulers Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541 (2010); Kenneth L. Karst, *From Carbone to United Haulers: The Advocates' Tales*, 2007 SUP. CT. REV. 237, 240–41 (2007).

¹²⁸ *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

¹²⁹ *United Haulers*, 550 U.S. at 334.

¹³⁰ *Id.*

¹³¹ *Id.* at 363 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)).

¹³² *Id.*

¹³³ *Id.* at 346–47.

¹³⁴ *Id.* at 344 (quoting *Maine v. Taylor*, 477 U.S. 131, 151 (1986)).

¹³⁵ *Id.* at 356 (Alito, J., dissenting, joined by Stevens and Kennedy, J.J.), (quoting *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 359 (1992)).

those of *C & A Carbone*. The *United Haulers* majority admitted that there was only one “salient difference” between *C & A Carbone* and *United Haulers*: in the former, state regulation benefited a private corporation, whereas in the latter, state regulation benefited a county-owned “public benefits corporation.”¹³⁶ Justice Thomas’ concurrence went farther, characterizing the distinction between the two cases as “razor thin.”¹³⁷ Dissenting Justices Alito, Stevens, and Kennedy complained that the provisions challenged in *United Haulers* were “essentially identical to the ordinance invalidated in *C & A Carbone*.”¹³⁸ Despite that acknowledgement, six Justices voted to uphold the constitutionality of the challenged state regulation in *United Haulers*, an outcome directly contrary to that of *C & A Carbone*.¹³⁹

Two Justices wrote separately to indicate their growing impatience with the Court’s invocation of the dormant Commerce Clause. In individual concurrences, Justices Scalia and Thomas reiterated their longstanding distrust of the dormant Commerce Clause. Justice Scalia wrote separately to “reaffirm [his] view that the so-called negative Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain.”¹⁴⁰ Justice Thomas went dramatically farther. He repudiated his vote in *C & A Carbone* holding the relevant state solid waste regulation unconstitutional, asserting, “Although I joined *C & A Carbone* . . . I no longer believe it was correctly decided. The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice.”¹⁴¹ Moreover, Justice Thomas argued that the Court should abandon the doctrine altogether. Tracing the history of the now-discredited right of free contract previously supported in *Lochner v. New York*,¹⁴² Justice Thomas opined that the Court should follow a similar course with its Commerce Clause jurisprudence: “[T]he . . . analogy to *Lochner* . . . suggests that the Court should reject the negative Commerce Clause, rather than tweak it. . . . The Court’s negative Commerce Clause jurisprudence, created from whole cloth, is just as illegitimate as the ‘right’ it vindicated in *Lochner*.”¹⁴³

By extending *United Haulers*’ public-private distinction to water export restrictions, the Court could close the regulatory gap that threatens to leave water resources under-regulated.¹⁴⁴ Rather, in appropriate cases, water re-

¹³⁶ *Id.* at 334. Chief Justice Roberts wrote the opinion of the Court, joined in full by Justices Souter, Ginsburg, and Breyer. They were joined, in relevant part, by Justice Scalia, and Justice Thomas concurred in the judgment.

¹³⁷ *Id.* at 353 (Thomas, J., concurring in the judgment).

¹³⁸ *Id.* at 356 (Alito, J., dissenting).

¹³⁹ *Id.* at 334. In separate opinions, Justice Scalia concurred in part and dissented in part, and Justice Thomas concurred in the judgment of Chief Justice Roberts joined by Justices Souter, Ginsburg, and Breyer.

¹⁴⁰ *Id.* at 348 (Scalia, J., concurring in part and dissenting in part).

¹⁴¹ *Id.* at 349 (Thomas, J., concurring in the judgment).

¹⁴² 198 U.S. 45 (1905).

¹⁴³ *United Haulers*, 550 U.S. at 355 (Thomas, J., concurring in the judgment).

¹⁴⁴ See *supra* Part II.D.

sources could be protected by both federal and state regulation.¹⁴⁵ In this way, the threat of a “regulatory void” can be minimized.

CONCLUSION: SUCKERS, SUCKERS EVERYWHERE . . .

Two recent cases have sparked a firestorm of controversy. The first involves a challenge by the Tarrant Regional Water District of Texas to surface water export restrictions enacted by Oklahoma.¹⁴⁶ In November 2009, a federal district court in Oklahoma held that the congressionally-approved Red River Compact — apportioning the water of the Red River and its tributaries among Oklahoma, Texas, Arkansas, and Louisiana — rendered the challenged state legislation immune from attack under the dormant Commerce Clause.¹⁴⁷ The court dismissed without prejudice all claims based on water not subject to the Compact,¹⁴⁸ making future litigation likely.

In the second dispute a private company, Wind River Resources, challenged Arizona’s refusal to issue a permit for the export of groundwater to Nevada.¹⁴⁹ The plaintiff alleged, among other things, that officials of the Arizona Department of Water Resources conspired to financially exhaust the applicant by delaying the processing of the permit application.¹⁵⁰ Opponents of the export asserted conspiracy claims of their own, speculating that Las Vegas and the Southern Nevada Water Authority were the intended recipients of the subject water, and claiming that they “hear a giant sucking sound from the direction of Las Vegas.”¹⁵¹

Cases such as these provide the courts with an important opportunity to reexamine and harmonize the relationship of the dormant and affirmative aspects of the Commerce Clause, and to bring the water cases into conformity with parallel cases involving natural resources other than water. This process will have important consequences, determining whether would-be water “suckers” should back off, or whether water export enterprises should be open for business.

¹⁴⁵ See generally William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 108 (2005) (discussing generally the benefits of “regulatory overlap, cooperative federalism structures, and redundant enforcement mechanisms” to reduce the threat of “regulatory underkill”).

¹⁴⁶ Tarrant Reg’l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2009 WL 3922803 (W.D. Okla. Nov. 18, 2009).

¹⁴⁷ *Id.* at *4.

¹⁴⁸ *Id.* at *8.

¹⁴⁹ Complaint at 4, Wind River Resources LLC v. Frisby, No. 2:08-cv-00653-KJD-GWF (D. Nev. May 21, 2008).

¹⁵⁰ *Id.* at 5.

¹⁵¹ Joe Gelt, *Arizona-to-Nevada Water Export Plan Proposed, Contested*, ARIZONA WATER RESOURCE (May-June 2007), at 1, 7, available at <http://cals.arizona.edu/AZWATER/awr/230b6cd7-c0a8-0164-0082-c6dc61f8a6ac-AWR-May-June-2007.pdf>.

APPENDIX: WATER, TRASH, AND THE COMMERCE CLAUSE

The Dormant Commerce Clause	
Resource	Opinion
Water	<p><i>Sporhase v. Nebraska</i>, 458 U.S. 941 (1982).</p> <ul style="list-style-type: none"> • Key holdings: Nebraska water export restriction (requiring reciprocity by importing state) violates dormant Commerce Clause under <i>Hughes</i> facial discrimination test; groundwater is an article of commerce. • Key facts: Involves groundwater; Nebraska charged fees for intrastate transfers; water was withdrawn from multistate Ogallala aquifer; water would be withdrawn from and used on single farm that straddled the Nebraska-Colorado border; no showing that Nebraska suffered from state-wide shortage that could not be alleviated by in-state transfers; water compacts lacked express indication that Congress intended to insulate such export restrictions from constitutional attack.
	<p><i>City of El Paso v. Reynolds</i> ("<i>El Paso II</i>"), 597 F. Supp. 694 (D.N.M. 1984), <i>superseding</i> 563 F. Supp. 379 (D.N.M. 1983).</p> <ul style="list-style-type: none"> • Key holdings: statute not facially unconstitutional where groundwater exports limited to those that are "not contrary to the conservation of water within the state and are not otherwise detrimental to the public welfare of the citizens of New Mexico." • Key facts: Involves groundwater; validity of export restrictions depends upon whether they mirror requirements for in-state uses.
	<p><i>Intake Water Co. v. Yellowstone River Compact Comm'n</i>, 769 F.2d 568 (9th Cir. 1985).</p> <ul style="list-style-type: none"> • Key holdings: Upholding Yellowstone River Compact of 1951, art. X, which prohibits the diversion of waters from the Yellowstone River Basin without the unanimous consent of all signatory states (Montana, Wyoming, North Dakota); by definition, congressionally approved compact cannot violate the dormant Commerce Clause, but rather Congress immunized state law from Commerce Clause objections by converting it into federal law. • Key facts: Involves surface water; involves interstate compact.
	<p><i>Ponderosa Ridge v. Banner Cnty.</i>, 554 N.W.2d 151 (Neb. 1996).</p> <ul style="list-style-type: none"> • Key holdings: Denying application to transfer groundwater from Nebraska to Wyoming under Neb. Rev. Stat. § 46-613.01 (1993) (successor to statute challenged in <i>Sporhase</i>) is not contrary to the dormant Commerce Clause; Nebraska may condition groundwater exports on showing that proposed use is beneficial, that alternative groundwater sources are not available, on consideration of the withdrawal's negative effects, and on consideration of any other factors consistent with the purposes of the statutory section. • Key facts: Involves groundwater; with limited exceptions, Nebraska restricts groundwater use to the overlying land (applying to both interstate and intrastate uses); Nebraska applies similar, but not identical, standards to interstate and intrastate uses.

	<p><i>Tarrant Reg'l Water Dist. v. Herrmann</i>, No. Civ-07-0045-HE, 2009 WL 3922803 (W.D. Okla. Nov. 18, 2009).</p> <ul style="list-style-type: none"> • Key holdings: Oklahoma legislation restricting water export rendered immune from Commerce Clause attack by congressionally-ratified Red River Compact; passage of legislation in 2009 did not impliedly repeal all statutes previously challenged by plaintiff nor render lawsuit moot; claims based on water not subject to the Compact dismissed without prejudice on the basis of ripeness. • Key facts: Compact specifically contemplated allocating the water at issue between the states involved; plaintiff was a political subdivision of Texas (not a Compact signatory) rather than the state itself (a signatory to the Compact) and thus not entitled to assert rights which Texas has under the Compact.
Landfill	<p><i>United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.</i>, 550 U.S. 330 (2007) (upholding county ordinance favoring state-created public benefit corporation).</p> <p><i>C & A Carbone v. Clarkstown</i>, 511 U.S. 383 (1994) (striking local ordinance requiring deposit of all solid waste within town at a single town-sponsored transfer station).</p> <p><i>Oregon Waste Systems, Inc. v. Dep't of Env'tl. Quality of Oregon</i>, 511 U.S. 93 (1994) (striking discriminatory state surcharge on importation of waste from other states).</p> <p><i>Fort Gratiot Sanitary Landfill v. Michigan</i>, 504 U.S. 353 (1992) (striking state restriction on importation of waste from outside county).</p> <p><i>Chem. Waste Mgmt., Inc. v. Hunt</i>, 504 U.S. 334 (1992) (striking state fee on disposal of hazardous waste from other states).</p> <p><i>City of Philadelphia v. New Jersey</i>, 437 U.S. 617 (1978) (striking state ban on importation of waste).</p>
The Affirmative Commerce Clause	
Resource	Opinion
Water	<p><i>Solid Waste Agency of Northern Cook Cnty v. U.S. Army Corps of Eng'rs</i>, 531 U.S. 159 (2001).</p> <ul style="list-style-type: none"> • Key holdings: Clean Water Act does not authorize agency to regulate as "navigable waters" intrastate, seasonal ponds used as habitat by migratory birds. • Constitutional dicta: Although resting its decision on statutory interpretation, the Court said, "Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited"; expressed concern for "federal encroachment upon a traditional state power," <i>id.</i> at 173, and feared "significant impingement of the States' traditional and primary power over land and water use," <i>id.</i> at 174. • Dissent: Stevens, J., joined by Souter, Ginsburg, and Breyer, J.J. Cites to <i>Sporhase's</i> holding that water is an "article of commerce," and asserts that "[t]he power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce," <i>id.</i> at 196.

Rapanos v. United States, 547 U.S. 715 (2006).

- **Key holdings:** Plurality opinion holds that under Clean Water Act, agency may only regulate as “navigable waters” relatively permanent, standing or flowing bodies of water and wetlands with a “continuous surface connection” to such bodies.
- **Constitutional dicta:** Although resting its decision on statutory interpretation, the Court expresses solicitude for avoiding “a significant impingement of the States’ traditional and primary power over land and water use,” *id.* at 737–38 (quoting *Solid Waste Agency of N. Cook Cty.*). “Regulation of land use, as through the issuance of . . . development permits . . . , is a quintessential state and local power,” *id.* at 738.