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

Christine A. Klein

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ABSTRACT

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

* Chesterfield Smith Professor of Law, University of Florida, Levin College of Law.
This article examines the Dormant Commerce Clause as it applies to water export, identifying factors that have influenced the courts’ legal opinions. It argues that Sporhase asked the wrong question, transplanting a relevant issue from the context of the affirmative Commerce Clause—whether water is an article of commerce—into the context of the Clause’s dormant aspect. Observing that the U.S. Supreme Court has not addressed the issue of water export regulation directly for more than twenty five years, this paper argues that courts should no longer rely upon Sporhase’s water-as-article-of-commerce mantra. Instead, this article suggests a new analytical paradigm, the “water continuum.” More broadly, this article examines evidence from the Court’s Dormant Commerce Clause jurisprudence involving other natural resources—specifically, landfill space—that suggests the Court may be poised to make a radical shift, abandoning the Dormant Commerce Clause entirely.

INTRODUCTION

Facing water shortages, states struggle with competing impulses, desiring to restrict water exports to other states, while simultaneously importing water from neighboring jurisdictions. In 1982, the Supreme Court weighed in on this issue through its seminal decision, Sporhase v. Nebraska. Determining that “groundwater is an article of commerce,” the Court held invalid under the Dormant Commerce Clause a provision of a Nebraska statute limiting water export. Many states, particularly in the West, have enacted legislation that prohibits or restricts the out-of-state export of water resources. Should such regulation be encouraged as valid conservation measures, or should it be rejected as undesirable economic protectionism?

In 2001, the issue came to a boiling point in an unlikely place—the water-rich Great Lakes region, home to one-fifth of the planet’s useable fresh water. Long fearful that others coveted their precious water supplies, the Great Lakes states reacted with alarm when they were faced with two major water export proposals in rapid succession, developed by the Nova Group and by Nestlé.

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Waters. In a memorable bit of political theatre, billboards protesting the threatened exports began to appear along Michigan’s interstate highways, featuring a map of the state framed by huge cut-outs of a Texas cowboy, a Utah skier, a California surfer, and a New Mexico man wearing a large sombrero. All were guzzling Great Lakes water through giant straws. Issuing a fierce warning to all such would-be water exporters, the billboard proclaimed, Back Off Suckers!

Legislation inspired by such blatant protectionist impulses would likely be unconstitutional. But Congress came to the rescue, twice, giving federal approval to state water export restrictions that might otherwise violate the Dormant Commerce Clause.2

More “suckers” continue to appear, particularly in the West. Among them, a Texas regional water district is eager to dip its straw into Oklahoma’s Red River system and a Nevada developer thirsts for Arizona groundwater. Should these would-be suckers back off, or should they be encouraged to covet their neighbors’ water?

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

The most relevant guidance of the U.S. Supreme Court comes from Sporhase v. Nebraska, holding invalid under the Dormant Commerce Clause a

provision of Nebraska law restricting the interstate export of groundwater.\textsuperscript{3} But the \textit{Sporhase} opinion, more than a quarter-century old, fails to reflect significant developments in the Court’s evolving Commerce Clause jurisprudence.

This paper examines the dormant commerce clause as it applies to water export, identifying factors that have influenced the courts’ legal opinions. Observing that the U.S. Supreme Court has not addressed the issue directly for more than twenty-five years, this paper argues that courts should no longer rely on \textit{Sporhase’s} water-as-article-of-commerce mantra. Instead, this article suggests a new analytical paradigm, the “water continuum.” More broadly, this article examines evidence from the Court’s Dormant Commerce Clause jurisprudence involving other natural resources—specifically, landfill space—that suggests the Court may be poised to make a radical shift, abandoning the Dormant Commerce Clause altogether.

\section*{I. REGULATING WATER EXPORT: \textit{SPORHASE V. NEBRASKA}}

A. \textit{The Dormant Commerce Clause and Water Export}

The Constitution enumerates the affirmative commerce power of the federal government in brief sentence: "Congress shall have Power . . . to regulate Commerce . . . among the several States . . . ."\textsuperscript{4} Although the Commerce Clause addresses only the authority of the federal government, the U.S. Supreme Court has long read into the clause an implied limitation on state regulation. In the 1824 decision \textit{Gibbons v. Ogden}, Chief Justice John Marshall addressed perhaps the easiest circumstance under which the federal commerce clause invalidates state regulation: where the latter creates an actual conflict with an exercise of the federal commerce authority.\textsuperscript{5} In that case, Justice Marshall invalidated under the Supremacy Clause a New York statute that purported to regulate the licensing of

\begin{flushleft}
\textsuperscript{3} 458 U.S. 941 (1982).
\textsuperscript{4} U.S. Const. art. I, § 8, cl. 3.
\textsuperscript{5} 22 U.S. (9 Wheat.) 1 (1842).
\end{flushleft}
steamboats in the waters of New York in direct contravention of a federal navigation license.\footnote{Id.} Beyond its narrow holding, \textit{Gibbons} suggested in dicta that in some circumstances states may lack the authority to regulate interstate commerce, even in the absence of conflicting federal legislation.\footnote{See New Jersey v. New York, -- U.S. – (1997), 1997 WL 291594, at *19-20 (unreported opinion).} Through that suggestion, the Chief Justice entangled the Court in an uncertain enterprise, one with which it has struggled for more than one and a half centuries.

In the aftermath of \textit{Ogden} and similar early cases, the courts have invoked the so-called “negative” or “dormant” commerce clause doctrine to invalidate state regulations that interfere unduly with interstate commerce, even if Congress has not affirmatively legislated in the area addressed by state law. The courts’ avowed purpose is to prohibit “economic protectionism,” defined as “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”\footnote{W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192-93 (1994).}

The courts’ analyses generally involve two steps. First, the court determines whether a state regulation discriminates against interstate commerce either on its face or in practical effect.\footnote{See United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Auth., 550 U.S. 330, 338-39 (2007); Oregon Waste Systems, Inc. v. Dep’t of Envtl. Quality, 511 U.S. 93, 99 (1994) (defining discrimination as “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter”).} If so, then the court will apply the strict scrutiny test articulated in Hughes v. Oklahoma, under which "the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available reasonable nondiscriminatory means."\footnote{Hughes v. Oklahoma, 441 U.S. 332, 336 (1974).} Second, where a nondiscriminatory state statute nevertheless burdens interstate commerce, the court will apply the test articulated in Pike v. Bruce Church: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce...
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.\textsuperscript{11}

In the context of water export, the Supreme Court gave its early imprimatur to the states’ efforts to keep water within their boundaries. In 1908, Hudson County Water Co. v. McCarter held constitutional New Jersey’s ban on water export. In that case, the ban limited the riparian water rights of the East Jersey Water Company, precluding it from piping water from the Passaic River for use across state lines in Staten Island, New York.\textsuperscript{12} Recognizing the regulation of water resources as a power that is uniquely within the purview of the states, Justice Holmes asserted, “[I]t appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of . . . a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.”\textsuperscript{13}

\textbf{B. \textit{Sporhase v. Nebraska}}

Although numerous states relied upon \textit{Hudson County} and enacted legislation similar to that of New Jersey, the Court changed course dramatically through its 1982 decision \textit{Sporhase v. Nebraska}.\textsuperscript{14} In that case, the Court invalidated a portion of a Nebraska export restriction, implicitly overruling \textit{Hudson County}. The facts of \textit{Sporhase} provided a sympathetic backdrop supporting the Court’s holding. Appellants Joy Sporhase and Delmer Moss owned a farm that straddled the Colorado-Nebraska border. Their home was located on the Colorado side of the border, but they sought to irrigate the entire tract with water withdrawn from a well on the Nebraska portion of their property. Despite the modest scope of Sporhase’s and Moss’s plan to transport water across state lines, the Nebraska Attorney General sought a permanent

\textsuperscript{11} Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

\textsuperscript{12} Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908).

\textsuperscript{13} Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908).

injunction against the proposed interstate groundwater transport. Thereafter, Sporhase and Moss challenged the constitutionality of the Nebraska statute under the dormant Commerce Clause.

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

1. The withdrawal of the ground water requested is reasonable;
2. The withdrawal is not contrary to the conservation and use of ground water;
3. The withdrawal is not otherwise detrimental to the public welfare; and
4. The state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska ("reciprocity provision").\(^\text{15}\)

The Court supported the first three statutory conditions, holding that they were not discriminatory on their face contrary to Hughes v. Oklahoma, and that they did not impermissibly burden interstate commerce under the Pike v. Bruce Church test.\(^\text{16}\) However, the Court held that the fourth requirement—the reciprocity provision—was facially discriminatory.\(^\text{17}\) Because Colorado law at the time also forbade interstate water export, Nebraska’s reciprocity provision worked as an “explicit barrier to commerce between the two States.”\(^\text{18}\)


\(^{16}\) Sporhase, 458 U.S. at 956-57.

\(^{17}\) Id. at 957-58.

\(^{18}\) Id.
The Court analyzed the offending reciprocity requirement under the test of *Hughes v. Oklahoma*. The Court noted with approval that Nebraska had established critical control areas requiring the installation of flow meters; adherence to well-spacing standards; conformity to maximum per acre irrigation application; and the limitation of *intrastate* groundwater transfers. These factors provided some support for Nebraska’s claim that its facially discriminatory legislation advanced a “legitimate local purpose.” As the Court explained, “Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State.”

Despite those efforts, the Court held the reciprocity provision unconstitutional because it was not narrowly tailored to promote water conservation. Three factors were particularly harmful to Nebraska’s case, casting doubt on the sincerity of Nebraska’s argument that the ban was designed to promote conservation, not discriminate against interstate commerce in groundwater. As the Court explained,

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

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19 See *supra* note and accompanying text.

20 458 U.S. at 955-56, applying test of *Hughes v. Oklahoma*.

21 *Id.*

22 *Id.*


24 *Id.*
The Court concluded with important guidance for states desiring to regulated water exports: “A demonstrably arid State conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water.”25 Because Nebraska had not made a sufficient showing, the reciprocity provision was held unconstitutional.26

II. THE LEGACY OF SPIRHASE

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

A. Asking the Wrong Question

Instead of considering whether the challenged Nebraska statute posed an impermissible burden on interstate commerce, *Sporhase* first evaluated whether groundwater itself is an article of commerce. Concluding in the affirmative, the Court held that Nebraska’s export restriction impermissibly burdened the free flow of that commodity in the interstate market. The *Sporhase* line of analysis—adopted by subsequent courts27—has proved to be unhelpful and misleading, at best. Arguably, it posed the wrong question altogether.

25 *Id.*

26 *Id.*

27 *See* Tarrant Regional Water Dist. v. Herrmann, 2009 WL 3922803, at *3 (W.D. Okla. 2009) (citing *Sporhase* for the conclusion that “water” is an article of commerce); Starkey v. U.S. Dep’t of the Interior, 238 F.Supp.2d 1188, 1194 (S.D. Cal. 2002) (citing *Sporhase* for the conclusion that “water” is an article of commerce); Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 196 (2001) (citing *Sporhase* for the conclusion that “water” is an article of commerce); Nova Chemicals, Inc. v. GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996) (citing *Sporhase* for the conclusion that “groundwater” is an article of commerce); United States v. Alcan Aluminum Corp., 1996 WL 637559 (N.D.N.Y. 1996) (unreported decision) (citing *Sporhase* for the
The *Sporhase* majority itself failed to maintain a consistent focus for its inquiry, shifting from a consideration of *ground* water to a consideration of simply *water*. At the beginning of its opinion, the Court framed the question as “whether *ground* water is an article of commerce and therefore subject to congressional regulation.” But in summary, the Court broadened its language to *water*—presumably incorporating both surface and subsurface supplies—and concluded that “*water* is an article of commerce.” Numerous courts have repeated that conclusory statement, often with little or no analysis.

*Sporhase* bolstered its determination that Nebraska groundwater is an article of commerce by observing that Nebraska permitted in-state economic transactions transferring groundwater from rural to urban areas. The Court considered such transfers to be commercial in nature, supporting the classification of groundwater as an article of commerce, even though required payments were called “fees” for distribution services rather than the market price of the water itself. The Court also noted that the Sporhase/Moss well

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

29 *Sporhase*, 458 U.S. at 954 (emphasis added).

30 *See supra* note.

31 *Id.* at 952.
withdrew water from the Ogallala aquifer, an underground formation underlying portions of eight states. The aquifer’s interstate character, the Court asserted, “confirms the view that there is a significant federal interest in conservation as well as in fair allocation of this diminishing resource.”\footnote{458 U.S. at 953.}

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

\begin{quote}
[A]ppellee’s claim that Nebraska ground water is not an article of commerce goes too far: it would not only exempt Nebraska ground water regulation from burden-on-commerce analysis, it would also curtail the affirmative power of Congress to implement its own policies concerning such regulation. . . . Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.”\footnote{Sporhase, 458 U.S. at 953-54.}
\end{quote}

In dissent, Justices Rehnquist and O’Connor were motivated by the opposite concern—a desire to limit federal regulation of groundwater in future cases. Recognizing the imperfect fit between the facts of \textit{Sporhase} and the majority’s question article-of-commerce analysis, the dissent chastised the majority for “first quite gratuitously undertak[ing] to answer the question of whether the authority of Congress to regulate interstate commerce . . . , would enable it to legislate with respect to ground-water overdraft in some or all of the States.”\footnote{Sporhase, 458 U.S. at 961-62 (Rehnquist, C.J. and O’Connor, J., dissenting).} Instead, the dissent asserted, “[t]he question actually involved in \textit{Sporhase} was] whether [the Nebraska export restriction] runs afoul of the unexercised authority of Congress to regulate interstate commerce.”\footnote{Id.}
The Dormant Commerce Clause

B. Overriding State Water Law

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

The Nebraska Supreme Court opinion suggested that the common law “correlative rights doctrine” governed the withdrawals at issue in Sporhase. Under that doctrine, all landowners above a common aquifer share the use (or usufruct) of the underlying water, generally in rough proportion to the amount of overlying acreage owned. As explained by the Nebraska Supreme Court, and duly noted by both the Sporhase majority and dissent, the right to use groundwater was strictly qualified by the state:

36 Citation.

37 Citation.

38 Citation.

39 Sporhase, 458 U.S. at.

40 Under the doctrine, all landowners above a common aquifer must share the underlying water, generally in rough proportion to the amount of overlying acreage owned.

41 Citation.

42 Sporhase, 458 U.S. at 949-50.
The owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.\textsuperscript{44}

In light of the significant degree of control maintained by the state over groundwater, the Nebraska Supreme Court concluded that under state law, ground water was not “a market item freely transferable for value among private parties, and therefore [is] not an article of commerce.”\textsuperscript{45} Accordingly, the Nebraska Court rejected the Dormant Commerce Clauses challenge to Nebraska’s water export restriction.\textsuperscript{46}

The \textit{Sporhase} majority observed that landowners in other states enjoyed much stronger property rights in groundwater than the qualified use right recognized by Nebraska. States such as Texas, the Court noted, followed the English rule\textsuperscript{47} of groundwater use:

“The rule . . . was that an owner of land could use all of the percolating water he could capture from the wells on his land for

\begin{footnotesize}
\begin{enumerate}
\item \textit{Sporhase}, 458 U.S. at 964 (Rehnquist, C.J., dissenting) (asserting, \textit{[a]s with almost all of the Western States, Nebraska does not recognize an absolute ownership interest in ground water, but grants landowners only a right to use ground water on the land from which it has been extracted}).
\item See \textit{supra} note and accompanying text.
\end{enumerate}
\end{footnotesize}
whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property.”

The Court concluded, “Since ground water, once withdrawn, may be freely bought and sold in States that follow this rule, in those States ground water is appropriately regarded as an article of commerce.” 48

Sporhase recognized that Nebraska landowners, in contrast to Texans, “[have] no comparable interest in ground water.” 49 It also acknowledged that Nebraska’s greater ownership interest in groundwater “may not be irrelevant to the Commerce Clause analysis.” 50 Moreover, Sporhase noted Congress’s traditional deference to state water law. 51 Nevertheless, Sporhase rejected the Nebraska Supreme Court’s interpretation. In a line of analysis more appropriate to the affirmative rather than dormant aspect of the Commerce Clause, 52 Sporhase concluded that Nebraska groundwater is an article of commerce. To hold otherwise, the Court feared, “would . . . curtail the affirmative power of Congress to implement its own policies concerning such regulation,” potentially requiring any such congressional regulation to be “more limited in Nebraska than in Texas and States with similar property laws.” 53


49 Sporhase, 458 U.S. at 949-50.

50 Sporhase, 458 U.S. at 951-52 (emphasis added), 953-54 (“nor is appellee’s claim to public ownership without significance”).

51 Sporhase, 458 U.S. at 953-54.

52 See supra Part II.A.

53 Sporhase, 458 U.S. at 953-54. The Court also rejected what it described as “the legal fiction of state ownership,” derived from a discredited doctrine of wildlife law. Sporhase, 458 U.S. at 951-52.
C. Focusing on Scarcity

*Sporhase* suggested that a showing of threatened scarcity might bolster the constitutionality of export restrictions. The Court noted that the arid western states’ “asserted superior competence . . . in conserving and preserving scarce water resources [is] not irrelevant in the Commerce Clause inquiry,” making it more likely that the states’ export restrictions would be deemed reasonable.\(^{54}\)

Further, it would not necessarily be fatal to a state’s case that it faced no imminent water shortage. As the Court explained, “[G]iven appellee’s conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage.” Providing an important hint to future regulators, the Court concluded, “A demonstrably arid State conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water.”\(^{55}\)

D. Creating a Regulatory Void

Despite *Sporhase*’s solicitude for the federal regulation of water—unhindered by state protectionist legislation\(^{56}\)—Congress failed to regulate water to the outer limits of its commerce clause authority. Moreover, in the post-*Sporhase* era, the Supreme Court placed severe limits on the scope of the federal commerce power. As a result, the protection of water resources suffered, falling into a regulatory gap.\(^{57}\) *Sporhase* cast a constitutional cloud on state regulation, whereas subsequent Supreme Court cases chilled federal regulatory efforts.\(^{58}\)

\(^{54}\) *Sporhase*, 458 U.S. at 954-55, 958.

\(^{55}\) *Id.* Such a showing would help to satisfy the *Hughes v. Oklahoma* requirement that legislation be narrowly tailored to achieving legitimate local purposes. *Sporhase*, 458 U.S. at 958. See also supra note and accompanying text.

\(^{56}\) See supra note and accompanying text.


\(^{58}\) See infra notes and accompanying text.
In 1991, a prominent constitutional law text observed, "[A]fter nearly 200 years of government under the Constitution, there are very few judicially enforced checks on the commerce power." Just four years later, in *United States v. Lopez*, the Court caught the legal community by surprise when it invalidated a federal statute that purported to prohibit firearms within school zones, finding that such legislation exceeded Congress’s authority to regulate under the affirmative aspect of the Commerce Clause. The Court asserted, "The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." It explained, “Admittedly, some of our prior cases have taken long steps down that road [of converting congressional authority under the Commerce Clause to a general police power of the sort retained by the states]. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.” *Lopez* marked the end of a sixty-year period during which the Court had rejected virtually every Commerce Clause challenge to federal legislation brought before it.

When *Sporhase* invalidated Nebraska’s groundwater export restrictions in 1982, the affirmative Commerce Clause power was thought to be nearly unlimited. Since that time, the scope of federal authority has been shrinking dramatically. In particular, the Court has demonstrated less appetite for congressional regulation of water, suggesting a potential whittling away of *Sporhase*’s sweeping statement that “water is an article of commerce.” In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Court invalidated a regulation purporting to exert federal authority over wetlands frequented by interstate migratory birds. Although the case was

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61 *Id.* at 566-67.

62 *Sporhase*, 458 U.S. at 954.

decided on narrow statutory grounds, the Court’s constitutional *dicta* cast doubt on the future of federal efforts to protect land and water resources. Specifically identifying land and water use as areas within “the States’ traditional and primary power,” the Court hinted, “These arguments [that the commerce power allows the federal government to regulate migratory birds and the ponds and wetlands upon which they depend] raise serious constitutional questions.”

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

This evolution of the affirmative Commerce Clause, without a concomitant evolution of the dormant Commerce Clause threatens to violate the Court’s repeated admonition, “The definition of commerce is the same when relied on to strike down or restrict state legislation as when relied on to support

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64 *Id.* at 174.


66 547 U.S. at 738.

67 547 U.S. at 803-04.
some exertion of federal control or regulation. If this admonition is ignored, then it is likely that the regulation of water resources will be frustrated, with courts invalidating state regulation under the Dormant Commerce Clause and striking federal regulation under the affirmative Commerce Clause.

III. CALMING THE WATERS: TOWARD A NEW ANALYTICAL PARADIGM

A. Asking the Right Question

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

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

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

The Sporhase dissent complained that majority had answered the wrong question—transplanting the question of whether the affirmative Commerce Clause authorizes federal regulation into a case where the question was whether

69 United States v. Lopez, 514 U.S. at 549, 558 (1995) (summarizing categories of activity traditionally recognized as within the scope of the federal commerce power).
70 Sporhase, 458 U.S. at 953-54.
the dormant Commerce Clause invalidates state regulation. As the dissent explained, “The issue presented by this case, and the only issue, is whether the existence of the Commerce Clause of the United States Constitution, by itself, in the absence of any action by Congress, invalidates some or all of [the challenged Nebraska statute].”71 In the dissent’s view, the two questions are “quite distinct.”72 Moreover, the dissent argued that the affirmative and dormant aspects of the Commerce Clause are not equal in scope, asserting that “the authority of Congress under the power to regulate interstate commerce may reach a good deal further than the mere negative impact of the Commerce Clause in the absence of any action by Congress.”73 Thus, the majority’s conclusion that groundwater is an article of commerce had little relevance to the primary issue of the case—whether or not Nebraska’s water export laws were constitutional.

In Dormant Commerce Clause litigation involving the regulation of natural resources other than water, the Supreme Court has begun to ask more appropriate questions. Particularly instructive is a line of cases determining the constitutionality of state regulation of the solid waste disposal industry. Just as Nebraska claimed that the water export ban challenged in Sporhase was intended to promote water conservation,74 so also do the states claim that their waste disposal regulations are designed to promote the conservation of landfill space, or to promote conservation through the encouragement of recycling efforts.

In the first two cases discussed below—decided in 1978, 1992—the Supreme Court prominently considered whether garbage is an article of commerce, reminiscent of its 1982 analysis in Sporhase. But by 1994, the Court had begun to move from the “wrong” question posed by the Sporhase majority to the more pertinent question suggested by Justice Rehnquist’s dissent in Sporhase.75

71 Sporhase, 458 U.S. at 961-62 (Rehnquist, J., dissenting).
72 Id.
73 Id.
74 See supra note and accompanying text.
75 See infra Part II.A.
In City of Philadelphia v. New Jersey, for example, a New Jersey statute prohibited the importation of most “solid or liquid waste which originated or was collected outside the territorial limits of the State.”\textsuperscript{76} Private landfill operators in New Jersey (desiring to attract business from out-of-state customers) and cities in other states that wished to dispose of their waste in New Jersey brought a Dormant Commerce Clause challenge against the import restriction.\textsuperscript{77} In an analysis reminiscent of \textit{Sporhase}, the New Jersey Supreme Court first determined that the subject waste did not constitute “commerce” because it was valueless, and that the state law therefore did not impermissibly interfere with interstate commerce.\textsuperscript{78} The U.S. Supreme Court reversed, finding that the out-of-state waste was indeed an article of commerce, and New Jersey’s banning of its importation therefore violated the Dormant Commerce Clause.\textsuperscript{79}

In subsequent cases, the Supreme Court continued to afford constitutional significance to the commercial status of waste. In 1992, a decade after \textit{Sporhase}, the Supreme Court stated unambiguously in \textit{Fort Gratiot Sanitary Landfill v. Michigan Dep’t of Natural Resources}, “Solid waste, even if it has no value, is an article of commerce.”\textsuperscript{80} Explaining its rationale, the Court stated, “[w]hether the business arrangements between out-of-state generators of waste and the Michigan operator of a waste disposal site are viewed as ‘sales’ of garbage or ‘purchases’ of transportation and disposal services, the commercial transactions unquestionably have an interstate character.”\textsuperscript{81} Therefore, restrictions on the

\begin{itemize}
  \item \textsuperscript{76} City of Philadelphia v. New Jersey, 437 U.S. 617, 18 (1978).
  \item \textsuperscript{77} \textit{Id.} at 619.
  \item \textsuperscript{78} \textit{Id.} at 621-22.
  \item \textsuperscript{79} \textit{Id.} The U.S. Supreme Court concluded that it made no constitutional difference whether the “scarce natural resource was itself the article of commerce [or] . . . the scarce resource [available landfill space] and the article of commerce [out-of-state-waste] are distinct.” \textit{id.} at 628.
  \item \textsuperscript{80} \textit{Fort Gratiot Sanitary Landfill v. Michigan Dep’t of Natural Resources}, 504 U.S. 353 (1992).
  \item \textsuperscript{81} \textit{Id.} at 359. Justice Rehnquist, in dissent, confessed that he was “\textit{Id.} at 369 (Rehnquist, J., dissenting).”
\end{itemize}
interstate import or export of such waste were more likely to violate Congress’ prerogative under the Commerce Clause. In dissent, Justice Rehnquist questioned the majority’s logic, confessing that he was “baffled by the Court’s suggestion that this case might be characterized as one in which garbage is being bought and sold.” Rather, Justice Rehnquist continued, “there is no suggestion that petitioner is making payment in order to have garbage delivered to it [but] Petitioner is, instead, being paid to accept the garbage of which others wish to be rid.”

By 1994, the Court had begun to refine its Dormant Commerce Clause analysis, at least in the context of garbage disposal. In C & A Carbone, Inc. v. Town of Clarkstown, the Court considered the constitutionality of a “flow control” ordinance adopted by a town in New York. Under that ordinance, all nonhazardous solid waste within the town’s borders was required to pass through a particular transfer station within the town. Although the favored transfer station was ostensibly private, the operator had contracted to sell the facility to the town for one dollar at the end of five years. Contrary to its analysis in City of Philadelphia and Ft. Gratiot Sanitary Landfill, the Court considered whether the challenged ordinance had an impermissible effect on interstate commerce, and not whether the regulated waste was itself an article of commerce. As the Court explained, “what makes garbage a profitable business is

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82 Id. (holding unconstitutional the waste import restrictions of Michigan’s Solid Waste Management Act, prohibiting private landfills from accepting most solid waste from out-of-county sources). generated outside).

83 Id. at 369. Justice Rehnquist, in dissent, made a similar argument in Oregon Waste Systems, Inc. v. dep’t of Envt’l Quality, 511 U.S. 93, 110-12 (1994) (Rehnquist, C.J., dissenting) (“While I understand that solid waste is an article of commerce, it is not a commodity sold in the marketplace; rather it is disposed of at a cost to the State. Petitioners do not buy garbage to put in their landfills; solid waste producers pay petitioners to take their waste.”).


85 Id. at 386-87.

86 See supra note and accompanying text.

87 See supra note and accompanying text.
not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.”

Despite this departure from its previous analyses, the Court came to a similar conclusion: the challenged ordinance placed an impermissible burden on commerce.

B. Recognizing Nuance: The Water Continuum

The *Sporhase* article-of-commerce analysis was hampered by the Court’s inability—or unwillingness—to appreciate the nuances of state water law. Further, the Court gave but scant attention to the physical nature of water itself, carelessly interchanging “water” and “groundwater.” As a result, the Court’s rationale was awkward. After declaring water an article of commerce, and after rejecting the state supreme court’s interpretation of Nebraska water law, the Supreme Court was forced to take an analytical step backwards. Admitting that the difference among state regulatory regimes might have constitutional significance, the Court weakly concluded that that Nebraska’s greater ownership interest in groundwater than other states “may not be irrelevant to the Commerce Clause analysis.”

If the Court retreats from its unhelpful article-of-commerce analysis, then a nuanced analysis will become even more important. Rather than affording monolithic constitutional status to all water, the Court should consider the legal, geographic, and hydrogeological nuances of water under the facts of each case, before determining whether state regulation thereof impermissibly burdens interstate commerce.

In undertaking this analysis, it would be helpful to recognize what this article calls “the water continuum.” At one end of the spectrum, challenged state legislation might regulate water *qua* natural resource, remaining in its natural

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89 *Id.* at

90 See *supra* note and accompanying text.

91 *Sporhase*, 458 U.S. at 951-52 (emphasis added), 953-54 (“nor is appellee’s claim to public ownership without significance”).
streamcourse or aquifer as an environmental, aesthetic, and recreational amenity. At the other end of the spectrum, challenged state legislation might regulate water *qua* commodity, incorporated into products ranging from baby food to cleaning supplies to bottled beverages.

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

[A] State may so regulate a natural resource as to preclude that resource from attaining the status of an “article of commerce” for the purposes of the negative impact of the Commerce Clause. It is difficult, if not impossible, to conclude that “commerce” exists in an item that cannot be reduced to possession under state law and in which the State recognizes only a usufructuary right. “Commerce” cannot exist in a natural resource that cannot be sold, rented, traded, or transferred, but only *used*.92

If a water right is involved, is it a new appropriation (subject to the state’s initial allocation criteria) or the change of an existing water right (generally prohibited from harming existing water users)? Another set of questions revolves around whether the relevant water rights affect surface water or groundwater. In the case of surface water rights, are the parameters of those rights determined under riparianism (giving the holder tort-like liability protection) or under the prior appropriation doctrine (giving the holder a precise, permanent right enforceable under property law)? Alternatively, if the state water rights pertain to groundwater, are the contours of those rights determined in accordance with the ownership of overlying land (under the absolute ownership doctrine, the

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92 *Sporhase*, 458 U.S. at 963-64 (Rehnquist, J., dissenting) (emphasis in original).
reasonable use doctrine, or the correlative rights doctrine) or in temporal order (under the prior appropriation doctrine)? Justice Rehnquist found this distinction constitutionally significant in his Sporhase dissent, arguing

Nebraska so regulates ground water that it cannot be said that the State permits any “commerce,” intrastate or interstate, to exist in this natural resource. As with almost all of the Western States, Nebraska does not recognize an absolute ownership interest in ground water, but grants landowners only a right to use ground water on the land from which it has been extracted.93

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

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

C. Abolishing the Dormant Commerce Clause?

After Sporhase, the Court invalidated numerous state laws purporting to regulate or restrict the interstate transport of natural resources. In 2007, however, the Court signaled that it may be reconsidering its position, at least where the beneficiaries of protective legislation are local governments, rather than private industries. In United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority, the Court sustained a county waste disposal ordinance virtually identical to that struck down in C & A Carbone thirteen years earlier.94 In United Haulers, the Court considered a dormant commerce clause challenge to a county flow control ordinance that required all solid waste collected within the

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93 Sporhase, 458 U.S. at 964 (Rehnquist, J., dissenting) (emphasis in original).

94 See supra note and accompanying text.
The favored facility was a state-created public benefit corporation, owned and operated by the county government.\textsuperscript{96}

\textit{United Haulers} may represent a sea-change in Dormant Commerce Clause jurisprudence. Two factors are particularly significant. First, the Supreme Court demonstrated a growing solicitude for health and safety regulations, particularly those that promote recycling efforts and other environmentally protective measures. Noting that waste disposal is a traditional function of local governments, the Court asserted, “[I]t does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism. Laws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism.”\textsuperscript{97} The Court concluded, “The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values.”\textsuperscript{98} The opinion represents a radical departure from the \textit{Sporhase} article-of-commerce analysis. The majority opinion did not address that question at all, instead confining itself to the issue of the impacts of the county ordinance on commerce. Only dissenting Justices Alito, Stevens, and Kennedy clung to the \textit{Sporhase} question, beginning their analysis with recitation of the mantra from \textit{Fort Gratiot}, “Solid waste, even if it has no value, is an article of commerce.”\textsuperscript{99}

Even more importantly, the Court appears poised on the brink of abandoning the Dormant Commerce Clause altogether. All the Justices

\textsuperscript{95} United Haulers Ass’n v. Oneida-Herkimer, 550 U.S. 330 (2007).

\textsuperscript{96} Id. at 334-35.

\textsuperscript{97} Id.

\textsuperscript{98} Id. at 343-44 (quoting Maine v. Taylor, 477 U.S. 131, 151 (1986).

\textsuperscript{99} Id. at 356 (Alito, J., dissenting, joined by Stevens and Kennedy, J.J.), quoting \textit{Fort Gratiot} Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources, 504 U.S. 353, 359 (1992). \textit{Fort Gratiot} is discussed in \textit{supra} note and accompanying text.
acknowledged that the factual circumstances of *United Haulers* are remarkably similar to those of *C & A Carbone*. The Court’s opinion admitted that there was only one “salient difference” between *Carbone* and *United Haulers*: in the former, state regulation benefitted a private corporation, whereas in the latter, state regulation benefitted a county owned “public benefits corporation.” Justice Thomas’ concurrence went farther, characterizing the distinction between the two cases as “razor thin.” Dissenting Justices Alito, Stevens, and Kennedy complained that the provisions challenged in *United Haulers* were “essentially identical to the ordinance invalidated in *Carbone*.” Despite that acknowledgement, six Justices voted to uphold the constitutionality of the challenged state regulation in *United Haulers*, an outcome directly contrary to that of *C & A Carbone*.

Two Justices wrote separately to indicate their growing impatience with the Court’s invocation of the Dormant Commerce Clause. In individual concurrences, Justices Scalia and Thomas each reiterated their longstanding distrust of the Dormant Commerce Clause. Justice Scalia wrote separately to “reaffirm [his] view that the so-called negative Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain.” Justice Thomas went dramatically farther. He repudiated his vote in *Carbone* for the unconstitutionality of the relevant state solid waste regulation, asserting, “Although I joined *C & A Carbone*, I no longer believe it was correctly decided. The negative Commerce Clause has no basis in the Constitution and has proved

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100 *United Haulers*, 550 U.S. at 334. Chief Justice Roberts wrote the opinion of the Court, joined in full by Justices Souter, Ginsburg, and Breyer. They were joined, in relevant part, by Justice Scalia, and Justice Thomas concurred in the judgment.

101 *Id.* at 353-54 (Thomas, J., concurring).

102 *Id.* at 356 (Alito, J., dissenting, joined by Stevens & Kennedy, JJ.).

103 *Id.*. In separate concurrences, Justices Scalia and Thomas joined the judgment of Chief Justice Roberts (joined by Justices Souter, Ginsburg, and Breyer).

104 550 U.S. at 348 (Scalia, J., concurring in the judgment).
unworkable in practice.” Moreover, Justice Thomas suggested that a majority of the Court might be moving toward abandonment of the doctrine altogether. Tracing the history of the Court’s rejection of the now-illegitimate right of free contract vindicated in Lochner v. New York, Justice Thomas opined that the Court should follow a similar course with its Commerce Clause jurisprudence: “The . . . analogy to Lochner suggests that the Court should reject the negative Commerce Clause, rather than tweak it. . . . The Court’s negative Commerce Clause jurisprudence, created from whole cloth, is just as illegitimate as the ‘right’ it vindicated in Lochner.”

CONCLUSION: SUCKERS, SUCKERS EVERYWHERE . . .

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

In the second dispute a Nevada developer, Wind River Resources, challenged Arizona’s refusal to issue a permit for the export of groundwater to Nevada. The plaintiff alleges, among other things, that officials of the Arizona Department of Water Resources conspired to financially exhaust the applicant by delaying the processing of the permit application. Opponents of the export

105 550 U.S. at 349 (Thomas, J., concurring).


107 United Haulers, 550 U.S. at 355 (Thomas, J., concurring).

asserted conspiracy claims of their own, speculating that Las Vegas and the Southern Nevada Water Authority are the intended recipients of the subject water, and claiming that they “hear a giant sucking sound from the direction of Las Vegas.”

Cases such as these provide the courts with an important opportunity to reexamine and harmonize the relationship of the dormant and affirmative aspects of the Commerce Clause, perhaps even abandoning the Clause’s dormant aspect entirely. The resolution of such cases will have important consequences, determining whether would-be water “suckers” should back off, or whether water export enterprises are open for business.

### APPENDIX

**Water, Trash, and the Commerce Clause**

#### The Dormant Commerce Clause

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<th>Resource</th>
<th>Opinion</th>
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- **Key holdings:** Nebraska water export restriction (requiring reciprocity by importing state) violates Dormant Commerce Clause under *Hughes* facial discrimination test; groundwater is an article of commerce
- **Key facts:** Involves groundwater; Nebraska charged fees for intrastate transfers; water was withdrawn from multistate Ogallala aquifer; water would be withdrawn from and used on single farm that straddled the Nebraska-Colorado border; no showing that Nebraska suffered from state-wide shortage that could not be alleviated by in-state transfers; water compacts lacked express indication that Congress intended to insulate such export restrictions from constitutional attack

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- **Key holdings:** Restricting exports to those that do not impair existing water rights, are not contrary to the conservation of water within NM, are not otherwise detrimental to NM’s public welfare; are necessitated by demonstrated shortage in receiving state; and where applicant demonstrates lack of in-state alternatives do not facially violate the Commerce Clause; imposition of conservation and public welfare criteria on interstate (but not all intrastate) uses of groundwater does violate the Commerce Clause; *Sporhase*’s tolerance for limited in-state preferences goes beyond mere “human survival” to include “public welfare” concerns (even with economic overtones)
- **Key facts:** Involves groundwater; validity of export restrictions depends upon whether they mirror requirements for in-state uses
<table>
<thead>
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<th><strong>Intake Water Co. v. Yellowstone River Compact Comm’r, 769 F.2d 568 (9th Cir. 1985)</strong></th>
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<td><strong>Key holdings:</strong> Upholding Yellowstone River Compact of 1951, art. X, which prohibits the diversion of waters from the Yellowstone River Basin without the unanimous consent of all signatory states (Montana, Wyoming, North Dakota); by definition, congressionally approved compact cannot violate the Dormant Commerce Clause, but rather immunized state law from commerce clause objections by converting it into federal law</td>
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<td><strong>Key facts:</strong> Involves surface water; involves interstate compact</td>
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<th><strong>Ponderosa Ridge v. Banner Cty, 554 N.W.2d 151 (Neb. 1996)</strong></th>
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<td><strong>Key holdings:</strong> Denial of application to transfer groundwater from Nebraska to Wyoming under Neb. Rev. Stat. § 46-613.01 (successor to statute challenged in Sporhase) is not contrary to the Dormant Commerce Clause; Nebraska may condition groundwater exports on showing that proposed use is beneficial, alternative groundwater sources are not available, and on consideration of the withdrawal’s negative effects</td>
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<td><strong>Key facts:</strong> Involves groundwater; with limited exceptions, Nebraska restricts groundwater use to the overlying land (applying to both interstate and intrastate uses); Nebraska applies similar, but not identical, standards to interstate and intrastate uses</td>
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<td><strong>Key holdings:</strong> Oklahoma legislation restricting water export rendered immune from Commerce Clause attack by congressionally-ratified Red River Compact; passage of legislation in 2009 did not impliedly repeal all statutes previously challenged by plaintiff nor render lawsuit moot; claims based on water not subject to the Compact dismissed without prejudice</td>
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<td><strong>Key facts:</strong> Compact specifically contemplated allocating the water in issue between the states involved; plaintiff was a political subdivision of Texas (not a compact signatory) rather than the state itself (a signatory to the compact)</td>
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The Dormant Commerce Clause

Landfill

- United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) (upholding county ordinance favoring state-created public benefit corporation)
- C&A Carbone v. Clarkstown, 511 U.S. 383 (1994) (striking local ordinance requiring deposit of all solid waste within town at a single town-sponsored transfer station)

The Affirmative Commerce Clause

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<th>Resource</th>
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<td></td>
<td>Key holdings: Clean Water Act does not authorize agency to regulate as “navigable waters” intrastate, seasonal ponds used as habitat by migratory birds</td>
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<td>Constitutional dicta: Although resting its decision on statutory interpretation, the Court said “Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited;” expresses concern for “federal encroachment upon a traditional state power, p. 173) (fears “significant impingement of the States’ traditional and primary power over land and water use”, p. 174)</td>
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<td>Dissent: Stevens, joined by Souter, Ginsburg, and Breyer, J.J.) Cites to Sporhase’s holding that water is an “article of commerce,” and asserts that “[t]he power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce” (p. 196)</td>
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- **Key holdings:** Plurality opinion holds that under Clean Water Act, agency may only regulate as “navigable waters” relatively permanent, standing or flowing bodies of water and wetlands with a continuous surface connect to such bodies.

- **Constitutional dicta:** Although resting its decision on statutory interpretation, the Court expresses solicitude for avoiding “a significant impingement of the States’ traditional and primary power over land and water use” (p. 737-38) (quoting SWANCC) “Regulation of land use, as through the issuance of . . . development permits . . ., is a quintessential state and local power.” (p. 738)