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Mixing Water and the Commerce Clause: The Problems of Practice, Precedent, and Policy in Sporhase v. Nebraska

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Mixing Water and the Commerce Clause: The Problems of Practice, Precedent, and Policy in *Sporhase v. Nebraska*

**INTRODUCTION**

Recently, in *Sporhase v. Nebraska*, the Supreme Court considered whether a state violates the dormant commerce clause when it restricts the export of water. Although the quantity of water at stake in *Sporhase* was "a mere cupful," the Court's opinion affects the disposition of vast supplies. Thus *Sporhase* is of first importance to the water lawyer.

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†I am indebted to Professor Andrew Kaufman of Harvard Law School for the guidance and encouragement he gave me as I wrote this article.

1. 102 S.Ct. 3456 (1982).
2. The commerce clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U. S. CONST. art. I, § 8, cl. 3. From the affirmative grant of power to Congress in the commerce clause, the Supreme Court early inferred limitations on the power of states to regulate commerce. E.g., Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 209 (1824) (first case to suggest that the commerce clause restricts the power of states to regulate commerce); Welton v. Missouri, 91 U.S. 275 (1876) (first case to invalidate a state regulation under the commerce clause). This negative aspect of the commerce clause has come to be known as the "dormant commerce clause." Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 425 n.1 (1982).
4. In early 1983, for instance, *Sporhase* was relied on to invalidate a New Mexico embargo which prevented a Texas city of almost 500,000 from gaining access to over 60 million acre-feet of groundwater. City of El Paso v. Reynolds, No. 80-730 HB (D.N.M. Jan. 17, 1983) (unpublished memorandum opinion) (discussed more extensively infra notes 48-64 and accompanying text).

A second example that demonstrates the practical importance of *Sporhase* concerns coal slurry pipelines. An element of many plans for the exploitation of coal in the western states is the use of slurry pipelines to transport the coal in a water solution to eastern markets. Already, however, Wyoming has passed a statute that prohibits the export of water in slurry pipelines without specific legislative authorization, WYO. STAT. 41-3-115 (1977), and Montana has enacted one that bans the use of water in any slurry pipeline, regardless of whether it would run intrastate or interstate. MONT. CODE ANN. 85-2-104 (1981). See generally, McDaniel, *Commerce Clause and Water Availability Issues Concerning Coal Slurry Pipelines*, 12. NAT. RES. LAW. 533 (1979); Tarlock, *Western Water Law and Coal Development*, 51 U. COLO. L. REV. 511 (1980). The validity of at least the Wyoming statute will be determined under *Sporhase*. (Presumably the validity of the Montana statute will be analyzed under the standards, described infra note 85, that apply to facially evenhanded regulations. See McDaniel, *supra*, at 543-45; Comment, "It's Our Water"—Can Wyoming Con-
Sporhase, however, also has significance outside the water area. On the doctrinal level, the opinion represents a substantial departure from the rule generally applied in prior cases involving natural resource embargoes. On the policy level, Sporhase provides a relatively novel solution to the issue of how courts should review export restrictions and other explicitly discriminatory regulations involving natural resource.

This paper analyzes Sporhase in its three areas of significance. Part I considers what Sporhase means from a water law perspective. It begins with a description of the opinion, and then probes areas of ambiguity. Part I concludes that Sporhase potentially provides states with substantial power to embargo water, although the scope of that power depends critically on how major ambiguities in the case are resolved. Part II then evaluates Sporhase from a doctrinal perspective. After a survey of the Supreme Court's previous natural resource cases, Part II asks how Sporhase departs from earlier doctrine. The central issue is whether the potential power which Sporhase gives states with respect to water extends to other resources as well. Part II concludes that, since Sporhase cannot soundly be limited to water or some small class of resources, the case is a significant departure from prior doctrine.

Finally, Part III takes up the policy question of whether Sporhase reaches a sound result. The conclusion reached is that both Sporhase and the case it overruled, Hudson County Water Co. v. McCarter,5 are unsatisfactory because they permit the enactment of undesirable embargoes. Then Part III pursues two more general questions: first, whether there are any embargoes which are justifiable as a matter of policy, and second, if there are such embargoes, whether the courts should attempt to differentiate between the desirable and the undesirable embargoes. Part III argues that situations arise from the commons nature6 of water which make embargoes desirable and that, despite the difficulty of the task, courts should attempt to identify those situations and thereby segregate desirable embargoes from undesirable ones.

This paper has a narrow focus. Throughout, the type of natural resource regulation considered is the regulation that explicitly favors in-state consumption. Thus the facially evenhanded regulation—i.e., the regulation


Yet a third proof of the practical significance of Sporhase is that of the 17 states west of the hundredth meridian, only three do not have statutes which restrict the export of water. See Note, Interstate Transfer of Water: The Western Challenge to the Commerce Clause, 59 TEX. L. REV. 1249, 1250 n.8, 1252-53 nn.16-21 (1982) (excellent short compilation and summary of the relevant statutes). Whenever a challenge is raised in any of the 14 states that restrict exports, analysis will proceed under the structure of Sporhase.

5. 209 U.S. 349 (1908).

6. A commons is a natural resource which many individuals exploit simultaneously. Classic examples of commons are pasturelands utilized by multiple herdsmen and the bounty of the seas. See generally, Hardin, The Tragedy of the Commons, 162 SCIENCE 1234 (1968).
that purports to affect in-state and out-of-state interests equivalently—and the dormant commerce clause problems that accompany it, is mentioned only in passing.  

I. EVALUATION OF SPORHASE FROM A WATER LAW PERSPECTIVE

The Opinion in Sporhase

The Issues

Joy Sporhase and Delmer Moss, Colorado residents, owned adjoining land in Colorado and Nebraska. They pumped groundwater from a well on their Nebraska land for use on their Colorado property without obtaining or applying for a permit from the Nebraska Department of Water Resources. That action violated Neb. Rev. Stat. § 46-613.01 which provided that no one could export groundwater from Nebraska without satisfying two conditions: first, that the Director of the Department of Water Resources must find “that the withdrawal of the groundwater requested is reasonable, is not contrary to the conservation and use of groundwater, and is not otherwise detrimental to the public welfare,” and second, that “the state in which the water is to be used grants reciprocal rights to withdraw and transport groundwater from that state for use in . . . Nebraska.”

Because Colorado did not allow export of its groundwater, the second condition in section 46-613.01 could not have been satisfied even if Sporhase and Moss had applied for a permit. Nebraska brought an action to enjoin Sporhase and Moss’s violation of section 46-613.01. They defended their action on the ground that the Nebraska law violated the dormant commerce clause.


8. In full, NEB. REV. STAT. § 46-613.01 (1978) provided:

Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the groundwater requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if 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.


10. It might be wondered why Sporhase and Moss did not simply drill a well on their Colorado property and thereby avoid the costs of litigation. The answer is that they apparently had wanted to do so, but were denied a permit to drill a well from Colorado. Brief of Colorado, Wyoming, Utah, Nevada, Kansas, North Dakota, South Dakota, and Missouri as Amici Curiae at 3. The possible relevance of the fact that Colorado denied Sporhase and Moss a permit is discussed infra note 146.
In *Hudson County Water Co. v. McCarter,* the Supreme Court had held that states could embargo water at their discretion, without limitation from the commerce clause. Because it accorded the states broad power over a natural resource, the 1906 *McCarter* decision was consistent with then prevailing doctrine. In *West v. Kansas Natural Gas Co.* and the cases that followed it, however, commerce clause interpretation shifted dramatically, with each case in the *West* series rejecting a state attempt to limit the export of a natural resource. Current commerce clause doctrine follows *West* and its progeny by disfavoring export restrictions, although it contains some notable exceptions. Hence, because *McCarter* would require upholding section 46-613.01 were it still valid precedent, the first issue before the Court in *Sporhase* was whether to overrule the longstanding but perhaps antiquated *McCarter* decision.

Assuming *McCarter* were overruled, the second issue in front of the Court was how to resolve, in whole or in part, the constitutional merits of section 46-613.01.

### The Overruling of *McCarter*

The Supreme Court, in an opinion by Stevens, chose to overrule *McCarter.* It did so for two reasons. First, the Court thought *McCarter* inconsistent with its summary affirmance of *City of Altus v. Carr.* In *City of Altus,* a three-judge court relied on *West* and its progeny to strike down a Texas embargo on groundwater holding that, because Texas law permitted trade in groundwater inside the state, Texas could not cut commerce off at the Texas border. Although the Supreme Court did not

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12. The Supreme Court decided *McCarter* on a theory of police power. According to Holmes, the author of the opinion, a state had the right to embargo its water because of the "omnipresent" and "fundamental" public interest in water. *Id.* at 356.
14. 221 U.S. 229 (1911).
16. *West* and its progeny are described in detail *infra* notes 76–85 and accompanying text.
17. Current commerce clause doctrine is described in detail *infra* notes 80–102 and accompanying text.
18. A third issue in *Sporhase* was whether Congress had authorized Nebraska to regulate water in a manner that would otherwise violate the dormant commerce clause. *Cf. Prudential Insurance Co. v. Benjamin,* 328 U.S. 408 (1946) (holding that Congress may, and did, authorize South Carolina to impose discriminatory taxes on out-of-state insurance companies). The Court in *Sporhase* held that Congress had not authorized Nebraska to discriminate in favor of in-state consumers in violation of the dormant commerce clause. 102 S.Ct. at 3456–66.

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consider City of Altus as controlling the merits of Sporhase,\textsuperscript{21} it did regard its affirmance of an opinion which invalidated an embargo on water as inconsistent with McCarter.\textsuperscript{22}

Second, the Court thought the McCarter doctrine inconsistent with Congress’s power under the commerce clause. To the Court, Congress’s power to regulate water was indubitably plenary. Over eighty percent of the water consumed annually in the United States is used for agriculture,\textsuperscript{23} an economic enterprise which is “the archtypical example of commerce among the several states for which the Framers of our Constitution intended to authorize federal regulation.”\textsuperscript{24} Moreover, some bodies of water underlie several states, thereby creating a federal interest in preventing the states from racing each other to the bottom of the aquifer.\textsuperscript{25} As the Court understood it, the McCarter doctrine “would not only exempt Nebraska groundwater regulation from burden-on-commerce analysis, it also would curtail the affirmative power of Congress to implement its own policies concerning such regulation.”\textsuperscript{26} Therefore the doctrine had to be overruled. The Court’s underlying assumption was that Congress’ power under the affirmative aspect of the commerce clause can reach no further than does the Court’s power to review cases under the dormant commerce clause; in other words, the Court assumed that Congress could not regulate under its commerce power what the dormant commerce clause precludes the Supreme Court from reviewing.\textsuperscript{27}

\textit{The Merits}

\textbf{The Finding Requirement.} The Court turned its initial attention to the first requirement of Neb. Rev. Stat. § 46-613.01—namely the requirement that no one export groundwater without a finding from the state Director

\begin{itemize}
  \item \textsuperscript{21} As the Court noted, Sporhase was distinguishable from City of Altus because “Texas law differs significantly from Nebraska law regarding the rights of a surface owner to ground water he has withdrawn.” 102 S.Ct. at 3641. Specifically, the distinction was that Nebraska generally did not permit trade in groundwater while Texas did.
  \item \textsuperscript{22} \textit{Id.} at 3461.
  \item \textsuperscript{23} \textit{Id.} at 3462.
  \item \textsuperscript{24} \textit{Id.} at 3462-63.
  \item \textsuperscript{25} \textit{Id.} at 3463. The Ogalalla Aquifer, the body of water at issue in Sporhase, underlies land in Colorado, Kansas, Nebraska, New Mexico, Oklahoma, and Texas. \textit{Id.}
  \item \textsuperscript{26} \textit{Id.}
  \item \textsuperscript{27} The Court’s assumption, which was vigorously challenged by Rehnquist, 102 S.Ct. at 3467 (Rehnquist, J. dissenting), raises an interesting line of inquiry. Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), and Reeves, Inc. v. Stake, 447 U.S. 429 (1980), seem to hold that the Court cannot review state proprietary actions under the dormant commerce clause. Under the Court’s assumption in Sporhase that Congress’s power extends no further than the Court’s, Alexandria Scrap and Reeves would imply that Congress could not regulate the state as proprietors. \textit{But see} United Transp. Union v. Long Island R.R. Co., 102 S.Ct. 1349 (1982) (Railway Labor Act applies to state-run commuter railroad).
\end{itemize}
of Water Resources that the export will be "reasonable, not contrary to the conservation and use of groundwater, and not otherwise detrimental to the public welfare." For two reasons, the Court held the finding requirement valid under a facial review.

First, the Court saw no facial problem with the finding requirement because it "may well be no more strict in application than the limitations upon intrastate transfers imposed by [Nebraska]." Were such the case, invalidating the requirement "would be inconsistent with the ideal of evenhandedness in regulation."

Second, the Court approved the facial validity of the finding requirement because "in the absence of a contrary view expressed by Congress, the Court was reluctant to condemn as unreasonable measures taken by a State to conserve and preserve this vital resource in times of severe shortage." Since the finding requirement might do no more than "conserv[e] and preserve this vital resource in times of severe shortage," the Court reasoned that the requirement should be upheld against a facial challenge, even if the requirement proved stricter in application than intrastate water law.

At the heart of the Court's second reason is a presumption that Nebraska has at least some rights to retain water for home consumption in times of shortage. To support that presumption, the Court offered four "realities":

First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. . . . Second, the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment

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28. Hereinafter the first requirement of section 46-613.01 will be referred to as the "finding requirement"; the second requirement of section 46-613.01—namely that the state receiving Nebraska groundwater permit exports to Nebraska—will be referred to as the "reciprocity requirement."

29. One could wonder whether the Supreme Court was wise to review the finding requirement. In the first place, Sporhase and Moss did not challenge the validity of the requirement, see Appellants' Brief at 23, thereby denying the Supreme Court the advantages of adversarial presentation. Secondly, the vague terms of the finding requirement had not been applied, so that the Court lacked a concrete setting in which to evaluate the requirement. The Court could have used its discretion under the ripeness doctrine to have declined to review the finding requirement.

30. 102 S.Ct. at 3464. The Supreme Court did not ask why Nebraska would have bothered with the finding requirement if the requirement only served to mimic existing groundwater regulations.

31. Id.

32. Id.

33. The Sporhase Court was not the first to suggest that states may have a right to embargo resources during periods of short supply. Professor Hardman made the same suggestion in 1919. Hardman, The Right of a State to Retrain the Exportation of its Natural Resources, 26 W. VA. L.Q. 1, 13 (1919). Cf. Toomer v. Witsell, 334 U.S. 385, 408-09 (1948) (Frankfurter, J., concurring) ("one of the weightiest doctrines in our law" is the doctrine that a state may limit out-of-state use of natural resources where necessary "to feed and maintain and give enjoyment to its own people").
decrees, . . . but also by the negotiation and enforcement of interstate compacts. . . . Third, although appellee's claim to public ownership of Nebraska groundwater cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. . . . In this regard, it is relevant that appellee's claim is logically more substantial than claims to public ownership of other natural resources. . . . Finally, given appellee's conservation efforts, the continuing availability of groundwater in Nebraska is not simply happenstance; the resource has some indicia of a good publicly produced and owned in which a state may favor its own citizens in times of shortage.34

Nebraska premised its claim to public ownership of groundwater, mentioned in the third reality, upon the fact that internal Nebraska water law generally did not permit landowners to buy or sell groundwater; Nebraska argued that because individuals could not trade in groundwater, the state should be regarded as the resource's owner.35 The conservation efforts referred to in the final reality involved, at least in the water district from which Sporhase and Moss withdrew their water, measures such as the installation of flow meters, well spacing requirements, and groundwater quotas.36

The Reciprocity Requirement. After upholding the facial validity of the finding requirement, the Court turned to the second half of section 46-613.01, the reciprocity requirement. Here, again, the Court indicated it would defer to certain discriminatory export restrictions, stating that, if a reciprocity requirement were "narrowly tailored to the State's legitimate conservation and preservation interest," then the requirement could survive challenge under the commerce clause.37 Nebraska, however, had failed to present evidence that would establish narrow tailoring to a legitimate conservation and preservation interest. The Court observed:

34. 102 S.Ct. at 3464.
35. An exception existed for municipalities, which were generally permitted to trade in groundwater. Id. at 3462.
36. See id. at 3461-62; accord Appellee's Brief at 8.
37. 102 S.Ct. 3463-64. The Court's reference to equitable apportionment decrees and interstate compacts in reality two may also warrant a word of explanation. The Court's equitable apportionment decrees resolve conflicts between two or more states that share a river. In the past, some decrees have contained terms that in application required that withdrawals from the river at issue be used exclusively in the withdrawing state. E.g., Wyoming v. Colorado, 353 U.S. 953 (1957) (of the 49,375 acre-feet per year that Colorado can withdraw from the Laramie River, 29,500 acre-feet must be used inside the Laramie River Basin—which basin lies wholly within Colorado). Similarly, some interstate compacts have contained terms that have the effect of barring water withdrawn from the subject river from being exported outside the state. E.g., The Snake River Compact, 64 Stat. 29 (1950) (Wyoming agreed not to permit water withdrawn from the Snake River to be used outside of the Snake River Drainage—which drainage lies wholly within Wyoming). It is presumably those terms of the equitable apportionment decrees and the interstate compacts that the Court regards as fostering the legal expectations of reality two.
38. 102 S.Ct. at 3465.
Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska.

Therefore, the Court ruled that the reciprocity requirement could not withstand analysis under the dormant commerce clause.

Because the Supreme Court regarded only half of Neb. Rev. Stat. §46-613.01 as invalid under the commerce clause, the Court remanded the case for consideration of whether the invalid half was severable. The Nebraska Supreme Court has since held section 46-613.01 to be severable, leaving the finding requirement as valid law in Nebraska.

The Power of States to Embargo Water Under Sporhase

The Sporhase opinion took away substantial power from the states to control their water in overruling McCarter. The key question from the water law perspective, however, is not what powers the opinion took away, but rather is what powers, if any, the opinion leaves for the states.

The Meaning of “Severe Shortage” and “Legitimate Conservation and Preservation Interest”

The Supreme Court in Sporhase expressed its deference to certain discriminatory export restrictions in two ways. First, in discussing the finding requirement of Neb. Rev. Stat. §46-613.01, the Court stated that it would be reluctant to condemn export restrictions enacted in times of “severe shortage.” Second, when the Court considered the reciprocity requirement of section 46-613.01, it indicated that a discriminatory export restriction which was narrowly tailored to a “legitimate conservation and preservation interest” would be valid. Consequently, the first task is to explore the meaning of the concepts “severe shortage” and “legitimate conservation and preservation interest.”

39. Id.
40. Id. The argument that the reciprocity requirement was an attempt to induce Colorado and similar states to abandon their export bans properly did not save the reciprocity requirement. As the Court pointed out in a footnote, A&P Tea Co. v. Cottrell, 424 U.S. 366 (1976), had held that a retaliatory motive cannot save a statute that otherwise violates the commerce clause. 102 S.Ct. at 3465 n.18.
42. 102 S.Ct. at 3464.
43. Id. at 3465.
44. However the concepts of “severe shortage” and “legitimate conservation and preservation interest” are ultimately interpreted, they should be given closely related meanings. Otherwise, the Supreme Court’s deference to export restrictions in times of “severe shortage” will not track its deference to export restrictions narrowly tailored to a “legitimate conservation and preservation interest.” A reasonable interpretation of the relationship between “severe shortage” and “legitimate conservation and preservation interest” is that a state has a “legitimate conservation and preservation interest” when it is acting to prevent a “severe shortage.”
The federal district court in New Mexico recently decided a case which applied Sporhase. City of El Paso v. Reynolds presented the issue of whether New Mexico could prevent El Paso from gaining access to two large and scarcely used aquifers in New Mexico. The district court determined that "the Supreme Court [in Sporhase] held that a State may discriminate in favor of its citizens only to the extent that water is essential to human survival." The district court specifically distinguished protecting economic activities from protecting health and safety, ruling that under Sporhase an interest in protecting economic enterprise is insufficient to justify a discriminatory export restriction. Because New Mexico "did not maintain that the embargo's purpose is to promote the health and safety of New Mexico's citizens," the court held that the New Mexico embargo was invalid.

In El Paso, "severe shortage" means a shortage that threatens drinking supplies, and "legitimate conservation and preservation interest" means an interest in human health and safety. Those interpretations of "severe shortage" and "legitimate conservation and preservation interest" may be overly narrow. They distinguish health and safety interests from environmental and other non-economic interests. The Supreme Court, however, has stated that a state's interests in the environment are "similar" to its interests in health and safety. This observation by the Supreme Court provides a basis for arguing that a state should have at least as much power to protect its environment as it has to protect health and safety.

A second problem with El Paso concerns its implication that threats to economic activity can never constitute a "severe shortage" and that protecting economic interests can never be a "legitimate conservation and preservation interest" sufficient to uphold a discriminatory export restriction. The district court justified distinguishing economic activity from health and safety by arguing that allowing a state to protect economic activity with discriminatory export restrictions "would remove groundwater from commerce clause restraints."

The district court's position seems persuasive insofar as it is an argument against according states unrestrained powers to protect economic enterprises. According a state wide-ranging powers to protect its economy with export restriction effectively would authorize any embargo which a

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46. Slip op. at 48.
47. Id.
48. Id. at 29. New Mexico admitted that the embargo was designed to protect a wide variety of in-state uses, "including water requirements for municipalities, industry, irrigated agriculture, energy production, fish and wildlife, and recreation." Id. at 29-30.
49. The district court in El Paso also had an alternative basis for invalidating New Mexico's embargo. This alternative basis is described infra notes 55-56 and accompanying text.
51. Slip op. at 30.
state might wish to impose. Therefore, this would be inconsistent with the Supreme Court's decision to overrule McCarter and to treat water as an article of commerce.

The district court's position is less persuasive, however, insofar as it is an argument against ever letting a state protect economic activity through embargoes. Sometimes the economic activities a state might want to protect will be related intimately to a pattern of living or to a lifestyle. Suppose, for instance, a state wanted to impose an embargo to protect the economy of a community of small farmers; or suppose the embargo at issue were part of a comprehensive plan for regional development. In cases like these, a state's interests in protecting and shaping economic activities approximate its interests in health and safety or its interests in the environment. As a consequence, contrary to El Paso, arguably threats to economic activities which are integrally related to patterns of living should constitute "severe shortages" under Sporhase, and a state's interests in protecting those activities should be regarded as "legitimate conservation and preservation interests" sufficient to justify discriminatory export restrictions.52

The Meaning of "Narrowly Tailored"

Sporhase not only requires a state to support a valid export restriction by demonstrating the existence of a "severe shortage" or a "legitimate conservation and preservation interest," but it also requires that the export restriction be "narrowly tailored"53 or exhibit "a close means-end relationship"54 to the legitimate interest. Accordingly, a second issue in interpreting Sporhase is what constitutes "narrow tailoring."

The El Paso court found the New Mexico embargo at issue defective for two reasons. The first, which has already been discussed, was that the embargo was not supported by an interest in protecting health and safety. The second defect was that, even if the purpose behind the embargo were the protection of health and safety, the embargo was not narrowly tailored. The district court found a lack of narrow tailoring because the embargo did not reserve the water which it retained inside New Mexico

52. The language of El Paso is inconsistent with permitting a state to impose a discriminatory export restriction whose purpose is to protect an economic activity. The holding of El Paso, however, is not inconsistent with recognizing that some economic interests may be validly protected by embargoes. The district court in El Paso was not confronted with a situation where water shortages threatened small farmers or any other current economic activity. Nor was the court confronted with an embargo which was part of a larger development plan. The purpose of the embargo in El Paso was to save water for a range of indefinite uses. Therefore, the invalidation of the New Mexico embargo is not inconsistent with permitting states to protect small farmers, other current economic activity, or comprehensive development plans through discriminatory export restrictions.

53. 102 S.Ct. at 3465.
54. Id.
55. See supra notes 45-52 and accompanying text.
for health and safety uses, but instead permitted the retained water to be
used for a variety of uses, including agriculture, industry, and energy.56
The El Paso case thus provides a partial interpretation of “narrow tai-
loring,” requiring that a valid export restriction, at a minimum, must
further a legitimate interest more than incidentally.

The interpretation of narrow tailoring in El Paso seems correct. If
“narrow tailoring” is to have any meaning, it must require more than an
incidental furthering of the legitimate conservation and preservation in-
terest. The El Paso opinion, however, leaves open the issue of what
beyond a more than incidental advancing of a legitimate interest is required
by the phrase “narrow tailoring.” At its most stringent, the narrow tai-
loring requirement could be read to require that the state have no less
discriminatory alternatives available for protecting its legitimate conser-
vation and preservation interests.57 A more lenient reading would require
only that the embargo directly function to further a legitimate conservation
and preservation interest.58

The Role of the Four “Realities”

The Court in Sporhase justifies its deference to certain export restric-
tions by citing four “realities.”59 This raises yet a third issue of inter-
pretation—namely, what role will the four realities occupy in future cases.

The four realities could be interpreted as playing three possible roles.
First, and most restrictively, they could each be separate prerequisites to
the right to embargo water. If they were to play such a role, no state
could promulgate a discriminatory restriction on water exports unless it
was protecting the health of its citizens (reality one), acting on the basis
of legal expectations (reality two), exercising logically superior ownership
claims (reality three), and simultaneously imposing conservation mea-
sures on in-state users (reality four). Second, and least restrictively, the
four realities could be regarded as irrelevant to a state’s power to embargo
water. Under this interpretation of their role, the validity of embargoes
would turn exclusively on the existence or nonexistence of a sufficient
shortage inside the state. Finally, the four realities could be treated neither
as independent prerequisites nor as irrelevant to the analysis, but as

56. See City of El Paso v. Reynolds, slip op. at 32-33.
57. Cf. Hughes v. Oklahoma, 441 U.S. 322, 336-38 (1979) (a state may embargo minnows in
order to conserve minnow populations only if no less discriminatory alternatives are available to it).
58. At least in part, how the narrow tailoring requirement should be read is a function of how
“severe shortage” and “legitimate conservation and preservation interest” are interpreted. Giving
both “severe shortage” or “legitimate conservation and preservation interest” and “narrow tailoring”
a restrictive reading would leave the states with hardly any power to embargo water. Such a reading
of Sporhase would be inconsistent with the deference to discriminatory export restrictions that is
expressed in the opinion.
59. 102 S.Ct. at 3464.
something in the middle. They could be seen, for instance, as factors that collectively must reach a certain threshold or critical mass before an embargo would be valid. Nothing in the Sporhase opinion indicates which of the three possible roles the realities are intended to occupy.  

If subsequent cases make the four realities independent prerequisites to valid embargoes, another set of uncertainties arises. Those uncertainties concern what satisfies each of the realities. Reality three requires a "logically more substantial" claim to public ownership, but what exactly is that? Reality four requires that the state impose conservation measures on in-state users; it does not, however, specify how extensive they have to be.  

The Relevancy of the Water Situation in the Embargoed State

After its export ban was struck down in El Paso, New Mexico enacted a permit system for controlling groundwater exports. The statute requires the New Mexico State Engineer to consider before issuing a permit the supplies of water available to the applicant in his home state. This aspect of the new New Mexico law raises a final issue in interpreting the power of states under Sporhase: does Sporhase allow ample water supplies or wasteful water practices in the state wishing to import water (the embargoed state) to justify an export restriction?

In the policy section of this paper, it will be argued that both the availability of alternative sources of supplies in the embargoed state and the prudence of the embargoed state's water management are relevant to the desirability of export restrictions. That relevance makes laws like the New Mexico permit system rational. It should therefore create a pressure to allow consideration of the embargoed state's water situation to enter the commerce clause analysis.

A restraining force exists, however. It is that Sporhase gives no indication that consideration of the embargoed state's water supply and usage is relevant or permissible. To the contrary, the only factors which Sporhase identifies as justifying embargoes all concern the status and action of the state imposing the embargo. Sporhase's failure to mention anything about the water situation of the embargoed state could be interpreted as meaning that consideration of such a factor is impermissible.

60. The El Paso opinion does not discuss what role the realities should play either.
61. Some comments on reality two, legal expectations, are presented infra note 151. Whether the third reality—Nebraska's "logically more substantial" claim to public ownership—would make a sound prerequisite to valid embargoes is discussed infra notes 110–20 and accompanying text. The relevance from a policy perspective of conservation efforts, the subject of reality four, is considered infra notes 132–43 and accompanying text.
63. Id. §§ 1(D)(5), 1(D)(6).
64. See infra notes 144–51 and accompanying text.
The issue of what powers states have after *Sporhase* is complex. The issue depends upon how "severe shortage" and "legitimate conservation and preservation interest" are defined, on what "narrow tailoring" requires, on what role is assigned to the four realities, and on whether the force of policy considerations will allow the water situation in the embargoed state to justify embargoes. An overall assessment, however, is that *Sporhase* permits states to limit exports when important enough state interests are at stake. Health and safety are sufficiently important state interests to justify discriminatory export restrictions under *Sporhase*. Arguably, so are environmental interests and certain economic ones. If this overall assessment is accurate, then *Sporhase* leaves the states with significant powers to keep water for in-state use.

II. EVALUATION OF *SPORHASE* FROM A DOCTRINAL PERSPECTIVE

Having explored what *Sporhase* means or may mean from a water law perspective, it is now appropriate to turn to the second inquiry: the importance of *Sporhase* to the development of constitutional doctrine. This inquiry logically breaks into two parts. First, there should be a historical survey of the important natural resource cases that preceded *Sporhase*. The aim of the survey, of course, must be to develop a picture of the doctrine that prevailed prior to *Sporhase*. The article then turns to the critical second question: to what extent does *Sporhase* depart from or modify the antecedent doctrine?

**Doctrine Before Sporhase**

**The Early Cases: McCready, Geer, and McCarter**

In the late 1800s and early 1900s, three cases confronted the Court that raised the issue of the power of states to bar nonresident access to their natural resources. The Court upheld the states' power in each case, thus broadly approving the right of states to retain natural resources for home consumption.

The first case, *McCready v. Virginia*, presented the Court with the issue of whether Virginia could prevent nonresidents from planting oysters

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65. The cases surveyed will be principally, but not exclusively, embargo cases. The relevant doctrinal area is the power of states deliberately to favor the in-state utilization of domestic resources. Thus cases like *McCready v. Virginia*, 94 U.S. 391 (1876) (limitation on nonresident use of tidal beds), *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978) (limitation on nonresident access to elk herds), and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (prohibition on use of in-state dumps by out-of-state waste generators), will be pertinent to the inquiry, even though they do not technically involve embargoes.

66. 94 U.S. 391 (1876).
in the state's tidelands. The Court upheld Virginia's authority against a privileges and immunities clause challenge by utilizing a state ownership theory. From the premise that "each state owns the beds of all tide-waters within its jurisdiction," the Court concluded that Virginia should be accorded the right to exclude nonresidents.

The second case, Geer v. Connecticut, also relied on a state ownership theory. The issue in the case was whether the commerce clause prohibited Connecticut from banning the export of game birds killed within the state. The Court reasoned that because wild animals roam at large throughout Connecticut, the state should be deemed owner of them. It then held "[t]he common ownership imports the right to keep the property, if the sovereign so chooses, always within the jurisdiction for every purpose."

The state ownership theories of McCready and Geer are malleable. With imagination, they plausibly could be extended to most natural resources if not all. The need to do so in order to uphold embargoes and similar restrictions, however, was obviated by the third case, Hudson County Water v. McCarter, which involved a commerce clause challenge to a prohibition on the export of water. Writing for the Court, Justice Holmes expressly declined to base his holding on a state ownership theory, choosing instead to place it on the "broader ground" of "public interest and the police power."

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67. Id. at 394.
68. Whether McCready would be decided the same way today is subject to doubt. It is unclear what the Supreme Court regards as the proper test to apply in privileges and immunities clause cases. Although Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978), held that the test is whether the right at issue is "fundamental," Hicklin v. Orbeck, 437 U.S. 518 (1978), which was decided only one month later, appeared to reinstate the test of Toomer v. Witsell, 334 U.S. 385 (1948), which prohibited discrimination "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." 334 U.S. at 398 (quoted in Hicklin at 525-26). Under either test, however, McCready would be suspect. Since employment is involved, the Virginia statute might well be found to affect a fundamental right. It is unlikely that the Virginia statute could pass the Toomer test since nonresidents would not appear to pose a special threat to Virginia oyster beds; indeed, in Toomer itself, it was held that nonresident shrimp fishermen did not create a special threat to South Carolina's shrimp fisheries. But see Hellerstein, Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources, 1979 SUP. CT. REV. 51, 86-90 (arguing that McCready "may not be ready for last rites").

The Virginia statute at issue in McCready would also be subject to challenge on federal preemption grounds. See Lewis & Strand, Douglas v. Seacoast Products, Inc.: The Legal and Economic Consequences for the Maryland Oyster, 38 MD. L. REV. 1, 8 (1978).
69. 161 U.S. 519 (1896).
70. But see Hughes v. Oklahoma, 441 U.S. 322, 339-41 (1979) (Rehnquist, J., dissenting) (arguing that the Court in Geer also relied on a police power theory).
71. 161 U.S. at 530. Geer of course has been overruled by Hughes v. Oklahoma, 441 U.S. 322 (1979).
72. For an example of how state ownership ideas may be extended to natural gas, see Hardman, supra note 33, at 10-11.
73. 209 U.S. 349 (1908).
74. Id. at 355-56.
to the welfare of the state gave the state the right to retain it within the state’s boundaries. As Holmes recognized, his police power theory is not easily limited to water, but would appear to apply with equal force to other resources.\textsuperscript{75}

Thus by the end of 1908, the year of the \textit{McCarter} decision, Supreme Court doctrine seemed to allow states wide discretion to control access to their natural resources. Neither the privileges and immunities clause nor the commerce clause appeared to impose any constitutional limitations on state power.

\textit{Rejection of the Early Cases: The Middle Period}

The one-sidedness of the early cases, which upheld the right of states to discriminate in favor of in-state consumption, was replaced in a series of cases stretching from 1911 to 1950 with an opposed one-sidedness. In \textit{West v. Kansas Natural Gas Co.},\textsuperscript{76} the first of the series, the Court struck down an Oklahoma embargo on natural gas. The Court reasoned that, if Oklahoma were permitted to embargo its gas, then “Pennsylvania might keep its coal, the northwest its timber, the mining states their minerals . . . [A]nd commerce will be halted at state lines.”\textsuperscript{77} In response to Oklahoma’s argument that \textit{McCarter} was controlling, the Court weakly commented, “surely we need not pause to point out the difference between a river flowing upon the surface of the earth and such a substance as gas seeping invisibly through sands beneath the earth.”\textsuperscript{78}

\textit{West} involved a complete embargo and hence left open the question of whether lesser restrictions might prevail. Later cases took up this question, and resolved it against the validity of lesser discriminations. In \textit{Pennsylvania v. West Virginia},\textsuperscript{79} the Court struck down a West Virginia requirement that natural gas producers within the state give West Virginia consumers a right of first refusal. And in \textit{H.P. Hood & Sons v. Du Mond},\textsuperscript{80} the Court ruled that New York could not use a permit system to insure that milk exports did not cause local milk shortages.

Nor did the middle period leave the state with much power under the privileges and immunities clause to limit to residents the right to harvest the bounties of state waters. In \textit{Toomer v. Witsell},\textsuperscript{81} the Court held that South Carolina could not charge nonresidents one hundred times more

\begin{footnotesize}
\textsuperscript{75} See \textit{Pennsylvania v. West Virginia}, 262 U.S. 553, 602-03 (1923) (Holmes, J., dissenting); \textit{infra} notes 104--09 and accompanying text. \textit{McCarter}, of course, was overruled by \textit{Sporhase}.
\textsuperscript{76} 221 U.S. 229 (1911).
\textsuperscript{77} \textit{Id.} at 255.
\textsuperscript{78} \textit{Id.} at 260.
\textsuperscript{79} 262 U.S. 553 (1923).
\textsuperscript{80} 336 U.S. 525 (1949).
\textsuperscript{81} 334 U.S. 385 (1948).
\end{footnotesize}
for a shrimp license than it charged residents. The theory of the case was that the privileges and immunities clause "outlaw[s] classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." McCready was limited to its special facts on the ground that the ownership theory of the case was "fiction."

In Cities Services Gas Co. v. Peerless Oil & Gas Co., the Court upheld an Oklahoma regulation that raised the price of natural gas in order to induce greater consumer conservation. Because one of the effects of the price increase surely would be to curtail nonresident use of natural gas, the Court's approval might seem inconsistent with its other holdings in the middle period. Cities Services is distinguishable from the West through Hood series of cases, however, on an important basis. The purpose of the price increase in Cities Services was to conserve natural gas for future consumption by both residents and nonresidents, not just to conserve the resource for home consumption. Thus Cities Services, unlike West, Pennsylvania v. West Virginia, Toomer, or Hood, did not involve a deliberate attempt to protect a natural resource for in-state consumption.

Contemporary Doctrine Before Sporhase

After over a twenty year hiatus, commerce clause cases involving natural resources returned to the Supreme Court in the mid-1970s. The doctrine that emerges from the contemporary cases is not as one-sided as the doctrine of either the early or the middle cases. In its main thrust, however, the contemporary doctrine as developed prior to Sporhase carries forward the anti-embargo position of the middle period.

In City of Philadelphia v. New Jersey, the issue before the Court was whether New Jersey could ban the import of garbage in order to conserve dump space for in-state producers of solid waste. The Court did not object to the state's end, which was to conserve dump space. Rather, the Court disapproved the method by which New Jersey hoped to accomplish the

82. Id. at 398.
83. Id. at 402.
85. Under contemporary doctrine, the Supreme Court would review a facially evenhanded regulation like the one at issue in Cities Services under the standard of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), which provides that "[w]here 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." Id. at 142. One commentator, however, has argued that the Court's review under Pike proceeds with great deference when the facially evenhanded regulation concerns natural resources. See Stewart, supra note 7, at 247-55.
86. 437 U.S. 617 (1978).
conservation. In the Court's view, New Jersey attempted to "impose[e] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." Under the commerce clause, this was impermissible regardless of the need that the import ban might meet:

"The evil of protectionism can reside in legislative means as well as legislative ends. . . . Whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State." 68

*New England Power Co. v. New Hampshire* 69 was the Supreme Court's latest pronouncement on the subject of natural resource embargoes prior to *Sporhase*. The issue in the case was the validity of New Hampshire's prohibition on the export of hydroelectricity. In a unanimous opinion, the Court ruled the export ban invalid:

Our cases have consistently held that the Commerce Clause . . . precludes a State from mandating that its residents be given a preferred right to access, over out-of-state consumers, to natural resources located within its borders or to products derived therefrom. 90

Because of *Philadelphia* 's strong language and *NEPCO* 's unanimity and recent vintage, the two cases must be taken as expressing the prevailing pre-*Sporhase* doctrine. Other recent cases, however, imply that the doctrine of *Philadelphia* and *NEPCO*, which seems categorically to prohibit embargoes and similar regulations, may be subject to possible qualifications in three areas.

The Court develops the first qualification in *Baldwin v. Fish & Game Commission*. 91 In that case, the Court upheld against a privileges and immunities challenge Montana's power to charge nonresidents twenty-five times more for elk licenses than residents were charged. The theory of the case was that since elk hunting is not a "fundamental" right, Montana was under no obligation to afford nonresidents equal access to its elk. 92 Hence, the qualification that apparently emerges in *Baldwin* is that a state may exclude nonresidents from non-fundamental or recreational resources. 93

*Hughes v. Oklahoma*, 94 which involved an embargo on minnows, reached

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87. Id. at 628.
88. Id. at 626–27.
89. 102 S.Ct. 1096 (1982) [hereinafter cited as *NEPCO*].
90. Id. at 1100.
92. Id. at 388.
93. The present status of the *Baldwin* doctrine that the privileges and immunities clause does not apply to non-fundamental rights is in some doubt as a result of *Hicklin v. Orbeck*, 437 U.S. 518 (1978). See supra note 68.
a result wholly consistent with *Philadelphia* and *NEPCO*—the embargo was struck down. The Court, however, qualified its opinion by stating an embargo might be valid were it necessary to “maintaining the ecological balance in state waters by avoiding the removal of inordinate numbers of minnows.” More generally, *Hughes* expresses the view that embargoes may be valid where there are no less discriminatory alternatives extant for accomplishing a “legitimate local purpose.” The opinion did not imply, however, that saving a resource for exclusively in-state consumption could ever be a legitimate local purpose.

The third exception to the general rule against embargoes concerns state-owned resources. *Reeves Inc. v. Stake* held that a state may limit the initial distribution of a state-produced good—in this case, cement—to residents. If the *Reeves* holding may be validly applied to all state-owned resources, not just those the state produced, and if the power to restrict initial distribution carries with it the power to embargo the resource, then *Reeves* implies that a state may ban the export of resources it owns.

A historical survey of the relevant cases reveals some inaccuracies in *NEPCO*’s contention that “[o]ur cases have consistently held that the commerce clause . . . precludes a State from mandating that its residents be given a preferred right of access.” *McCreary* and *McCarter*, neither of which were expressly overruled by the time of *NEPCO*, hold to the contrary. A more pertinent inaccuracy is that the contention ignores cases like *Baldwin*, *Hughes*, and *Reeves* that appear to qualify the prohibition on embargoes. Nonetheless, on the whole the statement is a fair assessment of the general rule applied by the Court, as a substantial line of cases stretching from 1911 to 1982 attest.

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95. Id. at 337.
96. Id.
99. A recent commentary has argued that the power to restrict initial distribution should not be read to carry with it the power to impose embargoes. See *Anson & Schenkkan, Federalism, the Dormant Commerce Clause and State-Owned Resources*, 59 TEX.L. REV. 71, 92–93 (1980) (embargoes, unlike restrictions on initial distribution, prevent economically efficient arbitrage).
100. Commentators have reached different conclusions about whether state ownership should be a sufficient basis for imposing embargoes. Compare *Anson & Schenkkan*, supra note 99, at 92–93 (embargoes are undesirable because inefficient) with *Hellerstein*, *supra* note 68, at 77 (“[t]o preclude the States from preferring in-state interests in the distribution of state natural resources would deprive the States of an important attribute of their separate existence as independent political units in our federal system”). Professor Varat takes a middle ground, arguing that embargoes may be valid when state ownership results from *purchase*, but not when ownership “stems from original dominion.” *Varat, State “Citizenship” and Interstate Equality*, 48 U. CHI. L. REV. 487, 556–57 (1981).
**The Extent of Sporhase's Departure from Prior Doctrine**

The extent of Sporhase's departure from prior doctrine depends on the set of natural resources to which the opinion extends. As the discussion in Part I indicated, Sporhase seems to provide states with considerable power to embargo water when important enough state interests are at stake. If that potential power extends to all natural resources, then Sporhase would represent a major modification of natural resource doctrine; it would replace the general prohibition on embargoes of Philadelphia and NEPCO with a doctrine that gives states substantial power to impose export bans to protect important state interests. On the other hand, if Sporhase may soundly be limited to water or some narrow set of resources, then the case would be more or less reconcilable with prior doctrine. Like Baldwin or Reeves, it would only segregate out a class of resources for special treatment.

Two principal arguments emerge to constrain the reach of Sporhase. First, Sporhase should apply only to water because water is a unique resource. Second, reliance could be placed on the Court's statement that "it is relevant that appellee's claim [to state ownership of water] is logically more substantial than claims to public ownership of other natural resources,"103 but Sporhase should not be generally extended because Nebraska had a special ownership interest in water which was essential to the Court's opinion. Each of the two arguments is taken up below. As will be seen, neither proves to be a satisfactory basis for limiting Sporhase.104

**The Argument that Water is a Unique Resource**

As its first reason for deferring to measures taken by Nebraska to conserve water for in-state use, the Court in Sporhase observed that "a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power."105 That comment suggests an argument for limiting the reach of Sporhase. The starting point of the argument is that water is a unique resource because

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103. 102 S.Ct. at 3464.
104. The general issue to be discussed is whether there are sound reasons for applying a different commerce clause rule to water, and perhaps to some similar resources, than is applied to the bulk of natural resources. This general issue was taken up in an article by Professor Hellerstein. Hellerstein, supra note 68. There he concluded that a state may have a sufficiently strong interest in water to justify applying a different commerce clause rule to water than is applied to other resources. Professor Hellerstein however, did not offer any reasons in support of his conclusion, professing instead to lack the needed expertise in "the complex and confusing problems associated with state 'ownership' of water." Id. at 90–92. In a much earlier article, Professor Hardman also considered the same general issue. Hardman, supra note 33. His conclusion was that water is indistinguishable from other natural resources. Id. at 10–11.
105. 102 S.Ct. at 3464.
it is particularly vital to the public’s welfare. As Holmes asserted in
McCarter, “few public interests are more obvious, indisputable and in-
dependent of political theory” than the interest in water.106 From the
premise of water’s uniqueness, it could be concluded that it would be
improper to extend the results of a case dealing with the unique resource
water to other resources.

Two problems, however, confront an argument based on water’s
uniqueness. The first is that the premise of the argument is flawed, for
upon inspection water turns out not to be unique in any relevant sense.
This point can be made in two ways. First, the mystique surrounding
water can be deflated by observing that water is consumed primarily by
economic interests, not by individuals for home consumption. Statistics
show that over four-fifths of all the water consumed in the United States
is used for agriculture; only ten percent is consumed residentially.107
Second, at the same time that the mystique of water is deflated, the
importance of other resources can be enhanced. Although water is vital,
other resources such as natural gas needed for heating108 or food are also
needed for survival.

The second problem with the argument based on uniqueness is that,
even if water were uniquely vital, it is hard to see why anything of
commerce clause significance should turn on that fact. Water’s vitality
would make the needs of in-state users more pressing, but at the same
time, the needs of out-of-state users would rise proportionately. It makes
no sense to change the status of a resource under the commerce clause
just because the stakes on both sides have risen.109

**The Argument that Nebraska Has Special Ownership Interests**

If Sporhase cannot be limited by an argument based on uniqueness,
perhaps reference to Nebraska’s ownership interests in water can curtail
the case’s possible implications. As noted above, the Court’s opinion
expressly states that Nebraska had “logically more substantial” ownership
interests in water.

The basis of Nebraska’s “logically more substantial” ownership in-
terests appears to be the fact that, as a general matter, Nebraska followed

106. 209 U.S. at 356. But cf. Pennsylvania v. West Virginia, 262 U.S. at 603 (Holmes, J.,
dissenting) (arguing that states should have the power to embargo resources besides water).
107. Reinhold, *Nation’s Water Is Bountiful, But Supplies are Squandered*, N.Y. Times, Aug. 9,
1981, § 1, at 1, col. 3.
108. With respect to natural gas, the Supreme Court noted long ago that “[h]eat is as indispensable
to the health and comfort of the people as light or water.” Jones v. City of Portland, 245 U.S. 217,
225 (1917).
109. Indeed, were water a uniquely vital resource, that might be a reason for diminishing, rather
than expanding, the power of the states to impose embargoes. One could argue that the unique
vitality of water would make it critical that residents of the embargoed state not be denied an adequate
a rule of beneficial use which did not permit internal trade in groundwater. The Court seemed to assume that the absence of intrastate trade entailed "a greater ownership interest" on the part of the state.\textsuperscript{110} Hence, the issue posed by the ownership argument is whether it is sensible to find an embargo valid because a state prohibits intrastate sales in water.\textsuperscript{111}

If the applicability of \textit{Sporhase} depends on whether internal trade is prohibited, a substantial "slippery slope" problem arises. The problem would be how to determine when something less than an absolute prohibition on intrastate trade would support an embargo. In \textit{Sporhase}, Nebraska's prohibition on internal trade was not absolute; the state allowed its municipalities to buy and sell groundwater.\textsuperscript{112} Nonetheless, the Supreme Court indicated that Nebraska could embargo water in certain circumstances. Had the state allowed sales only within the basin of origin, would it have retained sufficient ownership to support an embargo? Suppose the state limited the quantities that could be bought and sold. Would that be sufficient?

Line-drawing aside, there are two substantive problems with making the applicability of \textit{Sporhase} turn on whether internal trade is prohibited. First, a rule of law which rewards those states that limit internal commerce in groundwater is likely to conflict with the goal of economic efficiency. As a general matter, permitting internal trade leads to greater efficiency in the allocation of groundwater because it permits individuals to make mutually beneficial exchanges. Indeed, on its face, an extremely efficient conservation regime would be one that set extraction quotas but permitted the water that was extracted to be sold inside the state on an open market. If the Court conditioned its approval of embargoes on the prohibition of internal trade, states would have a significant incentive to meet that condition. The incentive might cause states deliberately to impose economically inefficient restrictions on in-state trade in water.

The second substantive problem is that the existence of internal trade is a reason for deferring to state embargoes, not a reason against deference. In Nebraska, because internal trade was generally prohibited, there were no in-state sellers of water who had an interest in free trade with neighboring states. If, however, internal trade had been permitted, then there would have been a group of in-state sellers with interests aligned with those of would-be out-of-state purchasers. There is,\textsuperscript{113} or should be,\textsuperscript{114} a

\textsuperscript{110} See 102 S.Ct. at 3461–62, 3464; accord Appellee's Brief at 8.

\textsuperscript{111} There is authority for making the nonexistence of internal trade a prerequisite. In City of Altus v. Carr, 255 F. Supp. 838 (W.D. Tex.), \textit{aff’d mem.}, 385 U.S. 35 (1966), the three-judge court based its invalidation of a Texas embargo on water on the fact that Texas law permitted internal trade.

\textsuperscript{112} 102 S.Ct. at 3462.


\textsuperscript{114} See Eule, \textit{supra} note 2 and Tushnet, \textit{supra} note 7.
general commerce clause principle that the degree of judicial deference to restrictions on exports should vary according to the extent to which out-of-state interests are represented within the state: the greater the representation of out-of-state interests, the greater the deference which it is appropriate to accord export limitations. The principle is justified because discrimination against out-of-state interests is less likely when the out-of-state interests are represented inside the state. Since the existence of internal trade creates a group of in-state sellers who will represent the interests of out-of-state purchasers, this principle would seem to dictate a more lenient review when internal trade is permitted than when it is prohibited.

It could be argued in response that the absence of internal trade is a relevant prerequisite to valid embargoes because of its relationship to considerations of state sovereignty. The argument would assert that a state has a different kind of interest, and a stronger one, in a resource that is not subject to private ownership than it does in resources like coal, natural gas, or timber which may be privately owned and traded. Therefore, as a consequence of that special interest, the state has a sovereignty claim in the resource which is not privately owned that provides an extra justification for the imposition of embargoes.

The problem with appealing to an idea of state sovereignty is that maximizing state sovereignty is not a persuasive policy goal standing by itself. State sovereignty should be increased or respected only when other policy goals such as economic efficiency or fairness justify, or at least do not undermine, increasing or respecting state sovereignty. There are two substantive policy reasons for not according states the right to retain only non-traded resources inside the state. First, according states that right is likely to conflict with economic efficiency. Second, other things being equal, the existence of internal trade is a reason for deferring to export restrictions. These two substantive policy considerations outweigh the goal of increasing state sovereignty for its own sake.

115. Id.
116. Cf. Eule, supra note 2, at 463 (criticizing the Supreme Court in Philadelphia for not relaxing its scope of review in recognition of the fact that New Jersey dump owners were pressing the interests of Pennsylvania residents).
117. An argument along these lines was made by Nebraska in Sporhase. See Appellee's Brief at 12-15.
118. See text supra between notes 112-13.
119. See supra notes 113-16 and accompanying text.
120. Although prohibitions on internal trade should not be prerequisites to valid embargoes, that does not mean that the existence or nonexistence of internal trade is wholly irrelevant to sound commerce clause analysis. It will be argued below that a state's conservation efforts are of considerable commerce clause importance. See infra notes 132-43 and accompanying text. When a prohibition on internal trade is a part of a state's conservation efforts, it then has the same relevance to the commerce clause analysis as has any conservation measure.
No convincing way apparently exists to limit the applicability of *Sporhase* to water or some small set of resources. Honestly followed, the logic of *Sporhase* modifies the general rule against embargoes by authorizing embargoes whenever sufficiently important state interests are at stake. Therefore, whether the Court was aware of it or not, *Sporhase* entails a significant departure from prevailing natural resource doctrine.\(^1\)

### III. EVALUATION OF *SPORHASE* FROM A POLICY PERSPECTIVE

#### The McCarter Solution

*Mccarter* accorded states wide-ranging, perhaps even unlimited, powers to embargo water. As background for analyzing the wisdom of *Sporhase*, it is useful to ask whether adhering to the rule of *McCarter* would produce desirable consequences.

The strongest argument for according states a broad power to impose embargoes rests on an idea of state sovereignty. This argument could proceed from a *Geer* theory that the water within a state belongs to the people of the state, and conclude that therefore the state should be able to retain its water. Alternatively, the argument could proceed from the theory developed in *McCarter* itself. It could be argued that retaining a vital resource like water for in-state use is an integral part of a state’s police power, one that states ought to be able to exercise broadly, at least in the absence of contrary congressional legislation.\(^2\) In either case, the core of the argument is that keeping important in-state resources for in-state consumption is one of the things states generally should be able to do.

The problem with the state sovereignty argument is that, upon analysis, it turns out to be question begging. If according sovereignty rights to states is a desirable policy goal, then the state sovereignty argument is persuasive. The argument, however, does not prove that according sovereignty rights is a desirable policy goal; rather, it simply assumes this point. Therefore, the state sovereignty argument leaves unresolved the ultimate policy issue: namely, do policy reasons justify, or at least not

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\(^1\) Although the *Sporhase* opinion cannot soundly be contained, and thus as a logical matter would seem to apply to a wide set of resources, it does not follow that all resources must come within its rule. Some resources may have special characteristics that would make applying *Sporhase* inappropriate. An example could be the hydropower which was involved in *NEPCO*. Arguably at least, that hydropower was a special type of resource because it had been incorporated into a multistate transmission grid. *See* 102 S.Ct. at 1098–99.

\(^2\) *Cf.* National League of Cities v. Usery, 426 U.S. 833 (1976) (holding that determining the wages of state employees is an integral governmental function which Congress cannot regulate under its commerce powers). (The continuing validity of Usery, however, is subject to some doubt after Equal Employment Opportunity Comm’n v. Wyoming, 103 S.Ct. 1054 (1983) (holding that Congress may protect state employees from age discrimination).
conflict with, according states broad powers to embargo natural resources like water?

When courts in the middle and contemporary periods raised the policy question of whether it would be desirable to accord states the right to embargo natural resources, they frequently relied on aphorisms to conclude that a broad power to impose embargoes would be undesirable. They stated that embargoes conflict with the ideal that "our economic unit is the Nation"\textsuperscript{123} or that "in matters of foreign and interstate commerce there are no state lines."\textsuperscript{124} Unfortunately, those claims also seem to beg the policy question; they do not explain why our economic unit should be the nation, or why no state lines should exist in interstate commerce.

Despite the explanatory shortcomings of the cases in the middle and contemporary period, they seem to reach the right result from a policy perspective, at least as regards the issue of whether states should have broad powers to impose embargoes on water, and if one accepts economic efficiency as the relevant policy goal. Providing states with wide powers to impose embargoes can prevent resources from going to their highest and best use. The paradigm case is when in-state consumers press for an embargo in order to shield themselves from competition from out-of-state buyers. In that situation, if an embargo is enacted, the in-state consumers benefit because resource availability increases inside the state and, provided there was a pre-existing market in the resource, the resource's price falls.\textsuperscript{125} The nation’s economy as a whole, however, will suffer if the out-of-state consumers could have put the embargoed resource to a more productive use than do the in-state consumers. To be more precise, if there is a market in the resource, and if willingness to pay is taken as the measure of the value of a use,\textsuperscript{126} then an inefficient result obtains whenever an embargo prevents an out-of-state consumer from outbidding an in-state consumer.\textsuperscript{127}

\textsuperscript{123} Hood, 336 U.S. at 537; Philadelphia, 437 U.S. at 633 (quoting Hood); Hughes, 441 U.S. at 339 (quoting Hood).

\textsuperscript{124} West, 221 U.S. at 255; Pennsylvania v. West Virginia, 262 U.S. at 599 (quoting West).

\textsuperscript{125} An assumption underlying the example in the text is that the marginal costs of supplying water rise. If there were substantial economies of scale associated with the production and supply of water, then of course eliminating out-of-state demand by means of an embargo could raise prices.

\textsuperscript{126} The problems with utilizing willingness to pay as the measure of value are described in R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY, 105–06 (2d ed. 1978). These problems include that willingness to pay "reflects not only the consumer's preferences among . . . commodities but also his or her income." \textit{Id.} at 105. Despite its shortcomings, however, the assumption that willingness to pay accurately measures value is fundamental to applied economic analysis. \textit{Id.} at 103.

\textsuperscript{127} A case against embargoes on fairness grounds can also be made, as commentators have suggested. \textit{See} Varat, \textit{supra} note 100, at 555–56; Anson & Schenkkan, \textit{supra} note 99, at 96–97. The essence of the argument is that it is unfair for citizens of a state which by accident happens to be richly endowed with natural resources to hoard those resources for themselves.
The Sporhase Solution

As a matter of policy, it appears undesirable to adopt the rule of McCarter which gives states expansive powers to embargo water. With that conclusion as background, the question of how the narrower Sporhase solution fares may be analyzed.

As Part I indicated, Sporhase seems to limit the power of states to embargo water to those situations when important enough in-state uses are at stake.\(^{128}\) It might be thought that this limitation overcomes the efficiency objection that the McCarter rule faced. After all, under Sporhase, only critical in-state uses can be protected by embargoes on water.

The Sporhase rule, however, could produce economic inefficiency for the nation as a whole. No matter how important the protected in-state use, the excluded out-of-state use could be more valuable. Although exports might threaten the drinking supplies of state residents, banning exports conceivably could cause even greater harm to the residents of the embargoed state.

The above efficiency objection to Sporhase does not seem fatal, however. Sometimes it may be clear that the threatened in-state use is superior to the proposed out-of-state one.\(^{129}\) In those situations, perhaps states should have the power to impose embargoes. To meet the efficiency objection, yet at the same time to retain significant state power to protect essential uses, Sporhase could be modified to permit embargoes where the protected in-state use is both critical and superior to the proposed out-of-state one.

The problem with the modification is that it accomplishes little. The modification allows a state to protect a critical and superior in-state use through an embargo. Prior to Sporhase, however, the state could protect a critical and superior in-state use by enacting facially evenhanded legislation that prohibited both out-of-state and in-state interests from encroaching on the use which the state wanted to safeguard. This sort of facially evenhanded legislation would survive the balancing test applied to such legislation under the dormant commerce clause because the burden

\(^{128}\) See supra notes 42-64 and accompanying text.

\(^{129}\) An example might be if the water were used inside the state to support a unique environment, while the proposed out-of-state use were commercial. One unique environment that apparently depends upon water replenishment from underground aquifers is the system of streams, lakes, and "prairie potholes" in North and South Dakota which contains some of the most productive waterfowl habitat in the country. Brief of National Wildlife Federation, Nebraska Wildlife Federation, and Colorado Wildlife Federation as Amici Curiae, at 5, Sporhase v. Nebraska, 102 S.Ct. 3456 (1982). Wyo. Stat. § 41-3-115 (1977), which effectively prohibits the export of water in slurry pipelines, provides a second example where a protected in-state use could be regarded as superior to a proposed out-of-state one. The argument would be that the use of water as a medium of transportation—i.e. in slurry pipelines—is inferior to the use of water for agricultural or municipal purposes. See Comment, supra note 4, at 145. Yet a third possible example of a superior in-state use could be if the state prohibited export in order to save water for use by future generations.
on out-of-state interests would not be "clearly excessive in relation to the putative local benefits."  

From a policy perspective, embargoes which function to protect specific in-state uses are not justifiable. Frequently the protected in-state use may be less valuable than the excluded out-of-state ones. Even where the converse is true, and the protected in-state use is more important than the excluded out-of-state one, embargoes are undesirable; in those situations, they accomplish nothing more than the state could accomplish through carefully drawn, facially evenhanded legislation.

Desirable Embargoes

Although states should not be allowed to impose embargoes to protect specific uses, it does not follow that all embargoes are undesirable. To the contrary, under at least three conditions states could impose justifiable embargoes. The common feature of the three conditions is that they all arise from the fact that water, and in particular groundwater, is a commons which many individuals can exploit simultaneously.

Conservation Efforts

The Court in Sporhase wrote that "given appellee’s conservation efforts, the continuing availability of groundwater in Nebraska is not mere happenstance; the natural resource has some indices of a good publicly produced and owned." The Court’s assertion is sound. Abstractly conceived, conservation efforts are equivalent to production efforts. A state that spends its financial reserves to conserve a product or resource ends up in just the same position as a state that spends its financial reserves to produce the same product or resource: both states end up with more of the natural resource and less in the bank.

Production efforts under current doctrine do, and under theory ought to, give states a right to favor their residents in the disposition of the good produced. If states were not given such a right, they frequently might decline to provide needed goods, services, and benefits. Because

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131. The three conditions that will be described in the text are not meant to be exhaustive. Given their shared origin in the commons nature of water, however, one would expect that any other valid conditions for imposing embargoes would also centrally involve problems arising from the fact that water can be exploited simultaneously by many individuals. For a definition of a commons, see supra note 6.
132. 102 S.Ct. at 3464-65.
133. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 38 (Supp. 1979) (commenting that because the elk involved in Baldwin v. Fish & Game Comm’n, 436 U.S. 371 (1978), “would not exist but for the voluntary undertaking by citizens of Montana to preserve [them]. . . . [the elk] are like state-supported medical services, libraries, or symphony orchestras”).
135. See Varat, supra note 100, at 522-23. A paradigm example of a benefit that states, in all likelihood, would not produce were they unable to favor residents in its distribution is state-funded welfare payments. Id.
conservation efforts are like production efforts, the same rule should apply to them: as a general matter, a state ought to be able to retain for in-state consumption whatever quantities of any resource the state preserves or "produces" through its conservation measures. Indeed, denying states such a right would create a free-rider problem. Without the right to retain the quantities conserved, the states would be unwilling to exert conservation efforts, or at least would have a diminished incentive to do so, because each state would have to share the fruits of its conservation with residents of other states.

It might be argued that states could overcome any free-rider problem by a less discriminatory means than embargoes—specifically, by imposing on would-be out-of-state consumers the same conservation requirements imposed on in-state consumers. For instance, if in-state consumers were subject to quotas, then out-of-state consumers could be made subject to them too. A problem with this response, however, is that a state might be unwilling to undertake the supervisory difficulties associated with imposing in-state measures outside the state. Rather than undertake that task, the state might decline to promulgate any in-state conservation regulations at all. Another serious problem is that many in-state conservation measures will not lend themselves to application to out-of-state consumers. As an example, consider a municipal water recycling facility, the function of which is to purify waste water for reuse. Requiring an out-of-state municipality to build an equivalent recycling facility would be problematic. If none of the relevant out-of-state consumers happened to be municipalities, it would be flatly impossible to apply the in-state conservation measure outside the state.

To the general principle that states should be able to retain whatever resources they conserve, two caveats should be added. The first is that there may be instances where exceptions to the general principle should be created. With respect to state-produced goods and services, Professor Varat has suggested that an exception to the general rule permitting dis-

136. A free-rider problem arises when a creator of a good cannot exclude the non-paying public from consuming the good. The inability to charge non-paying consumers results in the under-creation of the good. See generally R. STEWART & J. KRIER, supra note 126, at 107–09.

137. Reeves, 447 U.S. at 446.

138. There would be no constitutional problem with subjecting out-of-state consumers to the same conservation measures imposed on in-state consumers. In Sporhase, the Court observed: 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. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation. 102 S.Ct. at 3464.

139. Since requiring an out-of-state consumer to build a major facility is substantially different in degree, if not also in kind, from imposing a simple use restriction on the out-of-state consumer, a question of state power might arise. A practical difficulty with requiring the construction of a recycling facility would be in maintaining the equivalence of the in-state and out-of-state facilities as populations changed with time.
criminatory allocation be created where equal access is "ancillary to non-resident enjoyment of constitutionally guaranteed opportunities"; as examples of goods and services falling within the exception, he cites state highways and state police and fire protection on the theory that they are prerequisites to the exercise of the constitutional right to compete on equal terms with resident businesses. A similar exception would seem appropriate in the conservation context, although it is hard to see precisely how a claim under it would develop. A second possible exception to the general principle permitting the retention of conserved resources arises when the state has a monopoly over the resource at issue. It might be thought improper for a state with a monopoly over a resource to exclude non-residents, even if the availability of the resource is due entirely to the state's conservation efforts.

The second caveat is that a significant practical problem will arise in administering the principle that a state may keep what it conserves. When a state conserves water by requiring the growing of water-efficient crops, by digging a system of ditches to conserve run off, or by imposing quotas on the use of water, the water saved remains underground with a lot of water that was not generated through conservation. In theory, however, the state should be allowed to impose embargoes only with respect to the quantity of water the state actually conserved, and not with respect to any water that would have remained unused even in the absence of conservation efforts. The practical problem in administration, therefore, is to identify how much the state has conserved and so may permissibly retain for in-state consumption.

140. Varat, supra note 100, at 535.
141. Id. at 535–36.
142. See id. at 536–40. Varat argues that Baldwin v. Fish & Game Comm’n, 436 U.S. 371 (1978), was wrongly decided because Montana had monopoly power over the resource involved in the case, namely elk, and so should not have been permitted to limit nonresident access in a discriminatory fashion. Varat, supra note 100, at 559–60. Contra TRIBE, supra note 133, at 38–40 (arguing, without any discussion of the monopoly issue, that Montana’s conservation efforts justified the state’s discriminatory licensing scheme).
143. One possible solution to the practical problem would be to ask the counterfactual question, "How much water would out-of-state users have had available to them if the state had not imposed internal conservation measures?" If that question can be answered, then the out-of-state users should be limited to the amount of water that they would have been able to extract in the absence of the state’s conservation efforts. Any additional water would be the product of the state’s conservation efforts. A second possible solution is less exact but perhaps more handy. It is to permit the conserving state to restrict out-of-state use by the same fraction that its conservation efforts restrict in-state use. The second solution would solve the free-rider problem because it would ensure that the conserving state would reap the fruit of its conservation efforts. Its disadvantage is that it could constrain not only the volume of water consumed outside the state, but also the rate of consumption. As a theoretical matter at least, conservation efforts should not give a state the power to control how quickly out-of-state interests use up the water they are entitled to have access to.

It might be contended that the practical difficulties associated with letting states keep what they conserve are so substantial that courts should simply refuse to let conservation efforts justify export restrictions. This issue is discussed in infra notes 153–54 and accompanying text.
**Hoardin**

**Hoardin in the Importing State**

It is the fact that groundwater is a commons that gives rise to the need to let a state impose export restrictions on the water it conserves. If groundwater were not a commons, then states could not exploit the conservation efforts of a neighbor, and embargoes would not be required in order to give states adequate incentives to conserve. A second aspect of a commons like groundwater is that individual exploiters do not bear the full costs of their extractive activities. Specifically, although each individual’s extractions diminish the quantity of the resource available to everyone else, no individual has to compensate the other exploiters for their reduced prospects. This second aspect of a commons creates a second condition which justifies export restrictions.

The problem that the second aspect of a commons generates is hoarding. When a state mines its own water supplies, it bears the full costs of its actions. Each unit of water it extracts is one unit less that it can extract in the future. When a state mines its neighbor’s water, however, it does not bear the same costs, for presumably what the state does not extract today, its neighbor will take tomorrow, and thereby prevent the initial state from consuming in the future. As a consequence, each state has an incentive to use up its neighbor’s resources before it consumes its own reserves—or, in other words, to hoard its resources.

It might be asked why hoarding should be a concern sufficient to justify export restrictions. It could be argued that hoarding is not a problem because everything will come out in the wash, with state A first taking state B’s water and then state B taking state A’s water once B’s supplies are depleted. The problem with hoarding is that geography may prevent everything from coming out in the wash. Although state A may have good access to an aquifer in B, it does not follow that B can easily obtain water from A.

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144. For a definition of a commons, see supra note 6.
145. The statement in the text assumes that the water supply is not annually recharged.
146. Although the Court did not remark on it, hoarding may have been involved in *Sporhase*. The relevant evidence is that Colorado denied Sporhase and Moss a permit to mine Colorado water, and instead forced them to use Nebraska water. See Brief of Colorado, Wyoming, Utah, Nevada, Kansas, North Dakota, South Dakota, and Missouri as Amici Curiae at 3. Colorado’s permit denial may indicate a state intention to delay consumption of readily accessible Colorado water until the depletion of Nebraska supplies, making Colorado guilty of hoarding. There are, however, innocent explanations of Colorado’s action; for instance, the Colorado water that Sporhase and Moss wanted to extract might have been scarcer and more valuable than the relevant Nebraska water, and so not unreasonably withheld from development. See infra note 149 and accompanying text.

In discussions, Professor Kaufman of Harvard Law School has suggested that a second situation where hoarding might have been involved is *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Kaufman’s theory is that Philadelphia may have had plentiful dump space to its west, but was deliberately delaying use of it until it had put as much garbage in New Jersey as it could.

147. Such a situation would exist, for example, if a city in state A were situated equidistant between two aquifers, one of which was located in state B and the other in directly the opposite direction.
source in A, then the consequence of A’s depleting B’s water will be to force B to incur substantial water supply costs that it would not otherwise have had to bear. State B is clearly made worse off. On a macro level, so is society, for B’s substantial costs could have been avoided at minimal cost had A simply mined its own aquifer initially.\footnote{148}

Hoarding, or at least unjustifiable hoarding, does not occur every time a state withholds resources from development, thereby causing its residents to turn to the reserves in other states. If a state has scarcer resources than its neighbor, then it may be reasonable for the state to stop or limit the exploitation of its resources, even at the cost of driving some of its residents to its neighbor’s reserves. When the total social costs of in-state exploitation, however, are \textit{less} than the total social costs of exploiting a neighbor’s reserves, then the state should not be permitted to send its residents to its neighbor’s reserves if the neighbor objects. In that case, restrictions on development are hoarding. The neighboring state should be allowed to protect itself by imposing embargoes or other export restrictions.\footnote{149}

\begin{flushright}
\textit{Wasteful Use in the Importing State}
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A third condition under which embargoes are desirable as a matter of policy is closely related to the hoarding situation. It arises when the importing state could obtain its water at less total cost to society not by mining an in-state supply, but by imposing conservation measures on itself. In situations where the importing state is squandering its resources, embargoes are just as defensible as they are in situations where the importing state is hoarding its resources. In both cases, the embargoes function to prevent the importing state from diminishing its neighbor’s supplies when the importing state has less costly domestic sources of water available to it.

\footnote{148} A resort to some simple economics may be used to illustrate why hoarding occurs and how it can produce inefficiency. Let $DC_B$ represent the direct costs of extracting a unit of water in B and let $FC_B$ represent the cost to B of not having the unit of water available in the future. Further, let $DC_A$ represent direct extraction costs in A, and $FC_A$ represent the corresponding future costs which are imposed on A. State A bears $FC_A$ but not $FC_B$. Therefore A is likely to turn to B’s water whenever $DC_B < DC_A + FC_A$. But such a result will be inefficient whenever $DC_B + FC_B > DC_A + FC_A$.

\footnote{149} An interesting question, but one that will not be resolved here, is whether hoarding sometimes may justify only a \textit{partial} embargo. Suppose that state A refuses to mine an in-state source of water and instead tells its residents to utilize state B’s water; that state B has responded with an embargo on water exports to A; and that the optimal solution to the water conflict is for state A to obtain some of its water from the in-state source and some from state B. In such a situation, should B’s absolute embargo stand until A begins to mine some of its own supply? The argument in favor of the absolute embargo would seem to be that state B should not have to give up any water so long as state A has better in-state supplies. In response, however, it could be argued that upholding the embargo in full will require that the embargo will be relitigated once state A stops hoarding and begins to use in-state water, making it better to uphold the embargo only in part in the initial litigation—specifically, only to the extent that the embargo retains for B the quantity of water that A should be required to mine from its own sources.
An interesting problem arises when the profligate state does not seek out water imports until after it has depleted all its in-state supplies. In this situation, it could be argued embargoes should be prohibited because they are inefficient. The theory would be that, because the profligate state no longer has in-state reserves of water, its residents will suffer tremendous social costs unless they can import water from outside the state.

A compelling opposed consideration, however, is that if embargoes are not upheld in the situation of wasteful depletion, states will lack adequate incentives to impose conservation measures on themselves. They will know that, as long as they fully exhaust their existing supplies before turning to imports, they cannot be sanctioned for extravagant water consumption habits. Thus, despite the potential inefficiency in the individual case, embargoes should be permitted in the situation of wasteful depletion as well as in the situation of wasteful use.

Distinguishing Between Embargoes

Embargoes may sometimes be undesirable and sometimes desirable. They are undesirable when enacted by a state that wants to insulate in-state consumers from competition from out-of-state buyers; they are desirable when incidental to conservation efforts or promulgated as protection against a state that is hoarding or squandering its natural resources. The final question this paper will address is whether the courts should undertake to distinguish between embargoes according to their desirability.

Two principal arguments could be brought against the position that courts should attempt to differentiate embargoes. The first is that courts should decline to differentiate because the costs of distinguishing between embargoes, including the costs of erroneous decisions, will outweigh any benefits that could accrue from the undertaking. The second argument is that courts should decline to differentiate because, if they did so, they would be acting like "super-legislatures."

150. The recently decided El Paso case may have involved the problem of wasteful depletion; at least various briefs in the case have argued that El Paso would not face the water shortage it does if it had not been lavish in its past consumption of water. See, e.g., Defendant Lalo Garza and Defendant-Intervenor's Post-Trial Brief at 48-49.

151. In its second reality, the Court in Sporhase suggests a fourth possible condition under which embargoes may be desirable from a policy perspective—namely when the state has legal expectations that it may embargo water. Without expressing a view on the ultimate merits of that suggestion, it is possible to make an observation which diminishes the relevancy of legal expectations to a policy analysis. That observation is that the existence of legal expectations is not likely to be persuasive unless the expectations were both reasonable and relied upon. Given the development of commerce clause doctrine between McCarter and Sporhase, see supra notes 60-102 and accompanying text, the reasonableness of any expectations would be at least questionable. Even more troublesome for a state making a legal expectations argument would be showing that it relied upon its expectations with respect to the particular body of water at issue.

152. The phrase "super-legislature" comes from Southern Pacific Co. v. Arizona, 325 U.S. 761, 788 (1945) (Black, J., dissenting.).
The Costs of Distinguishing Objection

The argument that courts should not attempt to distinguish between embargoes because of the costs of doing so is a powerful one. It would be naive to think that courts could easily and infallibly determine how much of a resource a state has conserved and so may permissibly retain for in-state consumption. The court will have an equally difficult time determining whether either of the other two justifying conditions obtains—namely, whether the embargoed state has a less costly domestic supply available to it, or whether the embargoed state has been squandering its resources.\(^{153}\)

The problem with the argument, however, is that the costs of not distinguishing outweigh the costs of distinguishing between embargoes. If courts were not to distinguish, they could follow McCarter and uphold all embargoes or they could follow Philadelphia and NEPCO and invalidate all embargoes.\(^{154}\) These alternatives are worse than the alternative of distinguishing between embargoes. If McCarter is followed, then in-state consumers will be able to insulate themselves from outside competition. If Philadelphia and NEPCO are followed, the result will be to reduce states' incentives to conserve, to countenance the hoarding of resources, and to permit states which are squandering their resources to utilize scarce supplies in other states. Although it may be difficult to embrace with enthusiasm the prospect of courts undertaking the admittedly difficult task of differentiating desirable from undesirable embargoes, that prospect nonetheless seems the lesser of three evils.

The Super-Legislature Objection

The super-legislature objection states that courts should not undertake to distinguish between desirable and undesirable embargoes because courts are not representative institutions. Because state legislatures are demo-

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153. Writing in dissent in Pennsylvania v. West Virginia, 262 U.S. 553 (1923), Justice Brandeis argued that, because of the excessive difficulty of distinguishing between embargoes, the courts should follow the McCarter approach of approving all embargoes. Id. at 619.

154. Abstaining and leaving the problem to Congress may seem like a viable fourth option. As Professor Ernest Brown has pointed out, however: \("[T]he mechanisms of our government\) do not give to Congress any regularized opportunity or duty of reviewing, to test for compatibility with the federal system, state statutes even in their skeletal form as enacted, much less as fleshed by application, interpretation and administration. Nor has Congress been so idle that such matters could be assured a place on its agenda without competition from other business which might often be deemed more pressing; in Justice Jackson's phrase, the inertia of government would be heavy on the side of the centrifugal forces of localism.\) Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 YALE L.J. 219, 222 (1957). Because of congressional inertia, the abstention option would in practical effect be equivalent to the alternative of upholding all embargoes.
cratic, the argument claims that their decisions to impose or not to impose embargoes generally should be deferred to. The basis of the objection is that it is a usurpation of the lawmaking function for courts to evaluate de novo the merits of statutes passed by state legislatures.\textsuperscript{155}

The super-legislature objection has substantial persuasiveness when a court is reviewing a regulation whose adverse impacts fall largely on in-state interests. It is persuasive in those situations because the state internalizes most of the costs of its action and so can be trusted to make a fair and desirable choice.\textsuperscript{156}

In the embargo context, however, the super-legislature objection loses its merit for the reason that the bulk of the adverse impacts stemming from an embargo are likely to fall on out-of-state interests. Because the state imposing the embargo avoids most of the costs of the embargo, the state cannot be trusted to make sound decisions; it has relatively scant incentive to decline to enact an embargo that will impose great costs on out-of-state interests if the embargo will provide even small in-state gains. As a consequence, courts are needed to scrutinize each export restriction. Unless courts act like "super legislatures" and review independently the merits of each limitation on exports, the export limitations will frequently discriminate against non-residents to the detriment of the national economy.\textsuperscript{157}

CONCLUSION

\textit{Sporhase v. Nebraska} overruled \textit{McCarter}, the case which had held that states could restrict the export of water without limitation from the commerce clause. Hence, it seems odd to view \textit{Sporhase} as a state's rights case. But that is what the case appears to be. Although the opinion is ambiguous in several regards, it seems to give states the power to restrict the export of water when sufficiently important state interests are at stake. Furthermore, because the implications of the case cannot soundly

\textsuperscript{155} Cf. Southern Pacific Co. v. Arizona, 325 U.S. 761, 784–95 (1945) (Black, J., dissenting) (arguing that the district court in \textit{Southern Pacific} improperly assumed a legislative function when it undertook to assess directly the merits of an Arizona law regulating train lengths).

\textsuperscript{156} Or at least to make a fair and desirable choice more frequently than the courts could. See South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 187 (1938); Eule, \textit{supra} note 2, at 441–43.

\textsuperscript{157} It is possible that there could be a situation where the bulk of the costs of an embargo fall on in-state interests. Cf. Eule, \textit{supra} note 2, at 463 (arguing that dump owners in New Jersey bore a substantial part of the cost of New Jersey's ban on garbage imports in \textit{Philadelphia}). Were such a situation to arise, it would not be necessary for the court to review independently the merits of the relevant embargo. Since the state legislature could be trusted, a more deferential standard of review, along the lines proposed by Eule, \textit{supra} note 2, or Tushnet, \textit{supra} note 7, could safely be applied.
be limited to water, *Sporhase* can be read to give states equivalent power over other resources.

When analyzed from a policy perspective, *Sporhase* is not a compelling decision. States should not be given broad powers to embargo water because that would permit states to enact embargoes which protect in-state consumers from out-of-state competition. In addition, states should not be allowed to protect only important state interests with embargoes; a state can always enact evenhanded regulations to accomplish that objective.

Although *Sporhase* does not draw the right line between desirable and undesirable embargoes, both kinds of embargoes exist. Embargoes are desirable in at least three situations arising from the commons nature of water. Although differentiating between embargoes according to their merits concededly will be difficult, differentiation is preferable to following a rule which either automatically upholds or automatically invalidates all export restrictions.